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CHAPTER 2

CONSTITUTIONAL LAW

ANSWERS TO LEARNING OBJECTIVES/ LEARNING OBJECTIVES CHECK QUESTIONS AT THE BEGINNING AND THE END OF THE CHAPTER

Note that your students can find the answers to the even-numbered *Learning Objectives Check* questions in Appendix E at the end of the text. We repeat these answers here as a convenience to you.

1A. ***What is the basic structure of the U.S. government?*** The Constitution divides the national government's powers among three branches. The legislative branch makes the laws, the executive branch enforces the laws, and the judicial branch interprets the laws. Each branch performs a separate function, and no branch may exercise the authority of another branch. A system of checks and balances allows each branch to limit the actions of the other two branches, thus preventing any one branch from exercising too much power.

2A. ***What constitutional clause gives the federal government the power to regulate commercial activities among the various states?*** To prevent states from establishing laws and regulations that would interfere with trade and commerce among the states, the Constitution expressly delegated to the national government the power to regulate interstate commerce. The commerce clause—Article I, Section 8, of the U.S. Constitution—expressly permits Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

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3A. ***What constitutional clause allows laws enacted by the federal government to take priority over conflicting state laws?*** The supremacy clause—Article VI of the Constitution—provides that the Constitution, laws, and treaties of the United States are "the supreme Law of the Land." This article is important in the ordering of state and federal relationships. When there is a direct conflict between a federal law and a state law, the state law is rendered invalid.

4A. ***What is the Bill of Rights? What freedoms does the First Amendment guarantee?*** The Bill of Rights consists of the first ten amendments to the U.S. Constitution. Adopted in 1791, the Bill of Rights embodies protections for individuals against interference by the federal government. Some of the protections also apply to business entities. The First Amendment guarantees the freedoms of religion, speech, and the press, and the rights to assemble peaceably and to petition the government.

5A. ***Where in the Constitution can the due process clause be found?*** Both the Fifth and the Fourteenth Amendments to the U.S. Constitution provide that no person shall be deprived "of life, liberty, or property, without due process of law." The due process clause of each of these constitutional amendments has two aspects—procedural and substantive.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE FEATURES

BEYOND OUR BORDERS—CRITICAL THINKING

Should U.S. courts, and particularly the United States Supreme Court, look to the other nations' laws for guidance when deciding important issues—including those involving rights granted by the Constitution? If so, what impact might this have on their decisions? Explain. U.S. courts should consider foreign law when deciding issues of national importance because changes in views on those issues is not limited to domestic law. How other jurisdictions and other nations regulate those issues can be informative, enlightening, and instructive, and indicate possibilities that domestic law might not suggest. U.S. courts should not consider foreign law when deciding issues of national importance because it can be misleading and irrelevant in our domestic and cultural context.

ADAPTING THE LAW TO THE ONLINE ENVIRONMENT—CRITICAL THINKING

When should a statement made on social media be considered a true threat? The United States Supreme Court found that negligence was not enough to be

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convicted under a federal criminal law for making true threats. Rather, the person posting the statements must have either intended to threaten or know that his or her statements would be viewed as a threat. The Court did not, however, clearly establish what constitutes a threat under federal law, but merely sent the case back to a lower court to determine whether Elonis met a higher standard. Therefore, the law is somewhat ambiguous.

If a person posts threats on social media with the *intent* to threaten someone, he or she can and should be convicted under the federal statute. But intent is often difficult to prove. If a person posts threats on social media but claims he or she did not intend to threaten, or says the words were just song lyrics (as Elonis claimed), the result is unclear. The prosecution will have to prove that the person "knew his or her statements would be viewed as threats." Although posting statements about killing someone on a social media seems like it would be a true threat, it might not always be considered to be one. Perhaps the person was joking or just blowing off steam, and the other party knew that the threat was not serious.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE CASES

CASE 2.2—WHAT IF THE FACTS WERE DIFFERENT?

If Bad Frog had sought to use the offensive label to market toys instead of beer, would the court's ruling likely have been the same? Explain your answer. Probably not. The reasoning underlying the court's decision in the case was, in part, that "the State's prohibition of the labels . . . does not materially advance its asserted interests in insulating children from vulgarity . . . and is not narrowly tailored to the interest concerning children." The court's reasoning was supported in part by the fact that children cannot buy beer. If the labels advertised toys, however, the court's reasoning might have been different.

CASE 2.3—CRITICAL THINKING—LEGAL CONSIDERATION

Most states and the federal government permit inmates to grow 1/2-inch beards. Would the policies followed at these institutions be relevant in determining the need for a beard restriction in this case? Discuss. Yes, the policies followed at other institutions are relevant to a determination of the need for a beard restriction in this case. That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the department in this case could satisfy its security concerns through a means less restrictive than denying Holt an exemption.

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ANSWERS TO QUESTIONS IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

1A. ***Equal protection***

When a law or action limits the liberty of some persons but not others, it may violate the equal protection clause. Here, because the law applies only to motorcycle operators and passengers, it raises equal protection issues.

2A. ***Levels of scrutiny***

The three levels of scrutiny that courts apply to determine whether the law or action violates equal protection are strict scrutiny (if fundamental rights are at stake), intermediate scrutiny (in cases involving discrimination based on gender or legitimacy), and the "rational basis" test (in matters of economic or social welfare).

3A. ***Standard***

The court would likely apply the rational basis test, because the statute regulates a matter of social welfare by requiring helmets. Similar to seat-belt laws and speed limits, a helmet statute involves the state's attempt to protect the welfare of its citizens. Thus, the court would consider it a matter a social welfare and require that it be rationally related to a legitimate government objective.

4A. ***Application***

The statute is probably constitutional, because requiring helmets is rationally related to a legitimate government objective (public health and safety). Under the rational basis test, courts rarely strike down laws as unconstitutional, and this statute will likely further the legitimate state interest of protecting the welfare of citizens and promoting safety.

ANSWER TO DEBATE THIS QUESTION IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

Legislation aimed at protecting people from themselves concerns the individual as well as the public in general. Protective helmet laws are just one example of such legislation. Should individuals be allowed to engage in unsafe activities if they choose to do so? Certainly many will argue in favor of individual rights. If certain people wish to engage in risky activities such as riding motorcycles without a helmet, so be it. That should be their choice. No one is going to argue that

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motorcycle riders believe that there is zero danger when riding a motorcycle without a helmet. In other words, individuals should be free to make their own decisions and consequently, their own mistakes.

In contrast, there is a public policy issue involved. If a motorcyclist injures him- or herself in an accident because he or she was not wearing a protective helmet, society ends up paying in the form of increased medical care expenses, lost productivity, and even welfare for other family members. Thus, the state has an interest in protecting the public in general by limiting some individual rights.

ANSWERS TO ISSUE SPOTTERS AT THE END OF THE CHAPTER

1A. ***Can a state, in the interest of energy conservation, ban all advertising by power utilities if conservation could be accomplished by less restrictive means? Why or why not?*** No. Even if commercial speech is not related to illegal activities nor misleading, it may be restricted if a state has a substantial interest that cannot be achieved by less restrictive means. In this case, the interest in energy conservation is substantial, but it could be achieved by less restrictive means. That would be the utilities' defense against the enforcement of this state law.

2A. ***Suppose that a state imposes a higher tax on out-of-state companies doing business in the state than it imposes on in-state companies. Is this a violation of equal protection if the only reason for the tax is to protect the local firms from out-of-state competition? Explain.*** Yes. The tax would limit the liberty of some persons (out of state businesses), so it is subject to a review under the equal protection clause. Protecting local businesses from out-of-state competition is not a legitimate government objective. Thus, such a tax would violate the equal protection clause.

ANSWERS TO QUESTIONS AND CASE PROBLEMS AT THE END OF THE CHAPTER

BUSINESS SCENARIOS AND CASE PROBLEMS

2–1A. ***The free exercise clause***

Thomas has a constitutionally protected right to the free exercise of his religion. In denying his claim for unemployment benefits, the state violated this right. Employers

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are obligated to make reasonable accommodations for their employees' beliefs that are openly and sincerely held, as were Thomas's beliefs. By moving him to a department that made military goods, his employer effectively forced him to choose between his job and his religious principles. This unilateral decision on the part of the employer was the reason Thomas left his job and why the company was required to compensate Thomas for his resulting unemployment.

2–2A. SPOTLIGHT ON PLAGIARISM—*Due process*

To adequately claim a due process violation, a plaintiff must allege that he was deprived of "life, liberty, or property" without due process of law. A faculty member's academic reputation is a protected interest. The question is what process is due to deprive a faculty member of this interest and in this case whether Gunasekera was provided it. When an employer inflicts a public stigma on an employee, the only way that an employee can clear his or her name is through publicity. Gunasekera's alleged injury was his public association with the plagiarism scandal. Here, the court reasoned that "a name-clearing hearing with no public component would not address this harm because it would not alert members of the public who read the first report that Gunasekera challenged the allegations. Similarly, if Gunasekera's name was cleared at an unpublicized hearing, members of the public who had seen only the stories accusing him would not know that this stigma was undeserved." Thus the court held that Gunasekera was entitled to a public name-clearing hearing.

2–3A. Business CASE PROBLEM WITH SAMPLE ANSWER—*Establishment clause*

The establishment clause prohibits the government from passing laws or taking actions that promote religion or show a preference for one religion over another. In assessing a government action, the courts look at the predominant purpose for the action and ask whether the action has the effect of endorsing religion.

Although here DeWeese claimed to have a nonreligious purpose for displaying the poster of the Ten Commandments in a courtroom, his own statements showed a religious purpose. These statements reflected his views about "warring" legal philosophies and his belief that "our legal system is based on moral absolutes from divine law handed down by God through the Ten Commandments." This plainly constitutes a religious purpose that violates the establishment clause because it has the effect of endorsing Judaism or Christianity over other religions. In the case on which this problem is based, the court ruled in favor of the American Civil Liberties Union.

2–4A. *The dormant commerce clause*

The court ruled that like a state, Puerto Rico generally may not enact policies that discriminate against out-of-state commerce. The law requiring companies that sell

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cement in Puerto Rico to place certain labels on their products is clearly an attempt to regulate the cement market. The law imposed labeling regulations that affect transactions between the citizens of Puerto Rico and private companies. State laws that on their face discriminate against foreign commerce are almost always invalid, and this Puerto Rican law is such a law. The discriminatory labeling requirement placed sellers of cement manufactured outside Puerto Rico at a competitive disadvantage. This law therefore contravenes the dormant commerce clause.

2–5A. ***Freedom of speech***

No, Wooden's conviction was not unconstitutional. Certain speech is not protected under the First Amendment. Speech that violates criminal laws—threatening speech, for example—is not constitutionally protected. Other unprotected speech includes fighting words, or words that are likely to incite others to respond violently. And speech that harms the good reputation of another, or defamatory speech, is not protected under the First Amendment.

In his e-mail and audio notes to the alderwoman, Wooden discussed using a sawed-off shotgun, domestic terrorism, and the assassination and murder of politicians. He compared the alderwoman to the biblical character Jezebel, referring to her as a "bitch in the Sixth Ward." These references caused the alderwoman to feel threatened. The First Amendment does not protect such threats, which in this case violated a state criminal statute. There was nothing unconstitutional about punishing Wooden for this unprotected speech.

In the actual case on which this problem is based, Wooden appealed his conviction, arguing that it violated his right to freedom of speech. Under the principles set out above, the Missouri Supreme Court affirmed the conviction.

2–6A. ***Equal protection***

Yes, the equal protection clause can be applied to prohibit discrimination based on sexual orientation in jury selection. The appropriate level of scrutiny would be intermediate scrutiny. Under the equal protection clause of the Fourteenth Amendment, the government cannot enact a law or take another action that treats similarly situated individuals differently. If it does, a court examines the basis for the distinction. Intermediate scrutiny applies in cases involving discrimination based on gender. Under this test, a distinction must be substantially related to an important government objective.

Gays and lesbians were long excluded from participating in our government and the privileges of citizenship. A juror strike on the basis of sexual orientation tells the individual who has been struck, as well as the trial participants and the general public, that the judicial system still treats gays and lesbians differently. This deprives these individuals of the opportunity to participate in a democratic institution on the basis of a characteristic that has nothing to do with their fitness to serve.

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In the actual case on which this problem is based, SmithKline challenged the strike. The judge denied the challenge. On SmithKline's appeal, the U.S. Court of Appeals for the Ninth Circuit held that the equal protection clause prohibits discrimination based on sexual orientation in jury selection and requires that heightened scrutiny be applied to equal protection claims involving sexual orientation. The appellate court remanded the case for a new trial.

2–7A. ***Procedural due process***

No, the school's actions did not deny Brown due process. Procedural due process requires that any government decision to take life, liberty, or property must be made fairly. The government must give a person proper notice and an opportunity to be heard. The government must use fair procedures—the person must have at least an opportunity to object to a proposed action before a fair, neutral decision maker.

In this problem, Robert Brown applied for admission to the University of Kansas School of Law. He answered "no" to the questions on the application about criminal history and acknowledged that a false answer constituted cause for dismissal. He was accepted for admission to the school. But Brown had previous criminal convictions for domestic battery and driving under the influence. When school officials discovered this history, Brown was notified of their intent to dismiss him and given an opportunity to respond in writing. He demanded a hearing. The officials refused, and expelled him. As for due process, Brown knew he could be dismissed for false answers on his application. The school gave Brown notice of its intent to expel him and gave him an opportunity to be heard (in writing). Due process does not require that any specific set of detailed procedures be followed as long as the procedures are fair.

In the actual case on which this problem is based, Brown filed a suit in a federal district court against the school, alleging denial of due process. From a judgment in the school's favor, Brown appealed. The U.S. Court of Appeals for the Tenth Circuit affirmed, concluding that "the procedures afforded to Mr. Brown were fair."

2–8A. **A QUESTION OF ETHICS—*Free speech***

1. The answers to these questions begin with the protection of the freedom of speech under the First Amendment. The freedom to express an opinion is a fundamental aspect of liberty. But this right and its protection are not absolute. Some statements are not protected because, as explained in the Balboa decision, "they are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Defamatory statements are among those that are not protected.

Arguments in favor of protecting such statements include the perception of the right to freedom of speech as necessary to liberty and a free society. Arguments

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opposed to such protection include "the social interest in order and morality." In between these positions might fall a balancing of both their concerns. Under any interpretation the degree to which statements can be barred before they are made is a significant question.

In the *Balboa* case, the court issued an injunction against Lemen, ordering her to, among other things, stop making defamatory statements about the Inn. On appeal, a state intermediate appellate court invalidated this part of the injunction, ruling that it violated Lemen's right to freedom of speech under the Constitution because it was a "prior restraint"—an attempt to restrain Lemen's speech before she spoke. On further appeal, the California Supreme Court phrased "the precise question before us [to be] whether an injunction prohibiting the repetition of statements found at trial to be defamatory violates the First Amendment." The court held it could enjoin the repetition of such statements without infringing Lemen's right to free speech. Quoting from a different case, the court reasoned, "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment. An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint." The court added that the injunction could not prevent Lemen from complaining to the authorities, however.

2. To answer this question requires a standard to apply to the facts. A different chapter in the text sets out two fundamental approaches to ethical reasoning: one involves duty-based standards, which are often derived from religious precepts, and the other focuses on the consequences of an action and whether these are the "greatest good for the greatest number."

Under the former approach, a pre-established set of moral values founded on religious beliefs can be taken as absolute with regard to behavior. Thus, if these values proscribed Lemen's name-calling as wrong, it would be construed as wrong, regardless of the truth of what she said or any effect that it had. Similarly, if the values prescribed Lemen's conduct as correct, it might be unethical not to engage in it. A different duty-based approach grounded on philosophical, rather than religious, principles would weigh the consequences of the conduct in light of what might follow if everyone engaged in the same behavior. If we all engaged in name-calling, hostility and other undesirable consequences would likely flourish. A third duty-based approach, referred to as the principle of rights theory, posits that every ethical precept has a rights-based corollary (for example, "thou shalt not kill" recognizes everyone's right to live). These rights collectively reflect a dignity to which we are each entitled. Under this approach, Lemen's name-calling would likely be seen as unethical for failing to respect her victims' dignity.

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Finally, an outcome-based approach focuses on the consequences of an act, requiring a determination as to whom it affects and assessments of its costs and benefits, as well as those of alternatives. The goal is to seek the maximum societal utility. Here, Lemen's behavior appears to have had little positive effect on herself or the objects of her criticism (the Inn, its employees, its patrons, and its business). The Inn's business seems to have been affected in a substantial way, which in Lemen's eyes may be a "benefit," but in the lives of its owners, employees, and customers, would more likely be seen as a "cost."

CRITICAL THINKING AND WRITING ASSIGNMENTS

2–9A. BUSINESS LAW WRITING

For commercial businesses that operate only within the borders of one state, the power of the federal government to regulate every commercial enterprise in the United States means that even exclusively intrastate businesses are subject to federal regulations. This can discourage intrastate commerce, or at least the commercial activities of small businesses, by adding a layer of regulation that may require expensive or time-consuming methods of compliance. This may encourage intrastate commerce, however, by disallowing restrictions, such as arbitrary discriminatory practices, that might otherwise impair the operation of a free market. This federal power also affects a state's ability to regulate activities that extend beyond its borders, as well as the state's power to regulate strictly in-state activities if those regulations substantially burden interstate commerce. This effect can be to encourage intrastate commerce by removing some regulations that might otherwise impede business activity in the same way that added federal regulations can have an adverse impact. A state's inability to regulate may discourage small intrastate businesses, however, by inhibiting the state's power to protect its "home" or "native" enterprises.

2–10A. BUSINESS LAW CRITICAL THINKING GROUP ASSIGNMENT

1. The rules in this problem regulate the content of expression. Such rules must serve a compelling governmental interest and must be narrowly written to achieve that interest. In other words, for the rules to be valid, a compelling governmental interest must be furthered only by those rules. To make this determination, the government's interest is balanced against the individual's constitutional right to be free of the rules. For example, a city has a legitimate interest in banning the littering of its public areas with paper, but that does not justify a prohibition against the public distribution of handbills, even if the recipients often just toss them into the street. In this problem, the prohibition against young adults' possession of spray paint and markers in public places imposes a substantial burden on innocent expression because it applies even when the individuals have a legitimate purpose for the supplies. The contrast between the numbers of those cited for

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violating the rules and those arrested for actually making illegal graffiti also undercuts any claim that the interest in eliminating illegal graffiti could not be achieved as effectively by other means.

2. The rules in this problem do not regulate the content of expression—they are not aimed at suppressing the expressive conduct of young adults but only of that conduct being fostered on unsuspecting and unwilling audiences. The restrictions are instead aimed at combating the societal problem of criminal graffiti. In other words, the rules are content neutral. Even if they were not entirely content neutral, expression is always subject to reasonable restrictions. Of course, a balance must be struck between the government's obligation to protect its citizens and those citizens' exercise of their right. But the rules at the center of this problem meet that standard. Young adults have other creative outlets and other means of artistic expression available.

3. Under the equal protection clause of the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." This clause requires a review of the substance of the rules. If they limit the liberty of some person but not others, they may violate the equal protection clause. Here, the rules apply only to persons under the age of twenty-one. To succeed on an equal protection claim, opponents should argue that the rules should be subject to strict scrutiny—that the age restriction is similar to restrictions based on race, national origin, or citizenship. Under this standard, the rules must be necessary to promote a compelling governmental interest. The argument would be that they are not necessary—there are other means that could accomplish this objective more effectively. Alternatively, opponents could argue that the rules should be subject to intermediate scrutiny—that the age restriction is similar to restrictions based on gender or legitimacy. Under this level of scrutiny, the restrictions must be substantially related to an important government objective. In this problem, the contrast between the numbers of those cited for violating the rules and those arrested for actually making illegal graffiti undermines any claim that the restrictions are substantially related to the interest in eliminating illegal graffiti. If neither of these arguments is successful, opponents could cite these same numbers to argue that the rules are not valid because there is no rational basis on which their restrictions on certain persons relate to a legitimate government interest.

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ALTERNATE CASE PROBLEMS

CHAPTER 2

CONSTITUTIONAL LAW

2-1. Commercial Speech. In 1983, Gary Peel, an Illinois attorney, began placing on his letterhead the following statement: "Certified Civil Trial Specialist/By the National Board of Trial Advocacy." In so doing, Peel violated Rule 2-105(a) of the Illinois Code of Professional Responsibility, which prohibits lawyers from holding themselves out as "certified" or "specialists" in fields other than admiralty, trademark, and patent law. The Attorney Registration and Disciplinary Commission (ARDC) censured Peel for the violation. The ARDC claimed that Peel's letterhead was misleading because it implied that Peel had special qualifications as an attorney, although in fact no such thing as a civil trial specialty existed in Illinois; because the word *certified* might be interpreted to mean "licensed," and the National Board of Trial Advocacy (NBTA) did not have the authority to license lawyers; and because, given the fact that not all attorneys licensed to practice in Illinois are certified by the NBTA, Peel's assertion might erroneously be construed by some readers to mean that those who are certified by that board are superior to those who are not. Peel argued that Rule 2-105(a) violated his constitutional right to free speech and appealed the ARDC's decision to the United State Supreme Court. What will the Court decide? Discuss. [*Peel v. Attorney Registration and Disciplinary Commission,* 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990)]

2-2. Commerce Clause. In 1957, Rhodes and several other Georgia landowners entered into a sixty-five-year timber purchase contract with Inland-Rome, Inc. Thereafter, Inland-Rome cut timber from the landowners' land and then removed it for processing in certain Georgia facilities, after which it was shipped as lumber products to points throughout the country. In 1986, the landowners claimed that Inland-Rome had breached the contract, and they filed suit. Inland-Rome moved to compel arbitration because the parties had agreed, in their contract, to arbitrate any disputes arising thereunder. Georgia law enforces arbitration clauses only if they are contained in construction contracts. Arbitration clauses are enforceable under the Federal Arbitration Act only if the contracts in which they appear affect interstate commerce. Inland-Rome contended that because lumber products from the cut timber were shipped throughout the nation, the contract related to interstate commerce, and therefore the Federal Arbitration Act

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should apply. Will the court agree? Discuss. [*Rhodes v. Inland-Rome, Inc.,* 195 Ga.App. 39, 392 S.E.2d 270 (1990)]

2-3. Freedom of Speech. The City of Tacoma, Washington, enacted an ordinance that prohibited the playing of car sound systems at a volume that would be "audible" at a distance greater than fifty feet. Dwight Holland was arrested and convicted for violating the ordinance. The conviction was later dismissed, but Holland filed a civil suit in a Washington state court against the city. He claimed in part that the ordinance violated his freedom of speech under the First Amendment. On what basis might the court conclude that this ordinance is constitutional? (Hint: In playing a sound system, was Holland actually expressing himself?) [*Holland v. City of Tacoma,* 90 Wash.App. 533, 954 P.2d 290 (1998)]

2-4. Freedom of Speech. In 1988, as a result of a general election, Arizona added Article XXVIII to its constitution. Article XXVIII provided that English was to be the official language of the state and required all state officials and employees to use only the English language during the performance of government business. Maria-Kelly Yniguez, an employee of the Arizona Department of Administration, frequently spoke in Spanish to Spanish-speaking persons with whom she dealt in the course of her work. Yniguez claimed that Article XXVIII violated constitutionally protected free speech rights and brought an action in federal court against the state governor, Rose Mofford, and other state officials. Does Article XXVIII violate the freedom of speech guaranteed by the First Amendment to the U.S. Constitution? Why or why not? [*Yniguez v. Mofford,* 730 F.Supp. 309 (D.Ariz. 1990)]

2-5. Equal Protection. Adela Izquierdo Prieto, age forty-two, had worked for a government-owned and -operated radio and television station in Puerto Rico for over a decade when, without any prior notice, she was suddenly transferred from her television program to a position in radio. Her replacement in the television program was a twenty-eight-year-old woman with less experience. Agustin Mercado Rosa, the administrator of the television channel, explained to a newspaper reporter that Izquierdo was removed because "we need new faces" and because Izquierdo's replacement "is young, attractive and refreshing." Izquierdo sued Mercado, alleging in part that the transfer discriminated against her on the basis of age and therefore violated her rights under the equal protection clause. Mercado claimed that the transfer was rationally related to furthering a legitimate state interest in maximizing viewership for the public television channel and therefore was a permissible action. Will the court agree with Mercado? (In forming your answer, disregard the fact that Prieto could have sued Mercado under a federal law prohibiting age discrimination in employment. She based her claim only on the equal protection clause. The sole issue here is whether the state's interest was sufficient to justify replacing Prieto.) [*Izquierdo Prieto v. Mercado Rosa,* 894 F.2d 467 (1st Cir. 1990)]

2-6. Freedom of Speech. The Board of Trustees of the Loudoun County Library in Virginia opted to provide Internet access for its patrons. The board also adopted a "Policy on Internet Sexual Harassment." This required that Web site blocking software be installed on all library computers to "a. block child pornography and obscene material (hard core pornography)" and

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"b. block material deemed harmful to juveniles under applicable Virginia statutes and legal precedents (soft core pornography)." Mainstream Loudoun, an association of individuals, claimed that this policy blocked their access to such sites as the Quaker Home Page. Mainstream filed a suit in a federal district court against the board, alleging that this was an unconstitutional restriction on their right to access protected speech on the Internet. The board filed a motion for summary judgment. Does the First Amendment limit the ability of a public library to restrict its patrons' access to information on the Internet? Discuss. [*Mainstream Loudoun v. Board of Trustees of the Loudoun County Library,* 7 F.Supp.2d 783 (1998)]

2-7. Due Process. Ashland, Inc., was the sole owner of the St. Paul Park Refinery, an oil refinery in Minnesota, when Ashland and Marathon Oil Co. announced their intent to combine their refining and marketing assets into a new entity, Marathon Ashland Petroleum LLC (MAP). Marathon was to own the largest share of MAP, and control its operations, while Ashland was to own about a third of the new company. The day after this announcement, a series of explosions and fires at the St. Paul Park Refinery injured several workers. Ashland pleaded guilty to criminal charges relating to the release of a hazardous air pollutant into a sewer line. A federal district court sentenced Ashland to, among other things, five years' probation subject to various conditions, including an upgrade of the sewer at the St. Paul Park Refinery, to which a probation officer was to have continual access. Meanwhile, as part of the deal with Marathon, Ashland had transferred ownership of the refinery to MAP. Ashland appealed to the U.S. Court of Appeals for the Eighth Circuit, contending in part that the probation conditions violated its due process rights. Should the court rule in Ashland's favor on this point? Why or why not? [*United States v. Ashland, Inc.,* 356 F.3d 871 (8th Cir. 2004)]

2–8. Due Process. In 1994, the Board of County Commissioners of Yellowstone County, Montana, created Zoning District 17 in a rural area of the county and a planning and zoning commission for the district. The commission adopted zoning regulations, which provided, among other things, that "dwelling units" could be built only through "on-site construction." Later, county officials were unable to identify any health or safety concerns that were addressed by requiring on-site construction. There was no evidence that homes built off-site would negatively affect property values or cause harm to any other general welfare interest of the community. In December 1999, Francis and Anita Yurczyk bought two forty-acre tracts in District 17. The Yurczyks also bought a modular home and moved it onto the property the following spring. Within days, the county advised the Yurczyks that the home violated the on-site construction regulation and would have to be removed. The Yurczyks filed a suit in a Montana state court against the county, alleging in part that the zoning regulation violated their due process rights. Does the Yurczyks' claim relate to procedural or substantive due process rights? What standard would the court apply to determine whether the regulation is constitutional? How should the court rule? Explain. [*Yurczyk v. Yellowstone County,* 2004 MT 3, 319 Mont. 169, 83 P.3d 266 (2004)]

2–9. The Commerce Clause. Under the federal Sex Offender Registration and Notification Act (SORNA), sex offenders must register and update their registration as sex offenders when they

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travel from one state to another. David Hall, a convicted sex offender in New York, moved to Virginia, where he did not update his registration. He was charged with violating SORNA. He claimed that the statute is unconstitutional, arguing that Congress cannot criminalize interstate travel if no commerce is involved. Is that reasonable? Why or why not? [*United States v. Guzman,* 591 F.3d 83 (2d Cir. 2010)]

2-10. A Question of Ethics

In 1999, in an effort to reduce smoking by children, the attorney general of Massachusetts issued comprehensive regulations governing the advertising and sale of tobacco products. Among other things, the regulations banned cigarette advertisements within one thousand feet of any elementary school, secondary school, or public playground and required retailers to post any advertising in their stores at least five feet off the floor, out of the immediate sight of young children. A group of tobacco manufacturers and retailers filed suit against the state, claiming that the regulations were preempted by the federal Cigarette Labeling and Advertising Act (FCLAA) of 1965, as amended. That act sets uniform labeling requirements and bans broadcast advertising for cigarettes. Ultimately, the case reached the United States Supreme Court, which held that the federal law on cigarette ads preempted the cigarette advertising restrictions adopted by Massachusetts. The only portion of the Massachusetts regulatory package to survive was the requirement that retailers had to place tobacco products in an area accessible only by the sales staff. In view of these facts, consider the following questions. [*Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 121 S.Ct. 2404, 69 L.Ed.2d 532 (2001)]

1. Some argue that having a national standard for tobacco regulation is more important than allowing states to set their own standards for tobacco regulation. Do you agree? Why or why not?

2. According to the Court in this case, the federal law does not restrict the ability of state and local governments to adopt general zoning restrictions that apply to cigarettes, as long as those restrictions are "on equal terms with other products." How would you argue in support of this reasoning? How would you argue against it?

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ALTERNATE CASE PROBLEM ANSWERS

CHAPTER 2

CONSTITUTIONAL LAW

2-1A. ***Commercial speech***

The Supreme Court of Illinois had held that Rule 2-105(a) did not violate Peel's constitutional right to free speech because the rule served a valid state interest—to protect the public from misleading advertising. The rule was also not overly broad in its restrictions. It did not prohibit attorneys or firms from designating areas in which their practices were concentrated or to which their practices were limited; it only prohibited claims that might deceive or confuse the general public. The Illinois court had concluded that in the case of Peel's letter, the public could be misled for all of the reasons cited by the Attorney Registration and Disciplinary Commission and affirmed Peel's censure. On appeal to the United States Supreme Court, this decision was reversed. The United States Supreme Court held that the attorney had First Amendment rights—under standards applicable to commercial speech—to advertise the NBTA certification. The Court pointed out that the attorney's statement was neither actually nor inherently misleading—the facts were true and verifiable and there was no finding of deception or misunderstanding. The Court reasoned that the public understands that that many certificates are issued by private organizations and it is unlikely that certification as a "specialist" by a national organization would be confused with formal state recognition.

2-2A. ***Commerce clause***

The court did not agree with Inland-Rome that the contract related to interstate commerce. Therefore, the Federal Arbitration Act did not apply and the arbitration clause was not enforceable. The court found that the contract between the parties did not in itself relate to the interstate shipment of any product. "To the contrary," the court stated, "it relates solely to the sale of standing timber located exclusively in Georgia." Interstate commerce was affected but only *after* Inland-Rome's performance under the contract with the landowners was completed. Therefore, federal law did not apply, and the contract was subject to Georgia law. The state of Georgia enforced arbitration clauses, but only if they were contained in construction contracts. Therefore, arbitration of the contract could not be compelled.

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2-3A. ***Freedom of speech***

The court dismissed Holland's complaint, and he appealed. The state intermediate appellate court affirmed the lower court's decision. The state intermediate appellate court initially determined that, in playing a car sound system loud enough to violate the ordinance, Holland was not actually expressing himself. (He was only listening.) This meant that, as to Holland, the ordinance regulated only his conduct, not his expression. The court held that the First Amendment "protect[s] the communication and expression of someone attempting to broadcast music or another type of message, but that noise is subject to regulation." The court concluded that Holland failed to show "a real and substantial threat to expression in relation to the ordinance's legitimate sweep." The court also pointed out that "[t]his ordinance has clear guidelines. A person of ordinary intelligence knows what it means for sound to be 'audible' at more than 50 feet away."

2-4A. ***Freedom of speech***

The court held that the state constitutional provision establishing English as the official language for state employees was invalid because it was overbroad and gave rise to substantial potential for inhibiting constitutionally protected free speech rights. The court stated that "Article XXVIII, by its literal wording, is capable of reaching expression protected by the First Amendment, such as Gutierrez's [a co-plaintiff's] right to communicate in Spanish with his Spanish-speaking constituents." To determine whether the Article XXVIII reached a substantial amount of constitutionally protected conduct, the court had to first interpret the meaning of Article XXVIII. The plaintiffs (Yniguez and others) claimed that it was a blanket prohibition on the use of any language other than English in the state workplace. The defendants, however, considered the article to be merely a directive for state and local governmental entities to act in English when acting in their sovereign capacities. The court held that the article's plain language indicated that with limited exceptions, the article prohibited the use of any language other than English by all officers and employees of all political subdivisions in Arizona while performing their official duties. Given this interpretation, the court concluded that "there is a realistic danger of, and a substantial potential for, the unconstitutional application of Article XXVIII." The article was therefore voided by the court.

2-5A. ***Equal protection***

The court agreed with Izquierdo. Mercado appealed to the U.S. Court of Appeals for the First Circuit, which reversed this decision. Under the rational-basis test, the question was whether there was any rational basis under which Mercado's actions related to a legitimate state interest. Mercado's ostensible objective was to replace Ms. Izquierdo with someone with greater audience appeal. The court stated that "Mr. Mercado could have rationally believed that having 'new [and young] faces' would maximize audience drawing power." The purpose of public television "includes serving the public by providing increased access to information and enhanced opportunities for education. Benefit to the public as a whole is maximized the more people take advantage of the services provided. Thus, to maximize viewership by making programs as appealing as possible is a legitimate objective in the operation of government-owned television stations."

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2-6A. ***Freedom of speech***

Yes. The court denied the board's motion for summary judgment. The court held that the library did not have to provide Internet access, but that if it did, it could not restrict its patrons' access to sites on the Internet because the library "disfavors their content." According to the court, under the free speech clause of the First Amendment, the library could impose content-based restrictions on access to the Internet only on showing "a compelling state interest and means narrowly drawn to achieve that end." The court explained that even when a library, or any government entity, has a legitimate purpose—"whether it be to prevent the communication of obscene speech or materials harmful to children"—the means it uses to regulate must be a reasonable response that "will alleviate the harm in a direct and material way." The court concluded that the plaintiffs adequately alleged a lack of such a reasonable means in this case.

2-7A. ***Due process***

The U.S. Court of Appeals for the Eighth Circuit held that "it would be fundamentally unfair to hold Ashland accountable on probation for actions beyond its control. Ashland maintains that it would violate its due process rights to punish it for probation violations based solely on the future acts or omissions of MAP, which is a separate company not under Ashland's control. We agree." The court reasoned that "a defendant may not be sentenced for the crimes of another . . . . We believe that the probation conditions challenged here similarly improperly conditioned Ashland's probation on the conduct of MAP." The St. Paul Park Refinery "is no longer a business site of Ashland, but is owned, operated, and controlled by MAP, a third party that was not charged or sentenced in this case. As a minority stakeholder of MAP, Ashland has no control over or ability to direct MAP's day-to-day operation of the refinery, and is not in a position to ensure that continual access is granted to the probation office." Ashland had upgraded the sewer at the St. Paul Park Refinery, but "it had to obtain MAP's consent in order to implement this project at MAP's facility." The court "excise[d] the objectionable conditions" from the probation order, although finding it "reasonable that, to the extent that it can, Ashland should allow the probation office to monitor its compliance" with the sewer upgrade.

2-8A. ***Due process***

The court agreed with the Yurczyks' reasoning, as regarded their substantive due process rights, that the on-site construction requirement did "not have a substantial bearing upon the public health, safety, morals, or general welfare of the community" and "was not based upon a legitimate governmental objective." The county appealed this ruling to the Montana Supreme Court, which affirmed the judgment of the lower court. The state supreme court held that the on-site construction requirement was not rationally related to a legitimate governmental interest. The court pointed out that county officials were "unable to identify any health and only minimal safety concerns that the on-site construction provision addressed. As to general welfare * * * the preservation of property values may implicate legitimate government concerns in some zoning situations, [but] there is nothing * * * here that demonstrates these concerns actually drove the formulation of the regulations at issue. Indeed * * * the modular home would not have affected property values in the area," according to one official, who "testified that homes built off-

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site 'would have no real bearing upon market values at all,' " because District 17 "is a rural setting, and it's spread out into large residential acreages."

2–9A. ***The commerce clause***

Under the commerce clause, the national government has the power to regulate every commercial enterprise in the United States. The commerce clause may not justify national regulation of noneconomic conduct. Interstate travel involves the use of the channels of interstate commerce, however, and is properly subject to congressional regulation under the commerce clause. Thus, SORNA—which makes it a crime for a sex offender to fail to re-register as an offender when he or she travels in interstate commerce—is a legitimate exercise of congressional authority under the commerce clause.

In the actual case on which this problem is based, a federal district court dismissed Hall's indictment. On the government's appeal, the U.S Court of Appeals for the Second Circuit reversed the dismissal and remanded the case for further proceedings, based on the reasoning stated above.

2-10A. **A QUESTION OF ETHICS**

1. According to the United States Supreme Court in this case, in the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA), "Congress pre-empted state cigarette advertising regulations like [Massachusetts'] because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health. In holding that the FCLAA does not nullify the Massachusetts regulations, the [U.S. Court of Appeals for the] First Circuit concentrated on whether they are 'with respect to' advertising and promotion, concluding that the FCLAA only pre-empts regulations of the content of cigarette advertising." The Supreme Court did not agree: "There is no question about an indirect relationship between the Massachusetts regulations and cigarette advertising: The regulations expressly target such advertising. The Attorney General's argument that the regulations are not 'based on smoking and health' since they do not involve health-related content, but instead target youth exposure to cigarette advertising, is unpersuasive because, at bottom, the youth exposure concern is intertwined with the smoking and health concern."

2. Regarding a state's or a locality's ability to enact generally applicable zoning restrictions, the Supreme Court recognized that "state interests in traffic safety and esthetics may justify zoning regulations for advertising. Although [in the FCLAA] Congress has taken into account the unique concerns about cigarette smoking and health in advertising, there is no indication that Congress intended to displace local community interests in general regulations of the location of billboards or large marquee advertising, or that Congress intended cigarette advertisers to be afforded special treatment in that regard. Restrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision. Such restrictions are not 'based on smoking and health.' " The Court noted that the pre-emption provision "in no way affect[s] the power of any State or political subdivision of any State with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited

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entirely to State or local requirements or prohibitions in the advertising of cigarettes." An argument against local governments' exercise of their zoning power to regulate tobacco products' advertising is that "states and localities also have at their disposal other means of regulating conduct to ensure that minors do not obtain cigarettes."

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Chapter 2

Constitutional Law

Case 2.1

379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258, 1 Empl. Prac. Dec. P 9712

Supreme Court of the United States

HEART OF ATLANTA MOTEL, INC., Appellant,

v.

UNITED STATES et al.

No. 515.

Argued Oct. 5, 1964.

Decided Dec. 14, 1964.

Mr. Justice CLARK delivered the opinion of the Court

This is a declaratory judgment action, and (1958 ed.) attacking the constitutionality of Title II of the Civil Rights Act of 1964, 78 Stat. 241, 241. In addition to declaratory relief the complaint sought an injunction restraining the enforcement of the Act and damages against appellees based on allegedly resulting injury in the event compliance was required. Appellees counterclaimed for enforcement under s 206(a) of the Act and asked for a three-judge district court under s 206(b). A three-judge court, empaneled under s 206(b) as well as ed.) sustained the validity of the Act and issued a permanent injunction on appellees' counterclaim restraining appellant from continuing to violate the Act which remains in effect on order of Mr. Justice BLACK, We affirm the judgment.

See Appendix.

1. The Factual Background and Contentions of the Parties.

The case comes here on admissions and stipulated facts. Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it mainains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

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The appellant contends that Congress in passing this Act exceeded its power to regulate commerce under ; that the Act violates the Fifth Amendment because appellant is deprived of the right to choose its customers and operate its business as it wishes, resulting in a taking of its liberty and property without due process of law and a taking of its property without just compensation; and, finally, that by requiring appellant to rent available rooms to Negroes against its will, Congress is subjecting it to involuntary servitude in contravention of the Thirteenth Amendment.

The appellees counter that the unavailability to Negroes of adequate accommodations interferes significantly with interstate travel, and that Congress, under the Commerce Clause, has power to remove such obstructions and restraints; that the Fifth Amendment does not forbid reasonable regulation and that consequential damage does not constitute a 'taking' within the meaning of that amendment; that the Thirteenth Amendment claim fails because it is entirely frivolous to say that an amendment directed to the abolition of human bondage and the removal of widespread disabilities associated with slavery places discrimination in public accommodations, beyond the reach of both federal and state law.

At the trial the appellant offered no evidence, submitting the case on the pleadings, admissions and stipulation of facts; however, appellees proved the refusal of the motel to accept Negro transients after the passage of the Act. The District Court sustained the constitutionality of the sections of the Act under attack (ss 201(a), (b)(1) and (c)(1)) and issued a permanent injunction on the counterclaim of the appellees. It restrained the appellant from '(r) efusing to accept Negroes as guests in the motel by reason of their race or color' and from '(m)aking any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities privileges, advantages or accommodations offered or made available to the guests of the motel, or to the general public, within or upon any of the premises of the Heart of Atlanta Motel, Inc.'

2. The History of the Act.

Congress first evidenced its interest in civil rights legislation in the Civil Rights or Enforcement Act of April 9, 1866. There followed four Acts, with a fifth, the Civil Rights Act of March 1, 1875, culminating the series. In 1883 this Court struck down the public accommodations sections of the 1875 Act in the No major legislation in this field had been enacted by Congress for 82 years when the Civil Rights Act of 1957 became law. It was followed by the Civil Rights Act of 1960. Three years later, on June 19, 1963, the late President Kennedy called for civil rights legislation in a a message to Congress to which he attached a proposed bill. Its stated purpose was

14 Stat 27.

Slave Kidnaping Act, 14 Stat. 50; Peonage Abolition Act of March 2, 1867, 14 Stat. 546; Act of May 31, 1870, 16 Stat. 140; Anti-Lynching Act of April 20, 1871, 17 Stat. 13.

18 Stat. 335.

71 Stat. 634.

74 Stat. 86.

> 'to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in * * * public accommodations through the exercise by Congress of the powers conferred upon it * * * to enforce the provisions of the fourteenth and fifteenth amendments, to regulate commerce among the several States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.' H.R.Doc.No. 124, 88th Cong., 1st Sess., at 14.

Bills were introduced in each House of the Congress, embodying the President's suggestion, one in the Senate being S. 1732 and one in the House, H.R. 7152. However, it was not until July 2, 1964, upon the recommendation of President Johnson, that the Civil Rights Act of 1964, here under attack, was finally passed.

S. 1732 dealt solely with public accommodations. A second Senate bill, S. 1731, contained the entire administration proposal. The Senate Judiciary Committee conduct the hearings on S. 1731 while the Committee on Commerce considered S. 1732.

After extended hearings each of these bills was favorably reported to its respective house. H.R. 7152 on November 20, 1963, H.R.Rep.No.914, 88th Cong., 1st Sess., and S. 1732 on February 10, 1964, S.Rep.No.872, 88th Cong., 2d Sess. Although each bill originally incorporated extensive findings of fact these were eliminated from the bills as they were reported. The House passed its bill in January 1964 and sent it to the Senate. Through a bipartisan coalition of Senators Humphrey and Dirksen, together with other Senators, a substitute was worked out in informal conferences. This substitute was adopted by the Senate and sent to the House where it was adopted without change. This expedited procedure prevented the usual report on the substitute bill in the Senate as well as a Conference Committee report ordinarily filed in such matters. Our only frame of reference as to the legislative history of the Act is, therefore, the hearings, reports and debates on the respective bills in each house.

The Act as finally adopted was most comprehensive, undertaking to prevent through peaceful and voluntary settlement discrimination in voting, as well as in places of accommodation and public facilities, federally secured programs and in employment. Since Title II is the only portion under attack here, we confine our consideration to those public accommodation provisions.

3. Title II of the Act.

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This Title is divided into seven sections beginning with s 201(a) which provides that:

'All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.'

There are listed in s 201(b) four classes of business establishments, each of which 'serves the public' and 'is a place of public accommodation' within the meaning of s 201(a) 'if its operations affect commerce, or if discrimination or segregation by it is supported by State action.' The covered establishments are:

'(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

'(2) any restaurant, cafeteria * * * (not here involved);

'(3) any motion picture house * * * (not here involved);

'(4) any establishment * * * which is physically located within the premises of any establishment otherwise covered by this subsection, or * * * within the premises of which is physically located any such covered establishment * * * (not here involved).'

Section 201(c) defines the phrase 'affect commerce' as applied to the above establishments. It first declares that 'any inn, hotel, motel, or other establishment which provides lodging to transient guests' affects commerce per se. Restaurants, cafeterias, etc., in class two affect commerce only if they serve or offer to serve interstate travelers or if a substantial portion of the food which they serve or products which they sell have 'moved in commerce.' Motion picture houses and other places listed in class three affect commerce if they customarily present films, performances, etc., 'which move in commerce.' And the establishments listed in class four affect commerce if they are within, or include within their own premises, an establishment 'the operations of which affect commerce.' Private clubs are excepted under certain conditions. See s 201(e).

Section 201(d) declares that 'discrimination or segregation' is supported by state action when carried on under color of any law, statute, ordinance, regulation or any custom or usage required or enforced by officials of the State or any of its subdivisions.

In addition, s 202 affirmatively declares that all persons 'shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.'

Finally, s 203 prohibits the withholding or denial, etc., of any right or privilege secured by s 201 and s 202 or the intimidation, threatening or coercion of any person with the purpose of interfering with any such right or the punishing, etc., of any person for exercising or attempting to exercise any such right.

The remaining sections of the Title are remedial ones for violations of any of the previous sections. Remedies are limited to civil actions for preventive relief. The Attorney General may bring suit where he has 'reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described * * *.' s 206(a). A person aggrieved may bring suit, in which the Attorney General may be permitted to intervene. Thirty days' written notice before filing any such action must be given to the appropriate authorities of a State or subdivision the law of which prohibits the act complained of and which has established an authority which may grant relief therefrom. s 204(c). In States where such condition does not exist the court after a case is filed may refer it to the Community Relations Service which is established under Title X of the Act. s 204(d). This Title establishes such service in the Department of Commerce, provides for a Director to be appointed by the President with the advice and consent of the Senate and grants it certain powers, including the power to hold hearings, with reference to matters coming to its attention by reference from the court or between communities and persons involved in disputes arising under the Act.

4. Application of Title II to Heart of Atlanta Motel.

It is admitted that the operation of the motel brings it within the provisions of s 201(a) of the Act and that appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on s 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, s 8, cl. 3, of the Constitution.

The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' At the same time, however, it noted that such an objective has been and could be readily achieved 'by congressional action based on the commerce power of the Constitution.' S.Rep. No. 872, supra, at 16--17. Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not

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pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. Nor is s 201(d) or s 202, having to do with state action, involved here and we do not pass upon either of those
sections.

5. The , and their Application.

In light of our ground for decision, it might be well at the outset to discuss the Civil Rights Cases, supra, which declared provisions of the Civil Rights Act of 1875 unconstitutional. 18 Stat. 335, 336. We think that decision inapposite, and without precedential value in determining the constitutionality of the present Act. Unlike Title II of the present legislation, the 1875 Act broadly proscribed discriminaton in 'inns, public conveyances on land or water, theaters, and other places of public amusement,' without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved. Further, the fact that certain kinds of businesses may not in 1875 have been sufficiently involved in interstate commerce to warrant bringing them within the ambit of the commerce power is not necessarily dispositive of the same question today. Our populace had not reached its present mobility, nor were facilities, goods and services circulating as readily in interstate commerce as they are today. Although the principles which we apply today are those first formulated by Chief Justice Marshall in , the conditions of transportation and commerce have changed dramatically, and we must apply those principles to the present state of commerce. The sheer increase in volume of interstate traffic alone would give discriminatory practices which inhibit travel a far larger impact upon the Nation's commerce than such practices had on the economy of another day. Finally, there is language in the Civil Rights Cases which indicates that the Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power. Though the Court observed that 'no one will contend that the power to pass it was contained in the constitution before the adoption of the last three amendments (Thirteenth, Fourteenth, and Fifteenth),' the Court went on specifically to note that the Act was not 'conceived' in terms of the commerce power and expressly pointed out:

> 'Of course, these remarks (as to lack of congressional power) do not apply to those cases in which congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes * * *. In these cases congress has power to pass laws for regulating the subjects specified, in every detail, and the conduct and transactions of individuals in respect thereof.' .

Since the commerce power was not relied on by the Government and was without support in the record it is understandable that the Court narrowed its inquiry and excluded the Commerce Clause as a possible source of power. In any event, it is clear that such a limitation renders the opinion devoid of authority for the proposition that the Commerce Clause gives no power to Congress to regulate discriminatory practices now found substantially to affect interstate commerce. We, therefore, conclude that the Civil Rights Cases have no relevance to the basis of decision here where the Act explicitly relies upon the commerce power, and where the record is filled with testimony of obstructions and restraints resulting from the discriminations found to be existing. We now pass to that phase of the case.

6. The Basis of Congressional Action.

While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. See Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess.; S.Rep. No. 872, supra; Hearings before Senate Committee on the Judiciary on S. 1731, 88th Cong., 1st Sess.; Hearings before House Subcommittee No. 5 of the Committee on the Judiciary on miscellaneous proposals regarding Civil Rights, 88th Cong., 1st Sess., ser. 4; H.R.Rep. No. 914, supra. This testimony included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances ot secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight, S.Rep. No. 872, supra, at 14--22; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself 'dramatic testimony to the difficulties' Negroes encounter in travel. Senate Commerce Committee Hearings, supra, at 692--694. These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is 'no question that this discrimination in the North still exists to a large degree' and in the West and Midwest as well. Id., at 735, 744. This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. Id., at 744. This was the conclusion not only of the Under Secretary of Commerce but also of the Administrator of the Federal Aviation Agency who wrote the Chairman of the Senate Commerce Committee that it was his 'belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations.' . We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by

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hotels and motels impedes interstate travel.
7. The Power of Congress Over Interstate Travel.
The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. Its meaning was first enunciated 140 years ago by the great Chief Justice John Marshall in , in these words:

> 'The subject to be regulated is commerce; and * * * to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities * * * but it is something more: it is intercourse * * * between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. (At 189--190.)
>
> 'To what commerce does this power extend? The constitution informs us, to commerce 'with foreign nations, and among the several States, and with the Indian tribes.'
>
> 'It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse * * *. No sort of trade can be carried on * * * to which this power does not extend. (At 193--194.)
>
> 'The subject to which the power is next applied, is to commerce 'among the several States.' The word 'among' means intermingled * * *.
>
> '* * * (I)t may very properly be restricted to that commerce which concerns more States than one. * * * The genius and character of the whole government seem to be, that its action is to be applied to all the * * * internal concerns (of the Nation) which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. (At 194-- 195.)
>
> 'We are now arrived at the inquiry--What is this power?
>
> 'It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. * * * If, as has always been understood, the sovereignty of Congress * * * is plenary as to those objects (specified in the Constitution), the power over commerce * * * is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments. (At 196-- 197.)'

In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest. Let us now turn to this facet of the problem.
That the 'intercourse' of which the Chief Justice spoke included the movement of persons through more States than one was settled as early as 1849, in the where Mr. Justice McLean stated: 'That the transportation of passengers is a part of commerce is not now an open question.' At 401. Again in 1913 Mr. Justice McKenna, speaking for the Court, said: 'Commerce among the states, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and porperty.' And only four years later in 1917 in Mr. Justice Day held for the Court:

> 'The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.' At 491, .

Nor does it make any difference whether the transportation is commercial in character. In , Mr. Justice Reed observed as to the modern movement of persons among the States:

> 'The recent changes in transportation brought about by the coming of automobiles (do) not seem of great significance in the problem. People of all races travel today more extensively than in 1878 when this Court first passed upon state regulation of racial segregation in commerce. (It but) emphasizes the soundness of this Court's early conclusion in ' At 383, .

The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate carriers and the white-slave traffic has prompted it to extend the exercise of its power to gambling, ; to criminal enterprises, ; to deceptive parctices in the sale of products, ; to fraudulent security transactions, ; to misbranding of drugs, ; to wages and hours, ; to members of labor unions, ; to crop control, ; to discrimination against shippers, ; to the protection of small business from injurious price cutting, ; to resale price maintenance, , ; to professional football, ; and to racial discrimination by owners and managers of terminal restaurants, .
That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not

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restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, '(i)f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' . See National Labor Relations Board v. Jones & Laughlin Steel Corp., supra. As Chief Justice Stone put it in United States v. Darby, supra:

> 'The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See ' .

Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may--as it has--prohibit racial discrimination by motels serving travelers, however 'local' their operations may appear.

Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no 'right' to select its guests as it sees fit, free from governmental regulation.

There is nothing novel about such legislation. Thirty-two States now have it on their books either by statute or executive order and many cities provide such regulation. Some of these Acts go back fourscore years. It has been repeatedly held by this Court that such laws do not violate the Due Process Clause of the Fourteenth Amendment. Perhaps the first such holding was in the Civil Rights Cases themselves, where Mr. Justice Bradley for the Court inferentially found that innkeepers, 'by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.' .

> The following statutes indicate States which have enacted public accommodation laws: to ; to ; Colo.Rev.Stat.Ann., ss 25--1--1 to 25--2--5 (1953); Supp.); Del.Code Ann., Tit. 6, c. 45 (1963); to Supp.); Ill.Ann.Stat. (Smith-Hurd ed.), c. 38, ss 13--1 to 13--4 (1964), c. 43, s 133 (1944); Ind.Ann.Stat. (Burns ed.), ss 10--901 to 10--914 (1956, and 1963 Supp.); Iowa Code Ann., ss 735.1 and 735.2 (1950); Supp.); Me.Rev.Stat.Ann., c. 137, s 50 (1954); ; and , and Supp.); Mich.Stat.Ann., ss 28.343 and 28.344 (1962); ; Mont.Rev.Codes Ann., s 64--211 (1962); and ; N.H.Rev.Stat.Ann., ss 354:1, 354:2, 354:4 and 354:5 (1955, and 1963 Supp.); to , ss 18:25--1 to 18:25--6 (1964 Supp.); to 49--8--7 (1963 Supp.); N.Y.Civil Rights Law (McKinney ed.), Art. 4, ss 40 and 41 (1948, and 1964 Supp.), Exec. Law, Art. 15, ss 290 to 301 (1951, and 1964 Supp.), Penal Law, Art. 46, ss 513 to 515 (1944); --30 (1963 Supp.); Ohio Rev.Code Ann. (Page's ed.), ss 2901.35 and 2901.36 (1954); , and ; Pa.Stat.Ann., Tit. 18, s 4654 (1963); to ; S.Dak.Sess.Laws, c. 58 (1963); and 1452 (1958); to , and ; ; Wyo.Stat.Ann., ss 6--83.1 and 6--83.2 (1963 Supp.).
>
> In 1963 the Governor of Kentucky issued an executive order requiring all governmental agencies involved in the supervision or licensing of businesses to take all lawful action necessary to prevent racial discrimination.

As we have pointed out, 32 States now have such provisions and no case has been cited to us where the attack on a state statute has been successful, either in federal or state courts. Indeed, in some cases the Due Process and Equal Protection Clause objections have been specifically discarded in this Court. . As a result the constitutionality of such state statutes stands unquestioned. 'The authority of the Federal government over interstate commerce does not differ,' it was held in , 'in extent or character from that retained by the states over intrastate commerce.' At 569--570, See also .

It is doubtful if in the long run appellant will suffer economic loss as a result of the Act. Experience is to the contrary where discrimination is completely obliterated as to all public accommodations. But whether this be true or not is of no consequence since this Court has specifically held that the fact that a 'member of the class which is regulated may suffer economic losses not shared by others * * * has never been a barrier' to such legislation. Likewise in a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty. See , and cases there cited, where we concluded that Congress had delegated law-making power to the District of Columbia 'as broad as the police power of a state' which included the power to adopt a 'law prohibiting discriminations against Negroes by the owners and managers of restaurants in the Neither do we find any merit in the claim that the Act is a taking of property without just compensation. The cases are to the contrary. See ; ; .

We find no merit in the remainder of appellant's contentions, including that of 'involuntary servitude.' As we have seen, 32 States prohibit racial discrimination in public accommodations. These laws but codify the common-law innkeeper rule which long predated the Thirteenth Amendment. It is difficult to believe that the Amendment was intended to abrogate this principle. Indeed, the opinion of the Court in the Civil Rights Cases is to the contrary as we have seen, it having noted with approval the laws of 'all

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the States' prohibiting discrimination. We could not say that the requirements of the Act in this regard are in any way 'akin to African slavery.' .
We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed--what means are to be employed--is within the sound and exclusive discretion of the Congress. It is subject only to one caveat--that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.
Affirmed.

Case 2.2

134 F.3d 87
(Cite as: 134 F.3d 87)

BAD FROG BREWERY, INC., Plaintiff-Appellant,

v.

NEW YORK STATE LIQUOR AUTHORITY, Anthony J. Casale, Lawrence J. Gedda, Edward F. Kelly, individually and as members of the New York State Liquor Authority, Defendants-Appellees.

No. 1080, Docket 97-7949.
United States Court of Appeals,Second Circuit.
Argued Oct. 22, 1997.
Decided Jan. 15, 1998.
JON O. NEWMAN, Circuit Judge:
A picture of a frog with the second of its four unwebbed "fingers" extended in a manner evocative of a well known human gesture of insult has presented this Court with significant issues concerning First Amendment protections for commercial speech. The frog appears on labels that Bad Frog Brewery, Inc. ("Bad Frog") sought permission to use on bottles of its beer products. The New York State Liquor Authority ("NYSLA" or "the Authority") denied Bad Frog's application.
Bad Frog appeals from the July 29, 1997, judgment of the District Court for the Northern District of New York (Frederic J. Scullin, Jr., Judge) granting summary judgment in favor of NYSLA and its three Commissioners and rejecting Bad Frog's commercial free speech challenge to NYSLA's decision. We conclude that the State's prohibition of the labels from use in all circumstances does not materially advance its asserted interests in insulating children from vulgarity or promoting temperance, and is not narrowly tailored to the interest concerning children. We therefore reverse the judgment insofar as it denied Bad Frog's federal claims for injunctive relief with respect to the disapproval of its labels. We affirm, on the ground of immunity, the dismissal of Bad Frog's federal damage claims against the commissioner defendants, and affirm the dismissal of Bad Frog's state law damage claims on the ground that novel and uncertain issues of state law render this an inappropriate case for the exercise of supplemental jurisdiction.
Background
Bad Frog is a Michigan corporation that manufactures and markets several different types of alcoholic beverages under its "Bad Frog" trademark. This action concerns labels used by the company in the marketing of Bad Frog Beer, Bad Frog Lemon Lager, and Bad Frog Malt Liquor. Each label prominently features an artist's rendering of *91 a frog holding up its four-"fingered" right "hand," with the back of the "hand" shown, the second "finger" extended, and the other three "fingers" slightly curled. The membranous webbing that connects the digits of a real frog's foot is absent from the drawing, enhancing the prominence of the extended "finger." Bad Frog does not dispute that the frog depicted in the label artwork is making the gesture generally known as "giving the finger" and that the gesture is widely regarded as an offensive insult, conveying a message that the company has characterized as "traditionally ... negative and nasty." [FN1] Versions of the label feature slogans such as "He just don't care," "An

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amphibian with an attitude," "Turning bad into good," and "The beer so good ... it's bad." Another slogan, originally used but now abandoned, was "He's mean, green and obscene."

FN1. The gesture, also sometimes referred to as "flipping the bird," see New Dictionary of American Slang 133, 141 (1986), is acknowledged by Bad Frog to convey, among other things, the message "fuck you." The District Court found that the gesture "connotes a patently offensive suggestion," presumably a suggestion to having intercourse with one's self.

Hand gestures signifying an insult have been in use throughout the world for many centuries. The gesture of the extended middle finger is said to have been used by Diogenes to insult Demosthenes. See Betty J. Bauml & Franz H. Bauml, Dictionary of Worldwide Gestures 159 (2d ed.1997). Other hand gestures regarded as insults in some countries include an extended right thumb, an extended little finger, and raised index and middle fingers, not to mention those effected with two hands. See id.

Bad Frog's labels have been approved for use by the Federal Bureau of Alcohol, Tobacco, and Firearms, and by authorities in at least 15 states and the District of Columbia, but have been rejected by authorities in New Jersey, Ohio, and Pennsylvania. In May 1996, Bad Frog's authorized New York distributor, Renaissance Beer Co., made an initial application to NYSLA for brand label approval and registration pursuant to section 107-a(4)(a) of New York's Alcoholic Beverage Control Law. See N.Y. Alco. Bev. Cont. Law § 107-a(4)(a) (McKinney 1987 & Supp.1997). NYSLA denied that application in July. Bad Frog filed a new application in August, resubmitting the prior labels and slogans, but omitting the label with the slogan "He's mean, green and obscene," a slogan the Authority had previously found rendered the entire label obscene. That slogan was replaced with a new slogan, "Turning bad into good." The second application, like the first, included promotional material making the extravagant claim that the frog's gesture, whatever its past meaning in other contexts, now means "I want a Bad Frog beer," and that the company's goal was to claim the gesture as its own and as a symbol of peace, solidarity, and good will. In September 1996, NYSLA denied Bad Frog's second application, finding Bad Frog's contention as to the meaning of the frog's gesture "ludicrous and disingenuous." NYSLA letter to Renaissance Beer Co. at 2 (Sept. 18, 1996) ("NYSLA Decision"). Explaining its rationale for the rejection, the Authority found that the label "encourages combative behavior" and that the gesture and the slogan, "He just don't care," placed close to and in larger type than a warning concerning potential health problems,

foster a defiance to the health warning on the label, entice underage drinkers, and invite the public not to heed conventional wisdom and to disobey standards of decorum.

Id. at 3. In addition, the Authority said that it considered that approval of this label means that the label could appear in grocery and convenience stores, with obvious exposure on the shelf to children of tender age id., and that it is sensitive to and has concern as to [the label's] adverse effects on such a youthful audience.

Id. Finally, the Authority said that it has considered that within the state of New York, the gesture of "giving the finger" to someone, has the insulting meaning of "Fuck You," or "Up Yours," ... a confrontational, obscene gesture, known to lead to fights, shootings and homicides ... [,] concludes that the encouraged use of this gesture in licensed premises is akin to *92 yelling "fire" in a crowded theatre, ... [and] finds that to approve this admittedly obscene, provocative confrontational gesture, would not be conducive to proper regulation and control and would tend to adversely affect the health, safety and welfare of the People of the State of New York.

Id.

Bad Frog filed the present action in October 1996 and sought a preliminary injunction barring NYSLA from taking any steps to prohibit the sale of beer by Bad Frog under the controversial labels. The District Court denied the motion on the ground that Bad Frog had not established a likelihood of success on the merits. See Bad Frog Brewery, Inc. v. New York State Liquor Authority, No. 96-CV-1668, 1996 WL 705786 (N.D.N.Y. Dec. 5, 1996). The Court determined that NYSLA's decision appeared to be a permissible restriction on commercial speech under Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), and that Bad Frog's state law claims appeared to be barred by the Eleventh Amendment.

The parties then filed cross motions for summary judgment, and the District Court granted NYSLA's motion. See Bad Frog Brewery, Inc. v. New York State Liquor Authority, 973 F.Supp. 280 (N.D.N.Y.1997). The Court reiterated the views expressed in denying a preliminary injunction that the labels were commercial speech within the meaning of Central Hudson and that the first prong of Central Hudson was satisfied because the labels concerned a lawful activity and were not misleading. Id. at 282. Turning to the second prong of Central Hudson, the Court considered two interests, advanced by the State as substantial: (a) "promoting temperance and respect for the law" and (b) "protecting minors from profane advertising." Id. at 283.

Assessing these interests under the third prong of Central Hudson, the Court ruled that the State had failed to show that the rejection of Bad Frog's labels "directly and materially advances the substantial governmental interest in temperance and respect for the law." Id. at 286. In reaching this conclusion the Court appears to have accepted Bad Frog's contention that marketing gimmicks for beer such as the "Budweiser Frogs," "Spuds Mackenzie," the "Bud-Ice Penguins," and the "Red Dog" of Red Dog Beer ... virtually indistinguishable from the Plaintiff's frog ... promote intemperate behavior in the same way that the Defendants

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have alleged Plaintiff's label would ... [and therefore the] regulation of the Plaintiff's label will have no tangible effect on underage drinking or intemperate behavior in general.
Id.
However, the Court accepted the State's contention that the label rejection would advance the governmental interest in protecting children from advertising that was "profane," in the sense of "vulgar." Id. at 285 (citing Webster's II New Riverside Dictionary 559 (1984)). The Court acknowledged the State's failure to present evidence to show that the label rejection would advance this interest, but ruled that such evidence was required in cases "where the interest advanced by the Government was only incidental or tangential to the government's regulation of speech," id. at 285 (citing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, ---- - ----, 116 S.Ct. 1495, 1508-09, 134 L.Ed.2d 711 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476, 487-88, 115 S.Ct. 1585, 1592, 131 L.Ed.2d 532 (1995); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428, 113 S.Ct. 1505, 1516, 123 L.Ed.2d 99 (1993); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73, 103 S.Ct. 2875, 2883-84, 77 L.Ed.2d 469 (1983)), but not in cases "where the link between the regulation and the government interest advanced is self evident," 973 F.Supp. at 285 (citing Florida Bar v. Went for It, Inc., 515 U.S. 618, 625- 27, 115 S.Ct. 2371, 2376-78, 132 L.Ed.2d 541 (1995); Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328, 341-42, 106 S.Ct. 2968, 2976-77, 92 L.Ed.2d 266 (1986)). The Court concluded that common sense requires this Court to conclude that the prohibition of the use of the profane image on the label in question will necessarily limit the exposure of minors in *93 New York to that specific profane image. Thus, to that extent, the asserted government interest in protecting children from exposure to profane advertising is directly and materially advanced.
973 F.Supp. at 286.
Finally, the Court ruled that the fourth prong of Central Hudson--narrow tailoring--was met because other restrictions, such as point-of-sale location limitations would only limit exposure of youth to the labels, whereas rejection of the labels would "completely foreclose the possibility" of their being seen by youth. Id. at 287. The Court reasoned that a somewhat relaxed test of narrow tailoring was appropriate because Bad Frog's labels conveyed only a "superficial aspect of commercial advertising of no value to the consumer in making an informed purchase," id., unlike the more exacting tailoring required in cases like 44 Liquormart and Rubin, where the material at issue conveyed significant consumer information.
The Court also rejected Bad Frog's void-for-vagueness challenge, id. at 287-88, which is not renewed on appeal, and then declined to exercise supplemental jurisdiction over Bad Frog's pendent state law claims pursuant to 28 U.S.C. § 1367(c)(3) (1994), id. at 288.
Discussion
I. New York's Label Approval Regime and Pullman Abstention
Under New York's Alcoholic Beverage Control Law, labels affixed to liquor, wine, and beer products sold in the State must be registered with and approved by NYSLA in advance of use. See N.Y. Alco. Bev. Cont. Law § 107-a(4)(a). The statute also empowers NYSLA to promulgate regulations "governing the labeling and offering" of alcoholic beverages, id. § 107-a(1), and directs that regulations "shall be calculated to prohibit deception of the consumer; to afford him adequate information as to quality and identity; and to achieve national uniformity in this field in so far as possible," id. § 107-a(2).
Purporting to implement section 107-a, NYSLA promulgated regulations governing both advertising and labeling of alcoholic beverages. Signs displayed in the interior of premises licensed to sell alcoholic beverages shall not contain "any statement, design, device, matter or representation which is obscene or indecent or which is obnoxious or offensive to the commonly and generally accepted standard of fitness and good taste" or "any illustration which is not dignified, modest and in good taste." N.Y. Comp.Codes R. & Regs. tit. ix § 83.3 (1996). Labels on containers of alcoholic beverages "shall not contain any statement or representation, irrespective of truth or falsity, which, in the judgment of [NYSLA], would tend to deceive the consumer." Id. § 84.1(e).
NYSLA's actions raise at least three uncertain issues of state law. First, there is some doubt as to whether section 83.3 of the regulations, concerning designs that are not "in good taste," is authorized by a statute requiring that regulations shall be calculated to prohibit deception of consumers, increase the flow of truthful information, and/or promote national uniformity. It is questionable whether a restriction on offensive labels serves any of these statutory goals. Second, there is some doubt as to whether it was appropriate for NYSLA to apply section 83.3, a regulation governing interior signage, to a product label, especially since the regulations appear to establish separate sets of rules for interior signage and labels. Third, there is some doubt as to whether section 84.1(e) of the regulations, applicable explicitly to labels, authorizes NYSLA to prohibit labels for any reason other than their tendency to deceive consumers.
[1][2] It is well settled that federal courts may not grant declaratory or injunctive relief against a state agency based on violations of state law. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984). "The scope of authority of a state agency is a question of state law and not within the jurisdiction of federal courts." Allen v. Cuomo, 100 F.3d 253, 260 (2d Cir.1996) (citing Pennhurst). Moreover, where a federal constitutional claim turns on an uncertain issue of state law and the controlling state statute is susceptible to an interpretation that would avoid or modify the federal

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constitutional *94 question presented, abstention may be appropriate pursuant to the doctrine articulated in Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). See Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 477, 97 S.Ct. 1898, 1902-03, 52 L.Ed.2d 513 (1977); Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus, 60 F.3d 122, 126 (2d Cir.1995). Were a state court to decide that NYSLA was not authorized to promulgate decency regulations, or that NYSLA erred in applying a regulation purporting to govern interior signs to bottle labels, or that the label regulation applies only to misleading labels, it might become unnecessary for this Court to decide whether NYSLA's actions violate Bad Frog's First Amendment rights.

[3][4][5][6] However, we have observed that abstention is reserved for "very unusual or exceptional circumstances," Williams v. Lambert, 46 F.3d 1275, 1281 (2d Cir.1995). In the context of First Amendment claims, Pullman abstention has generally been disfavored where state statutes have been subjected to facial challenges, see Dombrowski v. Pfister, 380 U.S. 479, 489-90, 85 S.Ct. 1116, 1122-23, 14 L.Ed.2d 22 (1965); see also City of Houston v. Hill, 482 U.S. 451, 467, 107 S.Ct. 2502, 2512-13, 96 L.Ed.2d 398 (1987). Even where such abstention has been required, despite a claim of facial invalidity, see Babbitt v. United Farm Workers National Union, 442 U.S. 289, 307-12, 99 S.Ct. 2301, 2313-16, 60 L.Ed.2d 895 (1979), the plaintiffs, unlike Bad Frog, were not challenging the application of state law to prohibit a specific example of allegedly protected expression. If abstention is normally unwarranted where an allegedly overbroad state statute, challenged facially, will inhibit allegedly protected speech, it is even less appropriate here, where such speech has been specifically prohibited. Abstention would risk substantial delay while Bad Frog litigated its state law issues in the state courts. See Zwickler v. Koota, 389 U.S. 241, 252, 88 S.Ct. 391, 397-98, 19 L.Ed.2d 444 (1967); Baggett v. Bullitt, 377 U.S. 360, 378-79, 84 S.Ct. 1316, 1326-27, 12 L.Ed.2d 377 (1964).

II. Commercial or Noncommercial Speech?

[7] Bad Frog contends directly and NYSLA contends obliquely that Bad Frog's labels do not constitute commercial speech, but their common contentions lead them to entirely different conclusions. In Bad Frog's view, the commercial speech that receives reduced First Amendment protection is expression that conveys commercial information. The frog labels, it contends, do not purport to convey such information, but instead communicate only a "joke," [FN2] Brief for Appellant at 12 n. 5. As such, the argument continues, the labels enjoy full First Amendment protection, rather than the somewhat reduced protection accorded commercial speech.

FN2. Bad Frog also describes the "message" of its labels as "parody," Brief for Appellant at 12, but does not identify any particular prior work of art, literature, advertising, or labeling that is claimed to be the target of the parody. If Bad Frog means that its depiction of an insolent frog on its labels is intended as a general commentary on an aspect of contemporary culture, the "message" of its labels would more aptly be described as satire rather than parody. See generally Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580-81, 114 S.Ct. 1164, 1171-73, 127 L.Ed.2d 500 (1994) (explaining that "[p]arody needs to mimic an original to make its point").

NYSLA shares Bad Frog's premise that "the speech at issue conveys no useful consumer information," but concludes from this premise that "it was reasonable for [NYSLA] to question whether the speech enjoys any First Amendment protection whatsoever." Brief for Appellees at 24-25 n. 5. Ultimately, however, NYSLA agrees with the District Court that the labels enjoy some First Amendment protection, but are to be assessed by the somewhat reduced standards applicable to commercial speech.

The parties' differing views as to the degree of First Amendment protection to which Bad Frog's labels are entitled, if any, stem from doctrinal uncertainties left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved. In particular, these decisions have created some uncertainty as to the degree of protection for commercial advertising that lacks precise informational content.

*95 In 1942, the Court was "clear that the Constitution imposes no [First Amendment] restraint on government as respects purely commercial advertising." Valentine v. Chrestensen, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942). In Chrestensen, the Court sustained the validity of an ordinance banning the distribution on public streets of handbills advertising a tour of a submarine. Twenty-two years later, in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Court characterized Chrestensen as resting on "the factual conclusion [ ] that the handbill was 'purely commercial advertising,' " id. at 266, 84 S.Ct. at 718 (quoting Chrestensen, 316 U.S. at 54, 62 S.Ct. at 921), and noted that Chrestensen itself had "reaffirmed the constitutional protection for 'the freedom of communicating information and disseminating opinion,' " id. at 265-66, 84 S.Ct. at 718 (quoting Chrestensen, 316 U.S. at 54, 62 S.Ct. at 921) (emphasis added). The famously protected advertisement for the Committee to Defend Martin Luther King was distinguished from the unprotected Chrestensen handbill:

The publication here was not a "commercial" advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.

Id. at 266, 84 S.Ct. at 718 (emphasis added). The implication of this distinction between the King Committee advertisement and the submarine tour handbill was that the handbill's solicitation of customers for the tour was not "information" entitled to First Amendment protection.

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In 1973, the Court referred to Chrestensen as supporting the argument that "commercial speech [is] unprotected by the First Amendment." Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 384, 93 S.Ct. 2553, 2558, 37 L.Ed.2d 669 (1973). Pittsburgh Press also endeavored to give content to the then "unprotected" category of "commercial speech" by noting that "[t]he critical feature of the advertisement in Valentine v. Chrestensen was that, in the Court's view, it did no more than propose a commercial transaction." Id. at 385, 93 S.Ct. at 2558. Similarly, the gender-separate help-wanted ads in Pittsburgh Press were regarded as "no more than a proposal of possible employment," which rendered them "classic examples of commercial speech." Id. The Court rejected the newspaper's argument that commercial speech should receive some degree of First Amendment protection, concluding that the contention was unpersuasive where the commercial activity was illegal. See id. at 388-89, 93 S.Ct. at 2560-61.

Just two years later, Chrestensen was relegated to a decision upholding only the "manner in which commercial advertising could be distributed." Bigelow v. Virginia, 421 U.S. 809, 819, 95 S.Ct. 2222, 2231, 44 L.Ed.2d 600 (1975) (emphasis added). Bigelow somewhat generously read Pittsburgh Press as "indicat[ing] that the advertisements would have received some degree of First Amendment protection if the commercial proposal had been legal." Id. at 821, 95 S.Ct. at 2232. However, in according protection to a newspaper advertisement for out-of-state abortion services, the Court was careful to note that the protected ad "did more than simply propose a commercial transaction." Id. at 822, 95 S.Ct. at 2232. Though it was now clear that some forms of commercial speech enjoyed some degree of First Amendment protection, it remained uncertain whether protection would be available for an ad that only "propose[d] a commercial transaction."

That uncertainty was resolved just one year later in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Framing the question as "whether speech which does 'no more than propose a commercial transaction' ... is so removed from [categories of expression enjoying First Amendment protection] that it lacks all protection," id. at 762, 96 S.Ct. at 1825-26, the Court said, "Our answer is that it is not," id. Though Virginia State Board interred the notion that "commercial speech" enjoyed no First Amendment protection, it arguably kept alive the idea that protection was available *96 only for commercial speech that conveyed information:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.

Id. at 765, 96 S.Ct. at 1827; see id. at 763, 96 S.Ct. at 1826-27 (emphasizing the "consumer's interest in the free flow of commercial information").

Supreme Court commercial speech cases upholding First Amendment protection since Virginia State Board have all involved the dissemination of information. See, e.g., 44 Liquormart, 517 U.S. 484, 116 S.Ct. 1495 (price of beer); Rubin, 514 U.S. 476, 115 S.Ct. 1585 (alcoholic content of beer); Central Hudson, 447 U.S. 557, 100 S.Ct. 2343 (benefits of using electricity); Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (availability of lawyer services); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977) (residential "for sale" signs). In the one case since Virginia State Board where First Amendment protection was sought for commercial speech that contained minimal information--the trade name of an optometry business--the Court sustained a governmental prohibition. See Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979). Acknowledging that a trade name "is used as part of a proposal of a commercial transaction," id. at 11, 99 S.Ct. at 895, and "is a form of commercial speech," id., the Court pointed out "[a] trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time...." Id. at 12, 99 S.Ct. at 895. Moreover, the Court noted, "the factual information associated with trade names may be communicated freely and explicitly to the public," id. at 16, 99 S.Ct. at 897, presumably through the type of informational advertising protected in Virginia State Board. The trade name prohibition was ultimately upheld because use of the trade name had permitted misleading practices, such as claiming standardized care, see id. at 14, 99 S.Ct. at 896, but the Court added that the prohibition was sustainable just because of the "opportunity" for misleading practices, see id. at 15, 99 S.Ct. at 896-97.

[8] Prior to Friedman, it was arguable from language in Virginia State Board that a trademark would enjoy commercial speech protection since, "however tasteless," its use is the "dissemination of information as to who is producing and selling what product...." 425 U.S. at 765, 96 S.Ct. at 1827. But the prohibition against trademark use in Friedman puts the matter in considerable doubt, unless Friedman is to be limited to trademarks that either have been used to mislead or have a clear potential to mislead. Since Friedman, the Supreme Court has not explicitly clarified whether commercial speech, such as a logo or a slogan that conveys no information, other than identifying the source of the product, but that serves, to some degree, to "propose a commercial transaction," enjoys any First Amendment protection. The Court's opinion in Posadas, however, points in favor of protection. Adjudicating a prohibition on some forms of casino advertising, the Court did not pause to inquire whether the advertising conveyed information. Instead, viewing the case as involving "the restriction of pure commercial speech which does 'no more than propose a commercial transaction,' " Posadas, 478 U.S. at 340, 106 S.Ct. at 2976 (quoting Virginia State Board, 425 U.S. at 762, 96 S.Ct. at 1825-26), the Court applied the standards set forth in Central Hudson, see id.

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Bad Frog's label attempts to function, like a trademark, to identify the source of the product. The picture on a beer bottle of a frog behaving badly is reasonably to be understood as attempting to identify to consumers a product of the Bad Frog Brewery. [FN3] In addition, the label serves to propose a commercial transaction. Though the label communicates no information beyond the source *97 of the product, we think that minimal information, conveyed in the context of a proposal of a commercial transaction, suffices to invoke the protections for commercial speech, articulated in Central Hudson. [FN4]

FN3. The attempt to identify the product's source suffices to render the ad the type of proposal for a commercial transaction that receives the First Amendment protection for commercial speech. We intimate no view on whether the plaintiff's mark has acquired secondary meaning for trademark law purposes.

FN4. Since we conclude that Bad Frog's label is entitled to the protection available for commercial speech, we need not resolve the parties' dispute as to whether a label without much (or any) information receives no protection because it is commercial speech that lacks protectable information, or full protection because it is commercial speech that lacks the potential to be misleading. Cf. Rubin, 514 U.S. at 491, 115 S.Ct. at 1593-94 (Stevens, J., concurring in the judgment) (contending that label statement with no capacity to mislead because it is indisputably truthful should not be subjected to reduced standards of protection applicable to commercial speech); Discovery Network, 507 U.S. at 436, 113 S.Ct. at 1520 (Blackmun, J., concurring) ("[T]ruthful, noncoercive commercial speech concerning lawful activities is entitled to full First Amendment protection."). Even if its labels convey sufficient information concerning source of the product to warrant at least protection as commercial speech (rather than remain totally unprotected), Bad Frog contends that its labels deserve full First Amendment protection because their proposal of a commercial transaction is combined with what is claimed to be political, or at least societal, commentary.

[9] The "core notion" of commercial speech includes "speech which does no more than propose a commercial transaction." Bolger, 463 U.S. at 66, 103 S.Ct. at 2880 (citations and internal quotation marks omitted). Outside this so-called "core" lie various forms of speech that combine commercial and noncommercial elements. Whether a communication combining those elements is to be treated as commercial speech depends on factors such as whether the communication is an advertisement, whether the communication makes reference to a specific product, and whether the speaker has an economic motivation for the communication. See id. at 66-67, 103 S.Ct. at 2879-81. Bolger explained that while none of these factors alone would render the speech in question commercial, the presence of all three factors provides "strong support" for such a determination. Id.; see also New York State Association of Realtors, Inc. v. Shaffer, 27 F.3d 834, 840 (2d Cir.1994) (considering proper classification of speech combining commercial and noncommercial elements).

[10] We are unpersuaded by Bad Frog's attempt to separate the purported social commentary in the labels from the hawking of beer. Bad Frog's labels meet the three criteria identified in Bolger: the labels are a form of advertising, identify a specific product, and serve the economic interest of the speaker. Moreover, the purported noncommercial message is not so "inextricably intertwined" with the commercial speech as to require a finding that the entire label must be treated as "pure" speech. See Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 474, 109 S.Ct. 3028, 3031, 106 L.Ed.2d 388 (1989). Even viewed generously, Bad Frog's labels at most "link[ ] a product to a current debate," Central Hudson, 447 U.S. at 563 n. 5, 100 S.Ct. at 2350 n. 5, which is not enough to convert a proposal for a commercial transaction into "pure" noncommercial speech, see id. Indeed, the Supreme Court considered and rejected a similar argument in Fox, when it determined that the discussion of the noncommercial topics of "how to be financially responsible and how to run an efficient home" in the course of a Tupperware demonstration did not take the demonstration out of the domain of commercial speech. See Fox, 492 U.S. at 473-74, 109 S.Ct. at 3030-31.

We thus assess the prohibition of Bad Frog's labels under the commercial speech standards outlined in Central Hudson.

III. The Central Hudson Test

[11][12][13] Central Hudson sets forth the analytical framework for assessing governmental restrictions on commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly*98 advances the government interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566, 100 S.Ct. at 2351. The last two steps in the analysis have been considered, somewhat in tandem, to determine if there is a sufficient " 'fit' between the [regulator's] ends and the means chosen to accomplish those ends." Posadas, 478 U.S. at 341, 106 S.Ct. at 2977. The burden to establish that "reasonable fit" is on the governmental agency defending its regulation, see Discovery Network, 507 U.S. at 416, 113 S.Ct. at 1509-10, though the fit need not satisfy a least-restrictive-means standard, see Fox, 492 U.S. at 476-81, 109 S.Ct. at 3032-35.

A. Lawful Activity and Not Deceptive

We agree with the District Court that Bad Frog's labels pass Central Hudson 's threshold requirement that the speech "must concern lawful activity and not be misleading." See Bad Frog, 973 F.Supp. at 283 n. 4. The consumption of beer (at least by adults) is legal in New York, and the labels cannot be said to be deceptive, even if they are offensive. Indeed, although NYSLA

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argues that the labels convey no useful information, it concedes that "the commercial speech at issue ... may not be characterized as misleading or related to illegal activity." Brief for Defendants-Appellees at 24.

B. Substantial State Interests

NYSLA advances two interests to support its asserted power to ban Bad Frog's labels: (i) the State's interest in "protecting children from vulgar and profane advertising," and (ii) the State's interest "in acting consistently to promote temperance, i.e., the moderate and responsible use of alcohol among those above the legal drinking age and abstention among those below the legal drinking age." Id. at 26.

Both of the asserted interests are "substantial" within the meaning of Central Hudson. States have "a compelling interest in protecting the physical and psychological well-being of minors," and "[t]his interest extends to shielding minors from the influence of literature that is not obscene by adult standards." Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836-37, 106 L.Ed.2d 93 (1989); see also Reno v. American Civil Liberties Union, --- U.S. ----, ----, 117 S.Ct. 2329, 2346, 138 L.Ed.2d 874 (1997) ("[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials.").

The Supreme Court also has recognized that states have a substantial interest in regulating alcohol consumption. See, e.g., 44 Liquormart, 517 U.S. at ----, 116 S.Ct. at 1509; Rubin, 514 U.S. at 485, 115 S.Ct. at 1591. We agree with the District Court that New York's asserted concern for "temperance" is also a substantial state interest. See Bad Frog, 973 F.Supp. at 284.

C. Direct Advancement of the State Interest

[14] To meet the "direct advancement" requirement, a state must demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield v. Fane, 507 U.S. 761, 771, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993) (emphasis added). A restriction will fail this third part of the Central Hudson test if it "provides only ineffective or remote support for the government's purpose." Central Hudson, 447 U.S. at 564, 100 S.Ct. at 2350. [FN5]

FN5. In Central Hudson, the Supreme Court held that a regulation prohibiting advertising by public utilities promoting the use of electricity directly advanced New York State's substantial interest in energy conservation. See Central Hudson,447 U.S. at 569, 100 S.Ct. at 2353. In contrast, the Court determined that the regulation did not directly advance the state's interest in the maintenance of fair and efficient utility rates, because "the impact of promotional advertising on the equity of [the utility]'s rates [was] highly speculative." Id.

(1) Advancing the interest in protecting children from vulgarity. Whether the prohibition of Bad Frog's labels can be said to materially advance the state interest in protecting minors from vulgarity depends on the extent to which underinclusiveness of regulation is pertinent to the relevant inquiry. The *99 Supreme Court has made it clear in the commercial speech context that underinclusiveness of regulation will not necessarily defeat a claim that a state interest has been materially advanced. Thus, in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the Court upheld a prohibition of all offsite advertising, adopted to advance a state interest in traffic safety and esthetics, notwithstanding the absence of a prohibition of onsite advertising. See id. at 510-12, 101 S.Ct. at 2893- 95 (plurality opinion). Though not a complete ban on outdoor advertising, the prohibition of all offsite advertising made a substantial contribution to the state interests in traffic safety and esthetics. In United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), the Court upheld a prohibition on broadcasting lottery information as applied to a broadcaster in a state that bars lotteries, notwithstanding the lottery information lawfully being broadcast by broadcasters in a neighboring state. Though this prohibition, like that in Metromedia, was not total, the record disclosed that the prohibition of broadcasting lottery information by North Carolina stations reduced the percentage of listening time carrying such material in the relevant area from 49 percent to 38 percent, see Edge Broadcasting, 509 U.S. at 432, 113 S.Ct. at 2706, a reduction the Court considered to have "significance," id. at 433, 113 S.Ct. at 2706-07. [FN6]

FN6. Though not in the context of commercial speech, the Federal Communications Commission's regulation of indecent programming, upheld in Pacifica as to afternoon programming, was thought to make a substantial contribution to the asserted governmental interest because of the "uniquely pervasive presence in the lives of all Americans" achieved by broadcast media, 438 U.S. at 748, 98 S.Ct. at 3040. The pervasiveness of beer labels is not remotely comparable.

On the other hand, a prohibition that makes only a minute contribution to the advancement of a state interest can hardly be considered to have advanced the interest "to a material degree." Edenfield, 507 U.S. at 771, 113 S.Ct. at 1800. Thus, In Bolger, the Court invalidated a prohibition on mailing literature concerning contraceptives, alleged to support a governmental interest in aiding parents' efforts to discuss birth control with their children, because the restriction "provides only the most limited incremental support for the interest asserted." 463 U.S. at 73, 103 S.Ct. at 2884. In Linmark, a town's prohibition of "For Sale" signs was invalidated in part on the ground that the record failed to indicate "that proscribing such signs will reduce public awareness of realty sales." 431 U.S. at 96, 97 S.Ct. at 1620. In Rubin, the Government's asserted interest in preventing alcoholic strength wars was held not to be significantly advanced by a prohibition on displaying alcoholic content on labels while permitting such displays in advertising (in the absence of state prohibitions). 514 U.S. at 488, 115 S.Ct. at 1592. Moreover, the Court noted that the asserted

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purpose was sought to be achieved by barring alcoholic content only from beer labels, while permitting such information on labels for distilled spirits and wine. See id. [FN7]

FN7. Posadas contains language on both sides of the underinclusiveness issue. The Court first pointed out that a ban on advertising for casinos was not underinclusive just because advertising for other forms of gambling were permitted, 478 U.S. at 342, 106 S.Ct. at 2977; however, compliance with Central Hudson 's third criterion was ultimately upheld because of the legislature's legitimate reasons for seeking to reduce demand only for casino gambling, id. at 342-43, 106 S.Ct. at 2977-78, an interest the casino advertising ban plainly advanced.

In the pending case, NYSLA endeavors to advance the state interest in preventing exposure of children to vulgar displays by taking only the limited step of barring such displays from the labels of alcoholic beverages. In view of the wide currency of vulgar displays throughout contemporary society, including comic books targeted directly at children, [FN8] barring such displays from labels for alcoholic beverages cannot realistically be expected to reduce children's exposure to such displays to any significant degree.

FN8. Appellant has included several examples in the record.

We appreciate that NYSLA has no authority to prohibit vulgar displays appearing beyond the marketing of alcoholic beverages, but a state may not avoid the criterion of materially advancing its interest by authorizing only one component of its regulatory *100 machinery to attack a narrow manifestation of a perceived problem. If New York decides to make a substantial effort to insulate children from vulgar displays in some significant sphere of activity, at least with respect to materials likely to be seen by children, NYSLA's label prohibition might well be found to make a justifiable contribution to the material advancement of such an effort, but its currently isolated response to the perceived problem, applicable only to labels on a product that children cannot purchase, does not suffice. We do not mean that a state must attack a problem with a total effort or fail the third criterion of a valid commercial speech limitation. See Edge Broadcasting, 509 U.S. at 434, 113 S.Ct. at 2707 ("Nor do we require that the Government make progress on every front before it can make progress on any front."). Our point is that a state must demonstrate that its commercial speech limitation is part of a substantial effort to advance a valid state interest, not merely the removal of a few grains of offensive sand from a beach of vulgarity. [FN9]

FN9. Though Edge Broadcasting recognized (in a discussion of the fourth Central Hudson factor) that the inquiry as to a reasonable fit is not to be judged merely by the extent to which the government interest is advanced in the particular case, 509 U.S. at 430-31, 113 S.Ct. at 2705- 06, the Court made clear that what remains relevant is the relation of the restriction to the "general problem" sought to be dealt with, id. at 430, 113 S.Ct. at 2705. Thus, in the pending case, the pertinent point is not how little effect the prohibition of Bad Frog's labels will have in shielding children from indecent displays, it is how little effect NYSLA's authority to ban indecency from labels of all alcoholic beverages will have on the "general problem" of insulating children from vulgarity.The District Court ruled that the third criterion was met because the prohibition of Bad Frog's labels indisputably achieved the result of keeping these labels from being seen by children. That approach takes too narrow a view of the third criterion. Under that approach, any regulation that makes any contribution to achieving a state objective would pass muster. Edenfield, however, requires that the regulation advance the state interest "in a material way." The prohibition of "For Sale" signs in Linmark succeeded in keeping those signs from public view, but that limited prohibition was held not to advance the asserted interest in reducing public awareness of realty sales. The prohibition of alcoholic strength on labels in Rubin succeeded in keeping that information off of beer labels, but that limited prohibition was held not to advance the asserted interest in preventing strength wars since the information appeared on labels for other alcoholic beverages. The valid state interest here is not insulating children from these labels, or even insulating them from vulgar displays on labels for alcoholic beverages; it is insulating children from displays of vulgarity.

(2) Advancing the state interest in temperance. We agree with the District Court that NYSLA has not established that its rejection of Bad Frog's application directly advances the state's interest in "temperance." See Bad Frog, 973 F.Supp. at 286. NYSLA maintains that the raised finger gesture and the slogan "He just don't care" urge consumers generally to defy authority and particularly to disregard the Surgeon General's warning, which appears on the label next to the gesturing frog. See Brief for Defendants-Appellees at 30. NYSLA also contends that the frog appeals to youngsters and promotes underage drinking. See id.

The truth of these propositions is not so self-evident as to relieve the state of the burden of marshalling some empirical evidence to support its assumptions. All that is clear is that the gesture of "giving the finger" is offensive. Whether viewing that gesture on a beer label will encourage disregard of health warnings or encourage underage drinking remain matters of speculation.

NYSLA has not shown that its denial of Bad Frog's application directly and materially advances either of its asserted state interests.

D. Narrow Tailoring

[15] Central Hudson 's fourth criterion, sometimes referred to as "narrow tailoring," Edge Broadcasting, 509 U.S. at 430, 113 S.Ct. at 2705; Fox, 492 U.S. at 480, 109 S.Ct. *101 at 3034-35 ("narrowly tailored"), [FN10] requires consideration of whether the prohibition is more extensive than necessary to serve the asserted state interest. Since NYSLA's prohibition of Bad Frog's labels

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has not been shown to make even an arguable advancement of the state interest in temperance, we consider here only whether the prohibition is more extensive than necessary to serve the asserted interest in insulating children from vulgarity.

FN10. The metaphor of "narrow tailoring" as the fourth Central Hudson factor for commercial speech restrictions was adapted from standards applicable to time, place, and manner restrictions on political speech, see Edge Broadcasting, 509 U.S. at 430, 113 S.Ct. at 2705 (citing Ward v. Rock Against Racism, 491 U.S. 781, 799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989)).

In its most recent commercial speech decisions, the Supreme Court has placed renewed emphasis on the need for narrow tailoring of restrictions on commercial speech. In 44 Liquormart, where retail liquor price advertising was banned to advance an asserted state interest in temperance, the Court noted that several less restrictive and equally effective measures were available to the state, including increased taxation, limits on purchases, and educational campaigns. See 517 U.S. at ----, 116 S.Ct. at 1510. Similarly in Rubin, where display of alcoholic content on beer labels was banned to advance an asserted interest in preventing alcoholic strength wars, the Court pointed out "the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech." 514 U.S. at 491, 115 S.Ct. at 1594.

In this case, Bad Frog has suggested numerous less intrusive alternatives to advance the asserted state interest in protecting children from vulgarity, short of a complete statewide ban on its labels. Appellant suggests "the restriction of advertising to point-of-sale locations; limitations on billboard advertising; restrictions on over-the-air advertising; and segregation of the product in the store." Appellant's Brief at 39. Even if we were to assume that the state materially advances its asserted interest by shielding children from viewing the Bad Frog labels, it is plainly excessive to prohibit the labels from all use, including placement on bottles displayed in bars and taverns where parental supervision of children is to be expected. Moreover, to whatever extent NYSLA is concerned that children will be harmfully exposed to the Bad Frog labels when wandering without parental supervision around grocery and convenience stores where beer is sold, that concern could be less intrusively dealt with by placing restrictions on the permissible locations where the appellant's products may be displayed within such stores. Or, with the labels permitted, restrictions might be imposed on placement of the frog illustration on the outside of six-packs or cases, sold in such stores.

NYSLA's complete statewide ban on the use of Bad Frog's labels lacks a "reasonable fit" with the state's asserted interest in shielding minors from vulgarity, and NYSLA gave inadequate consideration to alternatives to this blanket suppression of commercial speech. Cf. Bolger, 463 U.S. at 73, 103 S.Ct. at 2883-84 ("[T]he government may not 'reduce the adult population ... to reading only what is fit for children.' ") (quoting Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957)) (footnote omitted).

E. Relief

[16] Since we conclude that NYSLA has unlawfully rejected Bad Frog's application for approval of its labels, we face an initial issue concerning relief as to whether the matter should be remanded to the Authority for further consideration of Bad Frog's application or whether the complaint's request for an injunction barring prohibition of the labels should be granted.

NYSLA's unconstitutional prohibition of Bad Frog's labels has been in effect since September 1996. The duration of that prohibition weighs in favor of immediate relief. Despite the duration of the prohibition, if it were preventing the serious impairment of a state interest, we might well leave it in force while the Authority is afforded a further opportunity to attempt to fashion some regulation of Bad Frog's labels that accords with First Amendment requirements. But this case presents no such threat of serious impairment *102 of state interests. The possibility that some children in supermarkets might see a label depicting a frog displaying a well known gesture of insult, observable throughout contemporary society, does not remotely pose the sort of threat to their well-being that would justify maintenance of the prohibition pending further proceedings before NYSLA. We will therefore direct the District Court to enjoin NYSLA from rejecting Bad Frog's label application, without prejudice to such further consideration and possible modification of Bad Frog's authority to use its labels as New York may deem appropriate, consistent with this opinion.

[17] Though we conclude that Bad Frog's First Amendment challenge entitles it to equitable relief, we reject its claim for damages against the NYSLA commissioners in their individual capacities. The District Court's decision upholding the denial of the application, though erroneous in our view, sufficiently demonstrates that it was reasonable for the commissioners to believe that they were entitled to reject the application, and they are consequently entitled to qualified immunity as a matter of law.

IV. State Law Claims

Bad Frog has asserted state law claims based on violations of the New York State Constitution and the Alcoholic Beverage Control Law. See Complaint ¶¶ 40- 46. In its opinion denying Bad Frog's request for a preliminary injunction, the District Court stated that Bad Frog's state law claims appeared to be barred by the Eleventh Amendment. See Bad Frog, 1996 WL 705786, at *5. In its summary judgment opinion, however, the District Court declined to retain supplemental jurisdiction over the state law claims, see 28 U.S.C. § 1367(c)(3), after dismissing all federal claims. See Bad Frog, 973 F.Supp. at 288.

[18] Contrary to the suggestion in the District Court's preliminary injunction opinion, we think that at least some of Bad Frog's state law claims are not barred by the Eleventh Amendment. The jurisdictional limitation recognized in Pennhurst does not apply to an individual capacity claim seeking damages against a state official, even if the claim is based on state law. See Ying Jing Gan v. City of New York, 996 F.2d 522, 529 (2d Cir.1993); Wilson v. UT Health Center, 973 F.2d 1263, 1271 (5th Cir.1992) ("Pennhurst

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and the Eleventh Amendment do not deprive federal courts of jurisdiction over state law claims against state officials strictly in their individual capacities."). Bad Frog purports to sue the NYSLA commissioners in part in their individual capacities, and seeks damages for their alleged violations of state law. See Complaint ¶¶ 5-7 and "Demand for Judgment" ¶ (3).

[19] Nevertheless, we think that this is an appropriate case for declining to exercise supplemental jurisdiction over these claims in view of the numerous novel and complex issues of state law they raise. See 28 U.S.C. § 1367(c)(1). As noted above, there is significant uncertainty as to whether NYSLA exceeded the scope of its statutory mandate in enacting a decency regulation and in applying to labels a regulation governing interior signs. Bad Frog's claims for damages raise additional difficult issues such as whether the pertinent state constitutional and statutory provisions imply a private right of action for damages, and whether the commissioners might be entitled to state law immunity for their actions.

In the absence of First Amendment concerns, these uncertain state law issues would have provided a strong basis for Pullman abstention. Because First Amendment concerns for speech restriction during the pendency of a lawsuit are not implicated by Bad Frog's claims for monetary relief, the interests of comity and federalism are best served by the presentation of these uncertain state law issues to a state court. We thus affirm the District Court's dismissal of Bad Frog's state law claims for damages, but do so in reliance on section 1367(c)(1) (permitting declination of supplemental jurisdiction over claim "that raises a novel or complex issue of State law").

Conclusion

The judgment of the District Court is reversed, and the case is remanded for entry of judgment in favor of Bad Frog on its claim *103 for injunctive relief; the injunction shall prohibit NYSLA from rejecting Bad Frog's label application, without prejudice to such further consideration and possible modification of Bad Frog's authority to use its labels as New York may deem appropriate, consistent with this opinion. Dismissal of the federal law claim for damages against the NYSLA commissioners is affirmed on the ground of immunity. Dismissal of the state law claim for damages is affirmed pursuant to 28 U.S.C. § 1367(c)(1). Upon remand, the District Court shall consider the claim for attorney's fees to the extent warranted with respect to the federal law equitable claim.

Case 2.3

U.S.,2015.
Holt v. Hobbs
135 S.Ct. 853, 15 Cal. Daily Op. Serv. 6827, 2015 Daily Journal D.A.R. 734
Supreme Court of the United States

Gregory Houston HOLT, aka Abdul Maalik Muhammad, Petitioner
v.
Ray HOBBS, Director, Arkansas Department of Correction, et al.

No. 13–6827.
Argued Oct. 7, 2014.
Decided Jan. 20, 2015.

Justice ALITO delivered the opinion of the Court.

Petitioner Gregory Holt, also known as Abdul Maalik Muhammad, is an Arkansas inmate and a devout Muslim who wishes to grow a 1/2 –inch beard in accordance with his religious beliefs. Petitioner's objection to shaving his beard clashes with the Arkansas Department of Correction's grooming policy, which prohibits inmates from growing beards unless they have a particular dermatological condition. We hold that the Department's policy, as applied in this case, violates the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.,* which prohibits a state or local government from taking any action that substantially burdens the religious exercise of an institutionalized person unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling governmental interest.

We conclude in this case that the Department's policy substantially burdens petitioner's religious exercise.

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Although we do not question the importance of the Department's interests in stopping the flow of contraband and facilitating prisoner identification, we do doubt whether the prohibition against petitioner's beard furthers its compelling interest about contraband. And we conclude that the Department has failed to show that its policy is the least restrictive means of furthering its compelling interests. We thus reverse the decision of the United States Court of Appeals for the Eighth Circuit.

I

A

[1] Congress enacted RLUIPA and its sister statute, the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.,* "in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. ——, ——, 134 S.Ct. 2751, 2760, 189 L.Ed.2d 675 (2014). RFRA was enacted three years after our decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment. *Id.,* at 878–882, 110 S.Ct. 1595. *Smith* largely repudiated the method of analysis used in prior free exercise cases like *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). In those cases, we employed a balancing test that considered whether a challenged government action that substantially burdened the exercise of religion was necessary to further a compelling state interest. See *Yoder, supra,* at 214, 219, 92 S.Ct. 1526; *Sherbert, supra,* at 403, 406, 83 S.Ct. 1790.

[2] Following our decision in *Smith,* Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment. See *Hobby Lobby, supra,* at —— – ——, 134 S.Ct., at 2760–2761. RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b). In making RFRA applicable to the States and their subdivisions, Congress relied on Section 5 of the Fourteenth Amendment, but in *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), this Court held that RFRA exceeded Congress' powers under that provision. *Id.,* at 532–536, 117 S.Ct. 2157.

[3] Congress responded to *City of Boerne* by enacting RLUIPA, which applies to the States and their subdivisions and invokes congressional authority under the Spending and Commerce Clauses. See § 2000cc–1(b). RLUIPA concerns two areas of government activity: Section 2 governs land-use regulation, § 2000cc; and Section 3—the provision at issue in this case—governs religious exercise by institutionalized persons, § 2000cc–1. Section 3 mirrors RFRA and provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000cc–1(a). RLUIPA thus allows prisoners "to seek religious accommodations pursuant to the same standard as set forth in RFRA." *Gonzales v. O Centro Espírita Beneficente União do Vegetal,* 546 U.S. 418, 436, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006).

Several provisions of RLUIPA underscore its expansive protection for religious liberty. Congress defined "religious exercise" capaciously to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A). Congress mandated that this concept "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc–3(g). And Congress stated that RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." § 2000cc–3(c). See *Hobby Lobby, supra,* at —— – —— –, ——, 134 S.Ct., at 2761–2762, 2781–2782.

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B

Petitioner, as noted, is in the custody of the Arkansas Department of Correction and he objects on religious grounds to the Department's grooming policy, which provides that "[n]o inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip." App. to Brief for Petitioner 11a. The policy makes no exception for inmates who object on religious grounds, but it does contain an exemption for prisoners with medical needs: "Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch." *Ibid.* The policy provides that "[f]ailure to abide by [the Department's] grooming standards is grounds for disciplinary action." *Id.,* at 12a.

Petitioner sought permission to grow a beard and, although he believes that his faith requires him not to trim his beard at all, he proposed a "compromise" under which he would grow only a 1/2 –inch beard. App. 164. Prison officials denied his request, and the warden told him: "[Y]ou will abide by [Arkansas Department of Correction] policies and if you choose to disobey, you can suffer the consequences." No. 5:11–cv–00164 (ED Ark., July 21, 2011), Doc. 13, p. 6 (Letter from Gaylon Lay to Gregory Holt (July 19, 2011)).

Petitioner filed a *pro se* complaint in Federal District Court challenging the grooming policy under RLUIPA. We refer to the respondent prison officials collectively as the Department. In October 2011, the District Court granted petitioner a preliminary injunction and remanded to a Magistrate Judge for an evidentiary hearing. At the hearing, the Department called two witnesses. Both expressed the belief that inmates could hide contraband in even a 1/2 –inch beard, but neither pointed to any instances in which this had been done in Arkansas or elsewhere. Both witnesses also acknowledged that inmates could hide items in many other places, such as in the hair on their heads or their clothing. In addition, one of the witnesses—Gaylon Lay, the warden of petitioner's prison—testified that a prisoner who escaped could change his appearance by shaving his beard, and that a prisoner could shave his beard to disguise himself and enter a restricted area of the prison. Neither witness, however, was able to explain why these problems could not be addressed by taking a photograph of an inmate without a beard, a practice followed in other prison systems. Lay voiced concern that the Department would be unable to monitor the length of a prisoner's beard to ensure that it did not exceed one-half inch, but he acknowledged that the Department kept track of the length of the beards of those inmates who are allowed to wear a 1/4 –inch beard for medical reasons.

As a result of the preliminary injunction, petitioner had a short beard at the time of the hearing, and the Magistrate Judge commented: "I look at your particular circumstance and I say, you know, it's almost preposterous to think that you could hide contraband in your beard." App. 155. Nevertheless, the Magistrate Judge recommended that the preliminary injunction be vacated and that petitioner's complaint be dismissed for failure to state a claim on which relief can be granted. The Magistrate Judge emphasized that "the prison officials are entitled to deference," *id.,* at 168, and that the grooming policy allowed petitioner to exercise his religion in other ways, such as by praying on a prayer rug, maintaining the diet required by his faith, and observing religious holidays.

The District Court adopted the Magistrate Judge's recommendation in full, and the Court of Appeals for the Eighth Circuit affirmed in a brief *per curiam* opinion, holding that the Department had satisfied its burden of showing that the grooming policy was the least restrictive means of furthering its compelling security interests. 509 Fed.Appx. 561 (2013). The Court of Appeals stated that "courts should ordinarily defer to [prison officials'] expert judgment" in security matters unless there is substantial evidence that a prison's response is exaggerated. *Id.,* at 562. And while acknowledging that other prisons allow inmates to maintain facial hair, the Eighth Circuit held that this evidence "does not outweigh deference owed to [the] expert judgment of prison officials who are more familiar with their own institutions." *Ibid.*

We entered an injunction pending resolution of petitioner's petition for writ of certiorari, 571 U.S. ——, 134 S.Ct. 635, 187 L.Ed.2d 414 (2013), and we then granted certiorari, 571 U.S. ——, 134 S.Ct. 1490, 188 L.Ed.2d 391 (2014).

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II

[4] Under RLUIPA, petitioner bore the initial burden of proving that the Department's grooming policy implicates his religious exercise. RLUIPA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," § 2000cc–5(7)(A), but, of course, a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation, see *Hobby Lobby,* 573 U.S., at ——, n. 28, 134 S.Ct., at 2774, n. 28. Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief.

[5] In addition to showing that the relevant exercise of religion is grounded in a sincerely held religious belief, petitioner also bore the burden of proving that the Department's grooming policy substantially burdened that exercise of religion. Petitioner easily satisfied that obligation. The Department's grooming policy requires petitioner to shave his beard and thus to "engage in conduct that seriously violates [his] religious beliefs." *Id.,* at ——, 134 S.Ct., at 2775. If petitioner contravenes that policy and grows his beard, he will face serious disciplinary action. Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise. Indeed, the Department does not argue otherwise.

[6] The District Court reached the opposite conclusion, but its reasoning (adopted from the recommendation of the Magistrate Judge) misunderstood the analysis that RLUIPA demands. First, the District Court erred by concluding that the grooming policy did not substantially burden petitioner's religious exercise because "he had been provided a prayer rug and a list of distributors of Islamic material, he was allowed to correspond with a religious advisor, and was allowed to maintain the required diet and observe religious holidays." App. 177. In taking this approach, the District Court improperly imported a strand of reasoning from cases involving prisoners' First Amendment rights. See, *e.g., O'Lone v. Estate of Shabazz,* 482 U.S. 342, 351–352, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987); see also *Turner v. Safley,* 482 U.S. 78, 90, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Under those cases, the availability of alternative means of practicing religion is a relevant consideration, but RLUIPA provides greater protection. RLUIPA's "substantial burden" inquiry asks whether the government has substantially burdened religious exercise (here, the growing of a 1/2 –inch beard), not whether the RLUIPA claimant is able to engage in other forms of religious exercise.

Second, the District Court committed a similar error in suggesting that the burden on petitioner's religious exercise was slight because, according to petitioner's testimony, his religion would "credit" him for attempting to follow his religious beliefs, even if that attempt proved to be unsuccessful. RLUIPA, however, applies to an exercise of religion regardless of whether it is "compelled." § 2000cc–5(7)(A).

[7] Finally, the District Court went astray when it relied on petitioner's testimony that not all Muslims believe that men must grow beards. Petitioner's belief is by no means idiosyncratic. See Brief for Islamic Law Scholars as *Amici Curiae* 2 ("hadith requiring beards ... are widely followed by observant Muslims across the various schools of Islam"). But even if it were, the protection of RLUIPA, no less than the guarantee of the Free Exercise Clause, is "not limited to beliefs which are shared by all of the members of a religious sect." *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 715–716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981).

III

Since petitioner met his burden of showing that the Department's grooming policy substantially burdened his exercise of religion, the burden shifted to the Department to show that its refusal to allow petitioner to grow a 1/2 –inch beard "(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that compelling governmental interest." § 2000cc–1(a).

[8][9] The Department argues that its grooming policy represents the least restrictive means of furthering a " 'broadly formulated interes[t],' " see *Hobby Lobby, supra,* at ——, 134 S.Ct., at 2779 (quoting *O Centro,* 546 U.S., at

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431, 126 S.Ct. 1211), namely, the Department's compelling interest in prison safety and security. But RLUIPA, like RFRA, contemplates a " 'more focused' " inquiry and " 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened.' " *Hobby Lobby,* 573 U.S., at ——, 134 S.Ct., at 2779 (quoting *O Centro, supra,* at 430–431, 126 S.Ct. 1211 (quoting § 2000bb–1(b))). RLUIPA requires us to " 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants' " and "to look to the marginal interest in enforcing" the challenged government action in that particular context. *Hobby Lobby, supra,* at ——, 134 S.Ct., at 2779 (quoting *O Centro, supra,* at 431, 126 S.Ct. 1211; alteration in original). In this case, that means the enforcement of the Department's policy to prevent petitioner from growing a 1/2 –inch beard.

The Department contends that enforcing this prohibition is the least restrictive means of furthering prison safety and security in two specific ways.

A

[10] The Department first claims that the no-beard policy prevents prisoners from hiding contraband. The Department worries that prisoners may use their beards to conceal all manner of prohibited items, including razors, needles, drugs, and cellular phone subscriber identity module (SIM) cards.

We readily agree that the Department has a compelling interest in staunching the flow of contraband into and within its facilities, but the argument that this interest would be seriously compromised by allowing an inmate to grow a 1/2 –inch beard is hard to take seriously. As noted, the Magistrate Judge observed that it was "almost preposterous to think that [petitioner] could hide contraband" in the short beard he had grown at the time of the evidentiary hearing. App. 155. An item of contraband would have to be very small indeed to be concealed by a 1/2 –inch beard, and a prisoner seeking to hide an item in such a short beard would have to find a way to prevent the item from falling out. Since the Department does not demand that inmates have shaved heads or short crew cuts, it is hard to see why an inmate would seek to hide contraband in a 1/2 –inch beard rather than in the longer hair on his head.

[11] Although the Magistrate Judge dismissed the possibility that contraband could be hidden in a short beard, the Magistrate Judge, the District Court, and the Court of Appeals all thought that they were bound to defer to the Department's assertion that allowing petitioner to grow such a beard would undermine its interest in suppressing contraband. RLUIPA, however, does not permit such unquestioning deference. RLUIPA, like RFRA, "makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress." *O Centro, supra,* at 434, 126 S.Ct. 1211. That test requires the Department not merely to explain why it denied the exemption but to prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest. Prison officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise. But that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard. And without a degree of deference that is tantamount to unquestioning acceptance, it is hard to swallow the argument that denying petitioner a 1/2 –inch beard actually furthers the Department's interest in rooting out contraband.

[12][13] Even if the Department could make that showing, its contraband argument would still fail because the Department cannot show that forbidding very short beards is the least restrictive means of preventing the concealment of contraband. "The least-restrictive-means standard is exceptionally demanding," and it requires the government to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Hobby Lobby, supra,* at ——, 134 S.Ct., at 2780. "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 815, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000).

The Department failed to establish that it could not satisfy its security concerns by simply searching petitioner's

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beard. The Department already searches prisoners' hair and clothing, and it presumably examines the 1/4 –inch beards of inmates with dermatological conditions. It has offered no sound reason why hair, clothing, and 1/4 –inch beards can be searched but 1/2 –inch beards cannot. The Department suggests that requiring guards to search a prisoner's beard would pose a risk to the physical safety of a guard if a razor or needle was concealed in the beard. But that is no less true for searches of hair, clothing, and 1/4 –inch beards. And the Department has failed to prove that it could not adopt the less restrictive alternative of having the prisoner run a comb through his beard. For all these reasons, the Department's interest in eliminating contraband cannot sustain its refusal to allow petitioner to grow a 1/2 –inch beard.

B

[14] The Department contends that its grooming policy is necessary to further an additional compelling interest, *i.e.,* preventing prisoners from disguising their identities. The Department tells us that the no-beard policy allows security officers to identify prisoners quickly and accurately. It claims that bearded inmates could shave their beards and change their appearance in order to enter restricted areas within the prison, to escape, and to evade apprehension after escaping.

We agree that prisons have a compelling interest in the quick and reliable identification of prisoners, and we acknowledge that any alteration in a prisoner's appearance, such as by shaving a beard, might, in the absence of effective countermeasures, have at least some effect on the ability of guards or others to make a quick identification. But even if we assume for present purposes that the Department's grooming policy sufficiently furthers its interest in the identification of prisoners, that policy still violates RLUIPA as applied in the circumstances present here. The Department contends that a prisoner who has a beard when he is photographed for identification purposes might confuse guards by shaving his beard. But as petitioner has argued, the Department could largely solve this problem by requiring that all inmates be photographed without beards when first admitted to the facility and, if necessary, periodically thereafter. Once that is done, an inmate like petitioner could be allowed to grow a short beard and could be photographed again when the beard reached the 1/2 –inch limit. Prison guards would then have a bearded and clean-shaven photo to use in making identifications. In fact, the Department (like many other States, see Brief for Petitioner 39) already has a policy of photographing a prisoner both when he enters an institution and when his "appearance changes at any time during [his] incarceration." Arkansas Department of Correction, Inmate Handbook 3–4 (rev. Jan. 2013).

The Department argues that the dual-photo method is inadequate because, even if it might help authorities apprehend a bearded prisoner who escapes and then shaves his beard once outside the prison, this method is unlikely to assist guards when an inmate quickly shaves his beard in order to alter his appearance within the prison. The Department contends that the identification concern is particularly acute at petitioner's prison, where inmates live in barracks and work in fields. Counsel for the Department suggested at oral argument that a prisoner could gain entry to a restricted area by shaving his beard and swapping identification cards with another inmate while out in the fields. Tr. of Oral Arg. 28–30, 39–43.

We are unpersuaded by these arguments for at least two reasons. First, the Department failed to show, in the face of petitioner's evidence, that its prison system is so different from the many institutions that allow facial hair that the dual-photo method cannot be employed at its institutions. Second, the Department failed to establish why the risk that a prisoner will shave a 1/2 –inch beard to disguise himself is so great that 1/2 –inch beards cannot be allowed, even though prisoners are allowed to grow mustaches, head hair, or 1/4 –inch beards for medical reasons. All of these could also be shaved off at a moment's notice, but the Department apparently does not think that this possibility raises a serious security concern.

C

[15] In addition to its failure to prove that petitioner's proposed alternatives would not sufficiently serve its security

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interests, the Department has not provided an adequate response to two additional arguments that implicate the RLUIPA analysis.

First, the Department has not adequately demonstrated why its grooming policy is substantially underinclusive in at least two respects. Although the Department denied petitioner's request to grow a 1/2 –inch beard, it permits prisoners with a dermatological condition to grow 1/4 –inch beards. The Department does this even though both beards pose similar risks. And the Department permits inmates to grow more than a 1/2 –inch of hair on their heads. With respect to hair length, the grooming policy provides only that hair must be worn "above the ear" and "no longer in the back than the middle of the nape of the neck." App. to Brief for Petitioner 11a. Hair on the head is a more plausible place to hide contraband than a 1/2 –inch beard—and the same is true of an inmate's clothing and shoes. Nevertheless, the Department does not require inmates to go about bald, barefoot, or naked. Although the Department's proclaimed objectives are to stop the flow of contraband and to facilitate prisoner identification, "[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct," which suggests that "those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

In an attempt to demonstrate why its grooming policy is underinclusive in these respects, the Department emphasizes that petitioner's 1/2 –inch beard is longer than the 1/4 –inch beard allowed for medical reasons. But the Department has failed to establish (and the District Court did not find) that a 1/4 –inch difference in beard length poses a meaningful increase in security risk. The Department also asserts that few inmates require beards for medical reasons while many may request beards for religious reasons. But the Department has not argued that denying petitioner an exemption is necessary to further a compelling interest in cost control or program administration. At bottom, this argument is but another formulation of the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *O Centro,* 546 U.S., at 436, 126 S.Ct. 1211. We have rejected a similar argument in analogous contexts, see *ibid.*; *Sherbert,* 374 U.S., at 407, 83 S.Ct. 1790, and we reject it again today.

Second, the Department failed to show, in the face of petitioner's evidence, why the vast majority of States and the Federal Government permit inmates to grow 1/2 –inch beards, either for any reason or for religious reasons, but it cannot. See Brief for Petitioner 24–25; Brief for United States as *Amicus Curiae* 28–29. "While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." *Procunier v. Martinez,* 416 U.S. 396, 414, n. 14, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks.

[16] We do not suggest that RLUIPA requires a prison to grant a particular religious exemption as soon as a few other jurisdictions do so. But when so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course, and the Department failed to make that showing here. Despite this, the courts below deferred to these prison officials' mere say-so that they could not accommodate petitioner's request. RLUIPA, however, demands much more. Courts must hold prisons to their statutory burden, and they must not "assume a plausible, less restrictive alternative would be ineffective." *Playboy Entertainment,* 529 U.S., at 824, 120 S.Ct. 1878.

[17][18][19] We emphasize that although RLUIPA provides substantial protection for the religious exercise of institutionalized persons, it also affords prison officials ample ability to maintain security. We highlight three ways in which this is so. First, in applying RLUIPA's statutory standard, courts should not blind themselves to the fact that the analysis is conducted in the prison setting. Second, if an institution suspects that an inmate is using religious activity to cloak illicit conduct, "prison officials may appropriately question whether a prisoner's religiosity, asserted as the

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basis for a requested accommodation, is authentic." *Cutter v. Wilkinson,* 544 U.S. 709, 725, n. 13, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). See also *Hobby Lobby,* 573 U.S., at ——, n. 28, 134 S.Ct., at 2774, n. 28. Third, even if a claimant's religious belief is sincere, an institution might be entitled to withdraw an accommodation if the claimant abuses the exemption in a manner that undermines the prison's compelling interests.

IV

In sum, we hold that the Department's grooming policy violates RLUIPA insofar as it prevents petitioner from growing a 1/2 –inch beard in accordance with his religious beliefs. The judgment of the United States Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, concurring.

Unlike the exemption this Court approved in *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. ——, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014), accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief. See *id.,* at ——, —— – ——, and n. 8, ——, 134 S.Ct., at 2787–2788, 2790–2791, and n. 8, 2801 (GINSBURG, J., dissenting). On that understanding, I join the Court's opinion.

Justice SOTOMAYOR, concurring.

I concur in the Court's opinion, which holds that the Department failed to show why the less restrictive alternatives identified by petitioner in the course of this litigation were inadequate to achieve the Department's compelling security-related interests. I write separately to explain my understanding of the applicable legal standard.

Nothing in the Court's opinion calls into question our prior holding in *Cutter v. Wilkinson* that "[c]ontext matters" in the application of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.* 544 U.S. 709, 723, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (internal quotation marks omitted). In the dangerous prison environment, "regulations and procedures" are needed to "maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Ibid.* Of course, that is not to say that cost alone is an absolute defense to an otherwise meritorious RLUIPA claim. See § 2000cc–3(c). Thus, we recognized "that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area." *Cutter,* 544 U.S., at 725, n. 13, 125 S.Ct. 2113.

I do not understand the Court's opinion to preclude deferring to prison officials' reasoning when that deference is due—that is, when prison officials offer a plausible explanation for their chosen policy that is supported by whatever evidence is reasonably available to them. But the deference that must be "extend[ed to] the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat." *Yellowbear v. Lampert,* 741 F.3d 48, 59 (C.A.10 2014). Indeed, prison policies " 'grounded on mere speculation' " are exactly the ones that motivated Congress to enact RLUIPA. 106 Cong. Rec. 16699 (2000) (quoting S.Rep. No. 103–111, 10 (1993)).

Here, the Department's failure to demonstrate why the less restrictive policies petitioner identified in the course of the litigation were insufficient to achieve its compelling interests—not the Court's independent judgment concerning the merit of these alternative approaches—is ultimately fatal to the Department's position. The Court is appropriately skeptical of the relationship between the Department's no-beard policy and its alleged compelling interests because the Department offered little more than unsupported assertions in defense of its refusal of petitioner's requested religious accommodation. RLUIPA requires more.

One final point bears emphasis. RLUIPA requires institutions refusing an accommodation to demonstrate that the policy it defends "is the least restrictive means of furthering [the alleged] compelling ... interest[s]." § 2000cc–1(a)(2);

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see also *Washington v. Klem,* 497 F.3d 272, 284 (C.A.3 2007) ("[T]he phrase 'least restrictive means' is, by definition, a relative term. It necessarily implies a comparison with other means"); *Couch v. Jabe,* 679 F.3d 197, 203 (C.A.4 2012) (same). But nothing in the Court's opinion suggests that prison officials must refute every conceivable option to satisfy RLUIPA's least restrictive means requirement. Nor does it intimate that officials must prove that they considered less restrictive alternatives at a particular point in time. Instead, the Court correctly notes that the Department inadequately responded to the less restrictive policies that petitioner brought to the Department's attention during the course of the litigation, including the more permissive policies used by the prisons in New York and California. See, *e.g., United States v. Wilgus,* 638 F.3d 1274, 1289 (C.A.10 2011) (observing in the analogous context of the Religious Freedom Restoration Act of 1993 that the government need not "do the impossible—refute each and every conceivable alternative regulation scheme" but need only "refute the alternative schemes offered by the challenger").

Because I understand the Court's opinion to be consistent with the foregoing, I join it.

Supplemental Case Printout for: *Beyond Our Borders*

539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508, 71 USLW 4574, 03 Cal. Daily Op. Serv. 5559, 2003 Daily Journal D.A.R. 7036, 16 Fla. L. Weekly Fed. S 427

John Geddes LAWRENCE and Tyron Garner, Petitioners,

v.

TEXAS.

No. 02-102.

Argued March 26, 2003.

Decided June 26, 2003.

***562** Justice delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.

I

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, ***563** resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another**2476** man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. to Pet. for Cert. 127a, 139a. The applicable state law is . It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows:

"(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or

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"(B) the penetration of the genitals or the anus of another person with an object." § 21.01(1).
The petitioners exercised their right to a trial *de novo* in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution. . Those contentions were rejected. The petitioners, having entered a plea of *nolo contendere,* were each fined $200 and assessed court costs of $141.25. App. to Pet. for Cert. 107a-110a.
The Court of Appeals for the Texas Fourteenth District considered the petitioners' federal constitutional arguments under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. After hearing the case en banc the court, in a divided opinion, rejected the constitutional arguments and affirmed the convictions. . The majority opinion indicates that the Court of Appeals considered our decision in , to be controlling on the federal due process aspect of the case. then being authoritative, this was proper.
***564** We granted certiorari, , to consider three questions:
1. Whether petitioners' criminal convictions under the Texas 'Homosexual Conduct' law-which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples-violate the Fourteenth Amendment guarantee of equal protection of the laws.
2. Whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.
3. Whether should be overruled. See Pet. for Cert. i.
The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.
II
We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in
There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including , and ; but the most pertinent beginning point is our decision in .
In the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or ****2477** aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and ***565** placed emphasis on the marriage relation and the protected space of the marital bedroom.
After it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In , the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights, It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:
"It is true that in the right of privacy in question inhered in the marital relationship .... If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."
The opinions in and were part of the background for the decision in . As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.
***566** In , the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both and as well as the holding and rationale in confirmed that the reasoning of could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered
The facts in had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger and Justice Powell joined the opinion of the Court and filed separate, concurring opinions. Four Justices dissented. (opinion of Blackmun, J., joined by Brennan, Marshall, and STEVENS, JJ.); ****2478** (opinion of STEVENS, J., joined by Brennan

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and Marshall, JJ.).
The Court began its substantive discussion in as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so ***567** for a very long time." That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.
Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the Court said: "Proscriptions against that conduct have ancient roots." In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions***568** in Brief for Cato Institute as *Amicus Curiae* 16-17; Brief for American Civil Liberties Union et al. as *Amici Curiae* 15-21; Brief for Professors of History et al. as *Amici Curiae* 3-10. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which placed such reliance.
At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. See, *e.g., King v. Wiseman,* 92 Eng. Rep. 774, 775 (K.B.1718) (interpreting "mankind" in Act of 1533 as including women and girls). Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men. See, *e.g.,* 2 J. Bishop, Criminal Law § 1028 (1858); 2 J. Chitty, Criminal Law 47-50 (5th Am. ed. 1847); R. Desty, A Compendium of American Criminal Law 143 (1882); J. May, The Law of Crimes § 203 (2d ed. 1893). The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of ****2479** person did not emerge until the late 19th century. See, e.g., J. Katz, The Invention of Heterosexuality 10 (1995); J. D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America 121 (2d ed. 1997) ("The modern terms *homosexuality* and *heterosexuality* do not apply to an era that had not yet articulated these distinctions"). Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of ***569** homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.
Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise, see 2 Chitty, *supra,* at 49, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.
To the extent that there were any prosecutions for the acts in question, 19th-century evidence rules imposed a burden that would make a conviction more difficult to obtain even taking into account the problems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent. See, *e.g.,* F. Wharton, Criminal Law 443 (2d ed. 1852); 1 F. Wharton, Criminal Law 512 (8th ed. 1880). The rule may explain in part the infrequency of these prosecutions. In

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all events that infrequency makes it difficult to say that society approved of a rigorous and systematic ***570** punishment of the consensual acts committed in private and by adults. The longstanding criminal prohibition of homosexual sodomy upon which the decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.

The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct. Despite the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing "ancient roots," American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880-1995 are not always clear in the details, but a significant number involved conduct in a public place. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 14-15, and n. 18.

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. See 1977 Ark. Gen. Acts no. 828; 1983 Kan. Sess. Laws p. 652; 1974 Ky. ****2480** Acts p. 847; 1977 Mo. Laws p. 687; 1973 Mont. Laws p. 1339; 1977 Nev. Stats. p. 1632; 1989 Tenn. Pub. Acts ch. 591; 1973 Tex. Gen. Laws ch. 399; see also (sodomy law invalidated as applied to different-sex couples). Post-even some of these States did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. See, *e.g.,* ; ; ; ***571**; see also 1993 Nev. Stats. p. 518 (repealing).

In summary, the historical grounds relied upon in are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." .

Chief Justice Burger joined the opinion for the Court in and further explained his views as follows: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards." As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. See, *e.g.,* Eskridge, . In all events we think that our laws and traditions in the past half century are of ***572** most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (KENNEDY, J., concurring).

This emerging recognition should have been apparent when was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." ALI, , Comment 2, p. 372 (1980). It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955). In 1961 Illinois changed its laws to conform to the Model Penal Code. ****2481** Other States soon followed. Brief for Cato Institute as *Amicus Curiae* 15-16.

In the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct").

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws ***573** punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, § 1.

Of even more importance, almost five years before was decided the European Court of Human Rights considered a case with parallels to and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been

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questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom,* 45 Eur. Ct. H.R. (1981) & ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. .

Two principal cases decided after cast its holding into even more doubt. In , the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The decision again confirmed ***574** that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

****2482** Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in would deny them this right.

The second post- case of principal relevance is . There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose.

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude***575** the instant case requires us to address whether itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders. ; . We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of at least four States were he or she to be subject to their jurisdiction. Pet. for Cert. 13, and n. 12 (citing to ; La.Code Crim. Proc. Ann. § § 15:540-15:549 ***576** West 2003); to (Lexis 2003); to (West 2002)). This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.

The foundations of have sustained serious erosion from our recent decisions in and When our precedent has been thus weakened, criticism from other sources is of greater significance.****2483** In the United States criticism of has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. See, *e.g.,* C. Fried, Order and Law: Arguing the Reagan Revolution-A Firsthand Account 81-84 (1991); R. Posner, Sex and Reason 341-350 (1992). The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment, see ; ; ; ; .

To the extent relied on values we share with a wider civilization, it should be noted that the reasoning and holding in have been

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rejected elsewhere. The European Court of Human Rights has followed not but its own decision in *Dudgeon v. United Kingdom.* See *P.G. & J.H. v. United Kingdom,* App. No. 00044787/98, & ¶ 56 (Eur.Ct.H. R., Sept. 25, 2001); *Modinos v. Cyprus,* 259 Eur. Ct. H.R. (1993); *Norris v. Ireland,* 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary ***577** Robinson et al. as *Amici Curiae* 11-12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision' " (quoting)). In we noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. see also ("Liberty finds no refuge in a jurisprudence of doubt"). The holding in however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on of the sort that could counsel against overturning its holding once there are compelling reasons to do so. itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

The rationale of does not withstand careful analysis. In his dissenting opinion in Bowers Justice STEVENS came to these conclusions:

"Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional***578** attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons." (footnotes and citations omitted).

****2484** Justice STEVENS' analysis, in our view, should have been controlling in and should control here.

was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume ***579** to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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Environment

United States Court of Appeals,
Third Circuit.
UNITED STATES of America
v.
Anthony Douglas ELONIS, Appellant.
No. 12–3798.
Argued: June 14, 2013.
Filed: Sept. 19, 2013.
OPINION OF THE COURT
SCIRICA, Circuit Judge.

This case presents the question whether the true threats exception to speech protection under the First Amendment requires a jury to find the defendant subjectively intended his statements to be understood as threats. Anthony Elonis challenges his jury conviction under 18 U.S.C. § 875(c), arguing he did not subjectively intend his Facebook posts to be threatening. In *United States v. Kosma,* 951 F.2d 549, 557 (3d Cir.1991) we held a statement is a true threat when a reasonable speaker would foresee the statement would be interpreted as a threat. We consider whether the Supreme Court decision in *Virginia v. Black,* 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), overturns this standard by requiring a subjective intent to threaten.

I.

In May 2010, Elonis's wife of seven years moved out of their home with their two young children. Following this separation, Elonis began experiencing trouble at work. Elonis worked at Dorney Park & Wildwater Kingdom amusement park as an operations supervisor and a communications technician. After his wife left, supervisors observed Elonis with his head down on his desk crying, and he was sent home on several occasions because he was too upset to work.

One of the employees Elonis supervised, Amber Morrissey, made five sexual harassment reports against him. According to Morrissey, Elonis came into the office where she was working alone late at night, and began to undress in front of her. She left the building after he removed his shirt. Morrissey also reported another incident where Elonis made a minor female employee uncomfortable when he placed himself close to her and told her to stick out her tongue. On October 17, 2010 Elonis posted on his Facebook page a photograph taken for the Dorney Park Halloween Haunt. The photograph showed Elonis in costume holding a knife to Morrissey's neck. Elonis added the caption “I wish” under the photograph. Elonis's supervisor saw the Facebook posting and fired Elonis that same day.

Two days after he was fired, Elonis began posting violent statements on his Facebook page. One post regarding Dorney Park stated:

> Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must have taken home a couple. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so fucking scary?

Elonis also began posting statements about his estranged wife, Tara Elonis, including the following: “If I only knew then what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder.” Several of the posts about Tara Elonis were in response to her sister's status updates on Facebook. For example, Tara Elonis's sister posted her status update as: “Halloween costume shopping with my niece and nephew should be interesting.” Elonis commented on this status update, writing, “Tell [their son] he should dress up as matricide for Halloween. I don't know what his costume would entail though. Maybe [Tara Elonis's] head on a stick?” Elonis also posted in October 2010:

> There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I

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used to be a nice guy but then you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you.

Based on these statements a state court issued Tara Elonis a Protection From Abuse order against Elonis on November 4, 2010. Following the issuance of the state court Protection From Abuse order, Elonis posted several statements on Facebook expressing intent to harm his wife. On November 7 he wrote: [FN1]

FN1. This statement was the basis of Count 2 of the indictment.

Did you know that it's illegal for me to say I want to kill my wife?

It's illegal.

It's indirect criminal contempt.

It's one of the only sentences that I'm not allowed to say.

Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.

I'm not actually saying it.

I'm just letting you know that it's illegal for me to say that.

It's kind of like a public service.

I'm letting you know so that you don't accidently go out and say something like that

Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.

That's illegal.

Very, very illegal.

But not illegal to say with a mortar launcher.

Because that's its own sentence.

It's an incomplete sentence but it may have nothing to do with the sentence before that. So that's perfectly fine.

Perfectly legal.

I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.

Insanely illegal.

Ridiculously, wrecklessly, insanely illegal.

Yet even more illegal to show an illustrated diagram.

Insanely illegal.

Ridiculously, horribly felonious.

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Cause they will come to my house in the middle of the night and they will lock me up.

Extremely against the law.

Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic simper tyrannis.

Tara Elonis testified at trial that she took these statements seriously, saying, “I felt like I was being stalked. I felt extremely afraid for mine and my children's and my families' lives.” Trial Tr. 97, Oct. 19, 2011. Ms. Elonis further testified that Elonis rarely listened to rap music, and that she had never seen Elonis write rap lyrics during their seven years of marriage. She explained that the lyric form of the statements did not make her take the threats any less seriously.

On November 15 Elonis posted on his Facebook page:

Fold up your PFA and put it in your pocket Is it thick enough to stop a bullet?

Try to enforce an Order

That was improperly granted in the first place Me thinks the judge needs an education on true threat jurisprudence

And prison time will add zeroes to my settlement

Which you won't see a lick

Because you suck dog dick in front of children

* * *

And if worse comes to worse

I've got enough explosives to take care of the state police and the sheriff's department

[link: Freedom of Speech, www. wikipedia. org]

This statement was the basis both of Count 2, threats to Elonis's wife, and Count 3, threats to local law enforcement. A post the following day on November 16 involving an elementary school was the basis of Count 4:

That's it, I've had about enough

I'm checking out and making a name for myself Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined

And hell hath no fury like a crazy man in a kindergarten class

The only question is ... which one?

By this point FBI Agent Denise Stevens was monitoring Elonis's public Facebook postings, because Dorney Park contacted the FBI claiming Elonis had posted threats against Dorney Park and its employees on his Facebook page. After reading these and other Facebook posts by Elonis, Agent Stevens and another FBI agent went to Elonis's house to interview him. When the agents knocked on his door, Elonis's father answered and told the agents Elonis was sleeping. The agents waited several minutes until Elonis came to the door wearing a t-shirt, jeans, and no shoes. Elonis asked the agents if they were law enforcement and asked if he was free to go. After the agents identified themselves and told him he was free to go, Elonis went inside and closed the door. Later that day, Elonis posted the following on Facebook:

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You know your shit's ridiculous when you have the FBI knockin' at yo' door

Little Agent Lady stood so close

Took all the strength I had not to turn the bitch ghost

Pull my knife, flick my wrist, and slit her throat Leave her bleedin' from her jugular in the arms of her partner

[laughter]

So the next time you knock, you best be serving a warrant

And bring yo' SWAT and an explosives expert while you're at it

Cause little did y'all know, I was strapped wit' a bomb

Why do you think it took me so long to get dressed with no shoes on?

I was jus' waitin' for y'all to handcuff me and pat me down

Touch the detonator in my pocket and we're all goin'

[BOOM!]

These statements were the basis of Count 5 of the indictment. After she observed this post on Elonis's Facebook page, Agent Stevens contacted the U.S. Attorney's Office.

II.

Elonis was arrested on December 8, 2010 and charged with transmitting in interstate commerce communications containing a threat to injure the person of another in violation of 18 U.S.C. § 875(c). The grand jury indicted Elonis on five counts of making threatening communications: Count 1 threats to patrons and employees of Dorney Park & Wildwater Kingdom, Count 2 threats to his wife, Count 3 threats to employees of the Pennsylvania State Police and Berks County Sheriff's Department, Count 4 threats to a kindergarten class, and Count 5 threats to an FBI agent.

Elonis moved to dismiss the indictments against him, contending the Supreme Court held in *Virginia v. Black,* 538 U.S. 343, 347–48, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) that a subjective intent to threaten was required under the true threat exception to the First Amendment and that his statements were not threats but were protected speech. The District Court denied the motion to dismiss because even if the subjective intent standard applied, Elonis's intent and the attendant circumstances showing whether or not the statements were true threats were questions of fact for the jury. *United States v. Elonis,* No. 11–13, 2011 WL 5024284, at *3 (E.D.Pa. Oct. 20, 2011).

Elonis testified in his own defense at trial. A jury convicted Elonis on Counts 2 through 5, and the court sentenced him to 44 months' imprisonment followed by three years supervised release. Elonis filed a post-trial Motion to Dismiss Indictment with Prejudice under Rule 12(b)(3); and for New Trial under Rule 33(a), to Arrest Judgment under Rule 34(b) and/or Dismissal under Rule 29(c). The District Court denied the motion to dismiss the indictment, finding the indictment correctly tracked the language of the statute and stated the nature of the threat, the date of the threat and the victim of the threat. The court also stated the objective intent standard conformed with Third Circuit precedent. The court found the evidence supported the jury's finding that the statements in Count 3 and Count 5 were true threats. Finally, the court held that the jury instruction presuming communications over the internet were transmitted through interstate commerce was supported by our precedent in *United States v. MacEwan,* 445 F.3d 237, 244 (3d Cir.2006).

III.[FN2]

FN2. The District Court had jurisdiction over this case under 18 U.S.C. § 3231. We exercise appellate jurisdiction under

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28 U.S.C. § 1291. We review statutory interpretations and conclusions of law de novo. *Kosma,* 951 F.2d at 553. We exercise plenary review over the sufficiency of indictments. *United States v. Kemp,* 500 F.3d 257, 280 (3d Cir.2007). "We apply a particularly deferential standard of review when deciding whether a jury verdict rests on legally sufficient evidence." *United States v. Dent,* 149 F.3d 180, 187 (3d Cir.1998). Because Elonis failed to object to the jury instructions at trial, we review whether the jury instructions stated the correct legal standard for plain error. *United States v. Lee,* 612 F.3d 170, 191 (3d Cir.2010).

A.

[1] Elonis was convicted under 18 U.S.C. § 875(c) for "transmit[ting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another...." Elonis contends the trial court incorrectly instructed the jury on the standard of a true threat. The court gave the following jury instruction:

> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

Trial Tr. 127, Oct. 20, 2011. Elonis posits that the Supreme Court decision in *Virginia v. Black* requires that a defendant subjectively intend to threaten, and overturns the reasonable speaker standard we articulated in *United States v. Kosma,* 951 F.2d 549, 557 (3d Cir.1991).

In *United States v. Kosma,* we held a true threat requires that

> the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress, or coercion.

Id. at 557 (quoting *Roy v. United States,* 416 F.2d 874, 877–78 (9th Cir.1969) (emphasis omitted)). We rejected a subjective intent requirement that the defendant "intended at least to convey the impression that the threat was a serious one." *Id.* at 558 (quoting *Rogers v. United States,* 422 U.S. 35, 46, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring)). We found "any subjective test potentially frustrates the purposes of section 871—to prevent not only actual threats on the President's life, but also the harmful consequences which flow from such threats." *Id.* (explaining "it would make prosecution of these threats significantly more difficult"). We have held the same "knowingly and willfully" mens rea *Kosma* analyzed under 18 U.S.C. § 871, threats against the president, applies to § 875(c). *United States v. Himelwright,* 42 F.3d 777, 782 (3d Cir.1994) (holding "the government bore only the burden of proving that Himelwright acted knowingly and willfully when he placed the threatening telephone calls and that those calls were reasonably perceived as threatening bodily injury"). Since our precedent is clear, the question is whether the Supreme Court decision in *Virginia v. Black* overturned this standard.

The Supreme Court first articulated the true threats exception to speech protected under the First Amendment in *Watts v. United States,* 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). During a rally opposing the Vietnam war, Watts told the crowd, "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706, 89 S.Ct. 1399 (internal quotation marks omitted). The Court reversed his conviction for making a threat against the president because the statement was "political hyperbole," rather than a true threat. *Id.* at 708, 89 S.Ct. 1399. The Court articulated three factors supporting its finding: 1. the context was a political speech; 2. the statement was "expressly conditional"; and 3. "the reaction of the listeners" who "laughed after the statement was made." *Id.* at 707–08, 89 S.Ct. 1399. The Court did not address the true threats exception again until *Virginia v. Black* in 2003.[FN3]

> FN3. The Court did discuss the constitutional limits on banning "fighting words" in *R.A. V. v. City of St. Paul,* 505 U.S. 377, 388, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

In *Virginia v. Black* the Court considered a Virginia statute that banned burning a cross with the "intent of intimidating" and provided "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." 538 U.S. at 348, 123 S.Ct. 1536 (citation and internal quotation marks omitted). The Court reviewed three separate convictions of defendants under the statute and concluded that intimidating cross burning could be proscribed as a true threat under the First Amendment. *Id.* at 363, 123 S.Ct. 1536. But the prima facie evidence provision violated due process, because it permitted a jury to

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convict whenever a defendant exercised his or her right to not put on a defense. *Id.* at 364–65, 123 S.Ct. 1536.

[2] The Court reviewed the historic and contextual meanings behind cross burning, and found it conveyed a political message, a cultural message, and a threatening message, depending on the circumstances. *Id.* at 354–57, 123 S.Ct. 1536. The Court then described the true threat exception generally before analyzing the Virginia statute:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. *See Watts v. United States, supra,* at 708 [89 S.Ct. 1399] ... ("political hyperbole" is not a true threat); *R.A.V. v. City of St. Paul,* 505 U.S., at 388 [112 S.Ct. 2538].... The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, *supra,* the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

Id. at 359–60, 123 S.Ct. 1536 (citation omitted). Elonis contends that this definition of true threats means that the speaker must both intend to communicate and intend for the language to threaten the victim.[FN4] But the Court did not have occasion to make such a sweeping holding, because the challenged Virginia statute already required a subjective intent to intimidate. We do not infer from the use of the term "intent" that the Court invalidated the objective intent standard the majority of circuits applied to true threats.[FN5] Instead, we read "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" to mean that the speaker must intend to make the communication. It would require adding language the Court did not write to read the passage as "statements where the speaker means to communicate [and intends the statement to be understood as] a serious expression of an intent to commit an act of unlawful violence." *Id.* at 359, 123 S.Ct. 1536. This is not what the Court wrote, and it is inconsistent with the logic animating the true threats exception.

FN4. Elonis also points to the passage "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black,* 538 U.S. at 360, 123 S.Ct. 1536. But this sentence explains when intimidation can be a true threat, and does not define when threatening language is a true threat.

FN5. *See, e.g., United States v. Whiffen,* 121 F.3d 18, 20–21 (1st Cir.1997); *United States v. Francis,* 164 F.3d 120, 122 (2d Cir.1999); *United States v. Darby,* 37 F.3d 1059, 1066 (4th Cir.1994); *United States v. Myers,* 104 F.3d 76, 80–81 (5th Cir.1997); *United States v. DeAndino,* 958 F.2d 146, 148 (6th Cir.1992); *United States v. Schneider,* 910 F.2d 1569, 1570 (7th Cir.1990); *United States v. Manning,* 923 F.2d 83, 86 (8th Cir.1991); *United States v. Hart,* 457 F.2d 1087, 1091 (10th Cir.1972); *United States v. Callahan,* 702 F.2d 964, 965 (11th Cir.1983); *Metz v. Dep't of Treasury,* 780 F.2d 1001, 1002 (Fed.Cir.1986).

The "prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.' " *Id.* at 360, 123 S.Ct. 1536 (quoting *R.A.V.,* 505 U.S. at 388, 112 S.Ct. 2538). Limiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from "the fear of violence" and the "disruption that fear engenders," because it would protect speech that a reasonable speaker would understand to be threatening. *Id.*

Elonis further contends the unconstitutionality of the prima facie evidence provision in *Black* indicates a subjective intent to threaten is required. The Court found the fact that the defendant burned a cross could not be prima facie evidence of intent to intimidate. *Id.* at 364–65, 123 S.Ct. 1536. The Court explained that while cross burning was often employed as intimidation or a threat of physical violence against others, it could also function as a symbol of solidarity for those within the white supremacist movement. *Id.* at 365–66, 123 S.Ct. 1536. Less frequently, crosses had been burned outside of the white supremacist context, such as stage performances. *Id.* at 366, 123 S.Ct. 1536. Since the burning of a cross could have a constitutionally-protected political message as well as a threatening message, the prima facie evidence provision failed to distinguish protected speech from unprotected threats. Furthermore, the prima facie evidence provision denied defendants the right to not put on a defense, since the prosecution did not have to produce any evidence of intent to intimidate, which was an element of the crime. *Id.* at 364–65, 123

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S.Ct. 1536.

[3] We do not find that the unconstitutionality of Virginia's prima facie evidence provision means the true threats exception requires a subjective intent to threaten. First, the prima facie evidence provision did not allow the factfinder to consider the context to construe the meaning of the conduct, *id.* at 365–66, 123 S.Ct. 1536, whereas the reasonable person standard does encompass context to determine whether the statement was a serious expression of intent to inflict bodily harm. Second, cross-burning is conduct that may or may not convey a meaning, as opposed to the language in this case which has inherent meaning in addition to the meaning derived from context. Finally, the prima facie evidence provision violated the defendant's due process rights to not put on a defense, because the defendant could be convicted even when the prosecution had not proven all the elements of the crime. *Id.* That is not an issue here because the government had to prove that a reasonable person would foresee Elonis's statements would be understood as threats.

The majority of circuits that have considered this question have not found the Supreme Court decision in *Black* to require a subjective intent to threaten. *See United States v. White,* 670 F.3d 498, 508 (4th Cir.2012) ("A careful reading of the requirements of § 875(c), together with the definition from *Black,* does not, in our opinion, lead to the conclusion that *Black* introduced a specific-intent-to-threaten requirement into § 875(c)...."); *United States v. Jeffries,* 692 F.3d 473, 479 (6th Cir.2012) ("[T]he position reads too much into *Black.*"); *United States v. Mabie,* 663 F.3d 322, 332–33 (8th Cir.2011), *cert. denied,* —— U.S. ——, 133 S.Ct. 107, 184 L.Ed.2d 50 (2012) (noting the objective test had been applied many times after *Black*) [FN6]; *United States v. Nicklas,* 713 F.3d 435, 440 (8th Cir.2013) (quoting extensively from *Jeffries,* the court "concluded § 875(c) does not require the government to prove a defendant specifically intended his or her statements to be threatening").

> FN6. The Eighth Circuit cited the following cases applying an objective standard after the Supreme Court's decision in *Black:*
>
> > *United States v. Beale,* 620 F.3d 856, 865 (8th Cir.2010) ...; *United States v. Armel,* 585 F.3d 182, 185 (4th Cir.2009) (applying an objective test in a true threat analysis); *Porter v. Ascension Parish Sch. Bd.,* 393 F.3d 608, 616–17 (5th Cir.2004) ("[T]o lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person."); *United States v. Zavrel,* 384 F.3d 130, 136 (3d Cir.2004) (applying an objective test in a true threat analysis).
>
> > *Mabie,* 663 F.3d at 332.

The Fourth Circuit in *United States v. White* considered the same criminal statute, 18 U.S.C. § 875(c), and found the Court in *Black* "gave no indication it was redefining a general intent crime such as § 875(c) to be a specific intent crime." 670 F.3d at 509. The Fourth Circuit reasoned that *Black* had analyzed a statute that included a specific intent element, whereas § 875(c) had consistently been applied as a general intent statute. *Id.* at 508. The court further distinguished *Black* by noting the multiple meanings of cross-burning necessitated a finding of intent to distinguish protected speech from true threats. *Id.* at 511. The court in *White* found this same problem did not exist for threatening language because it has no First Amendment value. *Id.* Finally, the court found the general intent standard for § 875(c) offenses did not chill "statements of jest or political hyperbole" because "any such statements will, under the objective test, always be protected by the consideration of the context and of how a reasonable recipient would understand the statement." *Id.* at 509.[FN7]

> FN7. The Fourth Circuit test focuses on the reasonable recipient, but our test asks whether a reasonable speaker would foresee the statement would be understood as a threat.

In *United States v. Jeffries* the Sixth Circuit agreed that *Black* does not require a subjective intent to threaten to convict under 18 U.S.C. § 875(c). 692 F.3d at 479. Because *Black* interpreted a statute that already had a subjective intent requirement, the Sixth Circuit found the Court was not presented with the question whether an objective intent standard is constitutional. *Id. Jeffries* also found that the Court's ruling on the prima facie evidence provision did not address the specific intent question because "the statute lacked any standard at all." *Id.* at 479–80. Like the Fourth Circuit in *White,* the Sixth Circuit explained that the prima facie evidence provision failed to distinguish between protected speech and threats by not allowing for consideration of any contextual factors. *Id.* at 480. In contrast, "[t]he reasonable-person standard winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made." *Id.* The Ninth Circuit took a different view, and found the true threats definition in *Black* requires the speaker both intend to communicate and "intend for his language to *threaten*

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the victim." *United States v. Cassel,* 408 F.3d 622, 631 (9th Cir.2005). The Ninth Circuit reasoned that the unconstitutionality of the prima facie provision meant that the Court required a finding of intent to threaten for all speech labeled as "true threats," and not just cross burning. *Id.* at 631–32 ("[T]he prima facie evidence provision rendered the statute facially unconstitutional because it effectively eliminated the intent requirement."). "We are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Id.* at 633.[FN8]

> FN8. Similarly, in *United States v. Bagdasarian* the Ninth Circuit wrote in dicta that, in light of *Black, "[a]* statement that the speaker does not intend as a threat is afforded constitutional protection and cannot be held criminal." 652 F.3d 1113, 1122 (9th Cir.2011).

[4] Regardless of the state of the law in the Ninth Circuit, we find that *Black* does not alter our precedent. We agree with the Fourth Circuit that *Black* does not clearly overturn the objective test the majority of circuits applied to § 875(c). *Black* does not say that the true threats exception requires a subjective intent to threaten. Furthermore, our standard does require a finding of intent to communicate. The jury had to find Elonis "knowingly and willfully" transmitted a "communication containing ... [a] threat to injure the person of another." 18 U.S.C. § 875(c). A threat is made "knowingly" as when it is "made intentionally and not [as] the result of mistake, coercion or duress." *Kosma,* 951 F.2d at 557 (quotation omitted). A threat is made willfully when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm." *Id.* (citation and emphasis omitted). This objective intent standard protects non-threatening speech while addressing the harm caused by true threats. Accordingly, the *Kosma* objective intent standard applies to this case and the District Court did not err in instructing the jury.

B.

[5][6] Elonis contends the indictment was insufficient because it did not quote the language of the allegedly threatening statements. An indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed.R.Crim.P. 7(c)(1). An indictment is sufficient when it "(1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." *United States v. Vitillo,* 490 F.3d 314, 321 (3d Cir.2007) (internal quotations omitted). We have found an indictment is sufficient "where it informs the defendant of the statute he is charged with violating, lists the elements of a violation under the statute, and specifies the time period during which the violations occurred." *United States v. Huet,* 665 F.3d 588, 595 (3d Cir.2012), *cert. denied,* —— U.S. ——, 133 S.Ct. 422, 184 L.Ed.2d 256 (2012).

In *Huet* we found an indictment for aiding and abetting a felon in possession of a firearm was sufficient because it alleged the previous felony conviction of the principal, the time period of the violation and the specific weapon involved, and alleged the defendant "knowingly aided and abetted Hall's possession of that firearm." *Id.* at 596. "No more was required to allow Huet to prepare her defense and invoke double jeopardy." *Id.*

The Eighth Circuit considered an indictment that did not include the verbatim contents of a letter, the date it was written, or the name of the author. *Keys v. United States,* 126 F.2d 181, 184–85 (8th Cir.1942). The indictment for communicating a threat to injure with the intent to extort merely stated the letter threatened to harm the reputation of the victim with intent to extort. *Id.* at 182–83. Since the indictment summarized the contents of the letter, provided the date it was mailed and the name of the addressee, the Eighth Circuit found there could be no confusion as to the elements and subject of the crime. *Id.* at 185 ("The fact that the defendant upon reading the indictment recognized the letter referred to and made no objection to the description at the time indicates the want of merit in his present criticism.").

To find a violation of 18 U.S.C. § 875(c) a defendant must transmit in interstate or foreign commerce a communication containing a threat to injure or kidnap a person. 18 U.S.C. § 875(c). Here the indictment on Count 2 stated:

> On or about November 6, 2010, through on or about November 15, 2010, in Bethlehem, in the Eastern District of Pennsylvania, and elsewhere, defendant ANTHONY DOUGLAS ELONIS knowingly and willfully transmitted in interstate and foreign commerce, via a computer and the Internet, a communication to others, that is, a communication containing a threat to injure the person of another, specifically, a threat to injure and kill T. E., a person known to the grand jury. In violation of Title 18, United States Code, Section 875(c).

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The indictment on the other counts was identical, but stated each date of the threat, the nature of the threat, and the subjects of the threat. Count 3 alleged “a threat to injure employees of the Pennsylvania State Police and the Berks County Sheriff's Department”; Count 4 alleged “a threat to injure a kindergarten class of elementary school children”; and Count 5 alleged “a threat to injure an agent of the Federal Bureau of Investigation.” Elonis contends the indictment was deficient because they did not include the allegedly threatening statements.

The indictment was sufficient because the counts describe the elements of the violation, the nature of the threat, the subject of the threat, and the time period of the alleged violation. For example, Count Four alleged defendant communicated over the internet on November 16, 2010 “a threat to injure a kindergarten class.” If Elonis had already been charged with this statement, the indictment provided enough information to challenge a subsequent prosecution. Based on the indictment, defendant was notified he needed to dispute that the statement was a threat, that he communicated the statement, and that he transmitted the statement through interstate commerce. Moreover, like the defendant in *Keys,* Elonis was able to identify which internet communications the indictment described, since he did not raise the issue until after trial.[FN9]

> FN9. Elonis did challenge the sufficiency of the indictment prior to trial, but only on constitutional grounds. The indictment did not include a subjective intent to threaten.

C.

Elonis contends there was insufficient evidence to convict on Counts 3 and 5 of the indictment because the statements on which they were based were not threats. “A claim of insufficiency of evidence places a very heavy burden on the appellant.” *United States v. Coyle,* 63 F.3d 1239, 1243 (3d Cir.1995). “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis omitted).

1.

[7] Elonis contends Count 3 was based on a conditional statement, which he asserts cannot be a true threat. In *Watts* the Supreme Court found the conditional nature of defendant's statement to be one of the three factors demonstrating it was not a true threat. *Watts,* 394 U.S. at 708, 89 S.Ct. 1399 (“Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.”). Elonis posted the following on his Facebook page:

> Fold up your PFA and put it in your pocket
>
> Is it thick enough to stop a bullet?
>
> Try to enforce an Order
>
> That was improperly granted in the first place
>
> Me thinks the judge needs an education on true threat jurisprudence
>
> And prison time will add zeroes to my settlement
>
> Which you won't see a lick
>
> Because you suck dog dick in front of children
>
> * * *
>
> And if worse comes to worse
>
> I've got enough explosives to take care of the state police and the sheriff's department
>
> [link: Freedom of Speech, www. wikipedia. org]

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We considered the impact of conditional statements on the true threat analysis in *Kosma,* 951 F.2d at 554. We found that *Watts* did not hold conditional statements can never be true threats. *Id.* at 554 n. 8 ("Even if Kosma's threats were truly conditional, they could still be considered true threats."). We explained the conditional statements in *Watts* "were dependent on the defendant's induction into the armed forces—a condition which the defendant stated would never happen." *Id.* at 554. Because the defendant's threats in *Kosma* stated a precise time and place for carrying out the alleged threats, they were true threats. *Id.*

[8] Here the District Court found that a reasonable jury could find the statement to be a true threat. *United States v. Elonis,* 897 F.Supp.2d 335, 346 (E.D.Pa.2012). Unlike in *Watts,* Elonis did not vow the condition precedent would never occur. However, this case is also unlike *Kosma,* where the statement included a particular time and place. Elonis's statement only conveys a vague timeline or condition. But, taken as a whole, a jury could have found defendant was threatening to use explosives on officers who "[t]ry to enforce an Order" of protection that was granted to his wife. Since there is no rule that a conditional statement cannot be a true threat—the words and context can demonstrate whether the statement was a serious expression of intent to harm—and we give substantial deference to a jury's verdict, there was not insufficient evidence for the jury to find the statement was a threat.

2.

[9] Defendant contends that the statement on which Count 5 is based is a description of past conduct, not a future intent to harm:

> You know your shit's ridiculous when you have the FBI knockin' at yo' door
>
> Little Agent Lady stood so close
>
> Took all the strength I had not to turn the bitch ghost
>
> Pull my knife, flick my wrist, and slit her throat Leave her bleedin' from her jugular in the arms of her partner
>
> [laughter]
>
> So the next time you knock, you best be serving a warrant
>
> And bring yo' SWAT and an explosives expert while you're at it
>
> Cause little did y'all know, I was strapped wit' a bomb
>
> Why do you think it took me so long to get dressed with no shoes on?
>
> I was jus' waitin' for y'all to handcuff me and pat me down
>
> Touch the detonator in my pocket and we're all goin'
>
> [BOOM!]

A threat under § 875(c) is a communication "expressing an intent to inflict injury in the present or future." *United States v. Stock,* No. 12–2914, 728 F.3d 287, 293, 2013 WL 4504766, *3 (3d Cir. Aug. 26, 2013). It was possible for a reasonable jury to conclude that the statement "the next time you knock, best be serving a warrant [a]nd bring yo' SWAT and an explosives expert" coupled with the past reference to a bomb was a threat to use explosives against the agents "the next time." Indeed, the phrase "the next time" refers to the future, not a past event. Accordingly, a reasonable jury could have found the statement was a true threat.

D.

[10] Elonis contends the jury instruction stating communications that travel over the internet necessarily travel in interstate commerce violated his due process rights because the government was required to prove interstate transmission as an element of the crime. The District Court instructed the jury: "Because of the interstate nature of the Internet, if you find beyond a reasonable

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doubt that the defendant used the Internet in communicating a threat, then that communication traveled in interstate commerce." Trial Tr. 126, Oct. 11, 2011.

In *United States v. MacEwan* we explained the difference between interstate transmission and interstate commerce. 445 F.3d 237, 243–44 (3d Cir.2006). The defendant in *MacEwan* contended the government failed to prove he received child pornography through interstate commerce because a Comcast witness testified it was impossible to know whether a particular transmission traveled through computer servers located entirely within Pennsylvania, or to any other server in the United States. *Id.* at 241–42. "[W]e conclude[d] that because of the very interstate nature of the Internet, once a user submits a connection request to a website server or an image is transmitted from the website server back to [the] user, the data has traveled in interstate commerce." *Id.* at 244. "Having concluded that the Internet is an instrumentality and channel of interstate commerce.... [i]t is sufficient that MacEwan downloaded those images from the Internet, a system that is inexorably intertwined with interstate commerce." *Id.* at 245.

Elonis distinguishes *MacEwan* by stating that in that case the government presented evidence on how the internet worked. But the government's evidence in *MacEwan* did not show that any one of the defendant's internet transmissions traveled outside of Pennsylvania.[FN10] We found that fact to be irrelevant to the question of interstate commerce because submitting data on the internet necessarily means the data travels in interstate commerce. *Id.* at 241. Instead, we held "[i]t is sufficient that [the defendant] downloaded those images from the Internet." *Id.* at 245. Based on our conclusion that proving internet transmission alone is sufficient to prove transmission through interstate commerce, the District Court did not err in instructing the jury.

> FN10. Notably, the government did present testimony on how Facebook works. A computer forensic expert, Michael Moore, testified about privacy settings and that when a Facebook account is made public the postings can be seen by "whoever has access to it through the internet throughout the world." Trial Tr. 15–17, Oct. 17, 2011.

IV.

For the foregoing reasons we will uphold Elonis's convictions under 18 U.S.C. § 875(c).

Supplemental Case Printout for: *Managerial Strategy*

United States District Court,
D. Utah,
Central Division.
Derek KITCHEN, Moudi Sbeity, Karen Archer, Kate Call, Laurie Wood, and Kody Partridge, Plaintiffs,
v.
Gary R. HERBERT, John Swallow, and Sherrie Swensen, Defendants.
Case No. 2:13–cv–217.
Dec. 20, 2013.
MEMORANDUM DECISION AND ORDER
ROBERT J. SHELBY, District Judge.

The Plaintiffs in this lawsuit are three gay and lesbian couples who wish to marry, but are currently unable to do so because the Utah Constitution prohibits same-sex marriage. The Plaintiffs argue that this prohibition infringes their rights to due process and

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equal protection under the Fourteenth Amendment of the United States Constitution. The State of Utah defends its laws and maintains that a state has the right to define marriage according to the judgment of its citizens. Both parties have submitted motions for summary judgment.

The court agrees with Utah that regulation of marriage has traditionally been the province of the states, and remains so today. But any regulation adopted by a state, whether related to marriage or any other interest, must comply with the Constitution of the United States. The issue the court must address in this case is therefore not who should define marriage, but the narrow question of whether Utah's current definition of marriage is permissible under the Constitution.

Few questions are as politically charged in the current climate. This observation is especially true where, as here, the state electorate has taken democratic action to participate in a popular referendum on this issue. It is only under exceptional circumstances that a court interferes with such action. But the legal issues presented in this lawsuit do not depend on whether Utah's laws were the result of its legislature or a referendum, or whether the laws passed by the widest or smallest of margins. The question presented here depends instead on the Constitution itself, and on the interpretation of that document contained in binding precedent from the Supreme Court and the Tenth Circuit Court of Appeals.

Applying the law as it is required to do, the court holds that Utah's prohibition on same-sex marriage conflicts with the United States Constitution's guarantees of equal protection and due process under the law. The State's current laws deny its gay and lesbian citizens their fundamental right to marry and, in so doing, demean the dignity of these same-sex couples for no rational reason. Accordingly, the court finds that these laws are unconstitutional.

BACKGROUND

I. The Plaintiffs

The three couples in this lawsuit either desire to be married in Utah or are already legally married elsewhere and wish to have their marriage recognized in Utah. The court summarizes below the relevant facts from the affidavits that the couples filed in support of their Motion for Summary Judgment.

A. *Derek Kitchen and Moudi Sbeity*

Derek Kitchen is a twenty-five-year-old man who was raised in Utah and obtained a B.A. in political science from the University of Utah. Moudi Sbeity is also twenty-five years old and was born in Houston, Texas. He grew up in Lebanon, but left that country in 2006 during the war between Lebanon and Israel. Moudi came to Logan, Utah, where he received a B.S. in economics from Utah State University. He is currently enrolled in a Master's program in economics at the University of Utah.

Derek testifies that he knew he was gay from a young age, but that he did not come out publicly to his friends and family for several years while he struggled to define his identity. Moudi also knew he was gay when he was young and came out to his mother when he was sixteen. Moudi's mother took him to a psychiatrist because she thought he was confused, but the psychiatrist told her that there was nothing wrong with Moudi. After that visit, Moudi's mother found it easier to accept Moudi's identity, and Moudi began telling his other friends and family members. Moudi testifies that he was careful about whom he told because he was concerned that he might expose his mother to ridicule.

Derek and Moudi met each other in 2009 and fell in love shortly after meeting. After dating for eighteen months, the two moved in together in Salt Lake City. Derek and Moudi run a business called “Laziz” that they jointly started. Laziz produces and sells Middle Eastern spreads such as hummus, muhammara, and toum to Utah businesses like Harmon's and the Avenues Bistro. Having maintained a committed relationship for over four years, Derek and Moudi desire to marry each other. They were denied a marriage license from the Salt Lake County Clerk's office in March 2013.

B. *Karen Archer and Kate Call*

Karen Archer was born in Maryland in 1946, but spent most of her life in Boulder, Colorado. She received a B.A. and an M.D. from the University of Texas, after which she completed her residency in OB/GYN at the Pennsylvania State University. She worked as a doctor until 2001, when she retired after developing two serious illnesses. Karen experienced a number of hardships due to her sexual identity. Karen came out to her parents when she was twenty-six years old, but her parents believed that her sexual orientation was an abnormality and never accepted this aspect of Karen's identity. Karen was one of thirteen women in a medical school class of 350, and she recalls that her male classmates often referred to the female students as “dykes.” Karen also testifies that she was once present at a gay bar when it was raided by the police, who assaulted the bar patrons with their batons.

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Kate Call is sixty years old and spent her earliest years in Wisconsin and Mexico, where her parents were mission presidents for the Church of Jesus Christ of Latter-day Saints. When she was eight years old, Kate moved to Provo, Utah, where her father worked as a professor at Brigham Young University. Kate received her B.A. from BYU in 1974. While she was in college, she dated several men and was even engaged twice. Although she hoped that she would begin to feel a more intimate connection if she committed herself to marriage, she broke off both engagements because she never developed any physical attraction to her fiancés. Kate began to realize that she was a lesbian, a feeling that continued to develop while she was serving a mission in Argentina. She wrote a letter sharing these feelings to her mission president, who, without Kate's consent, faxed Kate's message to church authorities and her parents. Kate's family was sad and puzzled at first, but ultimately told her that they loved her unconditionally.

During her professional life, Kate owned a number of businesses. In 2000, she bought a sheep ranch in San Juan County and moved there with D., her partner at the time. Kate worked seasonally for the National Park Service and D. found a job at the Youth Detention facility in Blanding. But when rumors surfaced that D. was a lesbian, D.'s boss told her that she needed to move away from Kate's ranch if she wished to keep her job. While Kate was helping D. move, someone from D.'s work saw Kate's vehicle at D.'s new trailer. That person reported the sighting to D.'s boss, and D. was fired. Several weeks later, Kate's supervisor also told her that her services were no longer needed. Kate never found out why she was let go, but she surmises that her supervisor may have been pressured by D.'s boss, who was one of her supervisor's mentors. Kate and D. moved back to the Wasatch Front, and Kate was eventually forced to sell the ranch. Kate testifies that she and D. split up as a result of the difficult challenges they had faced, and Kate eventually moved to Moab.

Karen and Kate met online through a dating website and were immediately attracted to each other when they first met in person. Karen moved from Colorado to Utah, and the couple now lives in Wallsburg. The two are both concerned about how they will support each other in the event that one of them passes away, a consideration that is especially urgent in light of Karen's illness. Karen has had difficult experiences with the legal aspects of protecting a same-sex union in the past. Before meeting Kate, Karen had two partners who passed away while she was with them. While partnered to a woman named Diana, Karen had to pay an attorney approximately one thousand dollars to draw up a large number of legal documents to guarantee certain rights: emergency contacts, visitation rights, power of attorney for medical and financial decisions, medical directives, living wills, insurance beneficiaries, and last wills and testaments. Despite these documents, Karen was unable to receive Diana's military pension when Diana died in 2005.

Karen and Kate have drawn up similar legal papers, but they are concerned that these papers may be subject to challenges because they are not legally recognized as a couple in Utah. In an attempt to protect themselves further, Karen and Kate flew to Iowa to be wed in a city courthouse. Because of the cost of the plane tickets, the couple was not able to have friends and family attend, and the pair had their suitcases by their side when they said, “I do.” Kate testifies that the pragmatism of their Iowa wedding was born out of the necessity of providing whatever security they could for their relationship. Under current law, Utah does not recognize their marriage performed in Iowa.

C. *Laurie Wood and Kody Partridge*

Laurie Wood has lived in Utah since she was three years old. She grew up in American Fork, received a B.A. from the University of Utah, and received her Master's degree from BYU. She spent over eleven years teaching in the public school system in Utah County and is now employed by Utah Valley University. She teaches undergraduate courses as an Associate Professor of English in the English and Literature Department, and also works as the Concurrent Enrollment Coordinator supervising high school instructors who teach as UVU adjuncts in high schools across Utah County. She has served on the Board of Directors for the American Civil Liberties Union for fifteen years and co-founded the non-profit Women's Redrock Music Festival in 2006. Laurie was not open about her sexual identity while she was a public school teacher because she believed she would be fired if she said anything. She came out when she was hired at UVU. While she dated men in high school and college, she never felt comfortable or authentic in her relationships until she began dating women.

Kody Partridge is forty-seven years old and moved to Utah from Montana in 1984 to attend BYU. She received her B.A. in Spanish and humanities and later obtained a Master's degree in English. She earned a teaching certificate in 1998 and began teaching at Butler Middle School in Salt Lake County. She realized that she was a lesbian while she was in college, and her family eventually came to accept her identity. She did not feel she could be open about her identity at work because of the worry that her job would be at risk. While she was teaching at Butler, Kody recalls that the story of Wendy Weaver was often in the news. Ms.

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Weaver was a teacher and coach at a Utah public school who was fired because she was a lesbian. Kody also became aware that the pension she was building in Utah Retirement Systems as a result of her teaching career could not be inherited by a life partner. Given these concerns, Kody applied and was accepted for a position in the English department at Rowland Hall–St. Mark's, a private school that provides benefits for the same-sex partners of its faculty members. Kody volunteers with the Utah AIDS Foundation and has traveled with her students to New Orleans four times after Hurricane Katrina to help build homes with Habitat for Humanity.

Laurie and Kody met and fell in love in 2010. Besides the fact that they are both English teachers, the two share an interest in books and gardening and have the same long-term goals for their committed relationship. They wish to marry, but were denied a marriage license from the Salt Lake County Clerk's office in March 2013.

II. History of Amendment 3

The Utah laws that are at issue in this lawsuit include two statutory prohibitions on same-sex unions and an amendment to the Utah Constitution. The court discusses the history of these laws in the context of the ongoing national debate surrounding same-sex marriage.

In 1977, the Utah legislature amended Section 30–1–2 of the Utah Code to state that marriages "between persons of the same sex" were "prohibited and declared void." In 2004, the Utah legislature passed Section 30–1–4.1 of the Utah Code, which provides:

> (1) (a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.
>
> (b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and woman because they are married.

In the 2004 General Session, the Utah legislature also passed a Joint Resolution on Marriage, which directed the Lieutenant Governor to submit the following proposed amendment to the Utah Constitution to the voters of Utah:

> (1) Marriage consists only of the legal union between a man and a woman.
>
> (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

Laws 2004, H.J.R. 25 § 1. The proposed amendment, which became known as Amendment 3, was placed on the ballot for the general election on November 2, 2004. Amendment 3 passed with the support of approximately 66% of the voters. The language in Amendment 3 was then amended to the Utah Constitution as Article I, § 29, which went into effect on January 1, 2005.[FN1]

> FN1. Unless noted otherwise, the court will refer to Amendment 3 in this opinion to mean both the Utah constitutional amendment and the Utah statutory provisions that prohibit same-sex marriage.

These developments were influenced by a number of events occurring nationally. In 1993, the Hawaii Supreme Court found that the State of Hawaii's refusal to grant same-sex couples marriage licenses was discriminatory. *Baehr v. Lewin,* 74 Haw. 530, 852 P.2d 44, 59 (1993).[FN2] And in 1999, the Vermont Supreme Court held that the State of Vermont was required to offer all the benefits of marriage to same-sex couples. *Baker v. Vermont,* 170 Vt. 194, 744 A.2d 864, 886–87 (1999).[FN3] Two court cases in 2003 immediately preceded Utah's decision to amend its Constitution. First, the United States Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment protected the sexual relations of gay men and lesbians. *Lawrence v. Texas,* 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). Second, the Supreme Court of Massachusetts ruled that the Massachusetts Constitution protected the right of same-sex couples to marry. *Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 798 N.E.2d 941, 948 (2003).

> FN2. The Hawaii Supreme Court remanded the case to the trial court to determine if the state could show that its marriage statute was narrowly drawn to further compelling state interests. *Baehr,* 852 P.2d at 68. The trial court ruled that

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the government failed to make this showing. *Baehr v. Miike,* No. 91–1394, 1996 WL 694235, at *22 (Haw.Cir.Ct. Dec. 3, 1996). The trial court's decision was rendered moot after Hawaii passed a constitutional amendment that granted the Hawaii legislature the ability to reserve marriage for opposite-sex couples. Recently, the legislature reversed course and legalized same-sex marriage. Same-sex couples began marrying in Hawaii on December 2, 2013.

FN3. The Vermont legislature complied with this mandate by creating a new legal status called a "civil union." The legislature later permitted same-sex marriage through a statute that went into effect on September 1, 2009.

Since 2003, every other state has either legalized same-sex marriage [FN4] or, like Utah, passed a constitutional amendment or other legislation to prohibit same-sex unions. During the past two decades, the federal government has also been involved in the same-sex marriage debate. In 1996, Congress passed the Defense of Marriage Act (DOMA), which allowed states to refuse to recognize same-sex marriages granted in other states and barred federal recognition of same-sex unions for the purposes of federal law. Act of Sept. 21, 1996, Pub.L. 104–199, 110 Stat. 2419. In 2013, the Supreme Court held that Section 3 of DOMA was unconstitutional.[FN5] *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 2696, 186 L.Ed.2d 808 (2013).

FN4. Six states have legalized same-sex marriage through court decisions (California, Connecticut, Iowa, Massachusetts, New Jersey, New Mexico); eight states have passed same-sex marriage legislation (Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island, Vermont); and three states have legalized same-sex marriage through a popular vote (Maine, Maryland, Washington). Same-sex marriage is also legal in Washington, D.C.

FN5. As discussed below, Section 3 defined marriage as the union between a man and a woman for purposes of federal law. The Court did not consider a challenge to Section 2, which allows states to refuse to recognize same-sex marriages validly performed in other states. *See* 28 U.S.C. § 1738C.

The Supreme Court also considered an appeal from a case involving California's Proposition 8. After the California Supreme Court held that the California Constitution recognized same-sex marriage, *In re Marriage Cases,* 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 453 (2008), California voters passed Proposition 8, which amended California's Constitution to prohibit same-sex marriage. The Honorable Vaughn Walker, a federal district judge, determined that Proposition 8 violated the guarantees of equal protection and due process under the United States Constitution. *Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 1003 (N.D.Cal.2010). Applying different reasoning, the Ninth Circuit Court of Appeals affirmed Judge Walker's holding that Proposition 8 was unconstitutional. *Perry v. Brown,* 671 F.3d 1052, 1095 (9th Cir.2012). This issue was appealed to the Supreme Court, but the Court did not address the merits of the question presented. *Hollingsworth v. Perry,* —— U.S. ——, 133 S.Ct. 2652, 2668, 186 L.Ed.2d 768 (2013). Instead, the Court found that the proponents of Proposition 8 did not have standing to appeal Judge Walker's decision after California officials refused to defend the law. *Id.* Consequently, the Supreme Court vacated the Ninth Circuit's opinion for lack of jurisdiction. *Id.* A number of lawsuits, including the suit currently pending before this court, have been filed across the country to address the question that the Supreme Court left unanswered in the California case. The court turns to that question now.

ANALYSIS

I. Standard of Review

The court grants summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The court "view[s] the evidence and make[s] all reasonable inferences in the light most favorable to the nonmoving party." *N. Natural Gas Co. v. Nash Oil & Gas, Inc.,* 526 F.3d 626, 629 (10th Cir.2008).

II. Effect of the Supreme Court's Decision in *United States v. Windsor*

The court begins its analysis by determining the effect of the Supreme Court's recent decision in *United States v. Windsor,* —– U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). In *Windsor,* the Court considered the constitutionality of Section 3 of DOMA, which defined marriage as the "legal union between one man and one woman as husband and wife" for the purposes of federal law. 1 U.S.C. § 7 (2012). A majority of the Court found that this statute was unconstitutional because it violated the Fifth Amendment of the United States Constitution. *Windsor,* 133 S.Ct. at 2696.

Both parties argue that the reasoning in *Windsor* requires judgment in their favor. The State focuses on the portions of the *Windsor* opinion that emphasize federalism, as well as the Court's acknowledgment of the State's "historic and essential authority to define the marital relation." *Id.* at 2692; *see also id.* at 2691 ("[S]ubject to [constitutional] guarantees, 'regulation of domestic

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relations' is 'an area that has long been regarded as a virtually exclusive province of the States.' " (quoting *Sosna v. Iowa,* 419 U.S. 393, 404, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975))). The State interprets *Windsor* to stand for the proposition that DOMA was unconstitutional because the statute departed from the federal government's "history and tradition of reliance on state law to define marriage." *Id.* at 2692. Just as the federal government cannot choose to disregard a state's decision to recognize same-sex marriage, Utah asserts that the federal government cannot intrude upon a state's decision *not* to recognize same-sex marriage. In other words, Utah believes that it is up to each individual state to decide whether two persons of the same sex may "occupy the same status and dignity as that of a man and woman in lawful marriage." *Id.* at 2689.

The Plaintiffs disagree with this interpretation and point out that the *Windsor* Court did not base its decision on the Tenth Amendment.[FN6] Instead, the Court grounded its holding in the Due Process Clause of the Fifth Amendment, which protects an individual's right to liberty. *Id.* at 2695 ("DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."). The Court found that DOMA violated the Fifth Amendment because the statute "place[d] same-sex couples in an unstable position of being in a second-tier marriage," a differentiation that "demean[ed] the couple, whose moral and sexual choices the Constitution protects[.]" *Id.* at 2694. The Plaintiffs argue that for the same reasons the Fifth Amendment prohibits the federal government from differentiating between same-sex and opposite-sex couples, the Fourteenth Amendment prohibits state governments from making this distinction.

> FN6. The Tenth Amendment makes explicit the division between federal and state power: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Both parties present compelling arguments, and the protection of states' rights and individual rights are both weighty concerns. In *Windsor,* these interests were allied against the ability of the federal government to disregard a state law that protected individual rights. Here, these interests directly oppose each other. The *Windsor* court did not resolve this conflict in the context of state-law prohibitions of same-sex marriage. *See id.* at 2696 (Roberts, C.J., dissenting) ("The Court does not have before it ... the distinct question whether the States ... may continue to utilize the traditional definition of marriage."). But the Supreme Court has considered analogous questions that involve the tension between these two values in other cases. *See, e.g., Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (balancing the state's right to regulate marriage against the individual's right to equal protection and due process under the law). In these cases, the Court has held that the Fourteenth Amendment requires that individual rights take precedence over states' rights where these two interests are in conflict. *See id.* at 7, 87 S.Ct. 1817 (holding that a state's power to regulate marriage is limited by the Fourteenth Amendment).

The Constitution's protection of the individual rights of gay and lesbian citizens is equally dispositive whether this protection requires a court to respect a state law, as in *Windsor,* or strike down a state law, as the Plaintiffs ask the court to do here. In his dissenting opinion, the Honorable Antonin Scalia recognized that this result was the logical outcome of the Court's ruling in *Windsor:*

> In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion ... is that DOMA is motivated by "bare ... desire to harm" couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.

133 S.Ct. at 2709 (citations and internal quotation marks omitted). The court agrees with Justice Scalia's interpretation of *Windsor* and finds that the important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law.

III. *Baker v. Nelson* Is No Longer Controlling Precedent

In 1971, two men from Minnesota brought a lawsuit in state court arguing that Minnesota was constitutionally required to allow them to marry. *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185, 187 (1971). The Minnesota Supreme Court found that Minnesota's restriction of marriage to opposite-sex couples did not violate either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment. *Id.* at 186–87. On appeal, the United States Supreme Court summarily dismissed the case "for want of a substantial federal question." *Baker v. Nelson,* 409 U.S. 810, 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972).

Utah argues that the Court's summary dismissal in *Baker* is binding on this court and that the present lawsuit should therefore

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be dismissed for lack of a substantial federal question. But the Supreme Court has stated that a summary dismissal is not binding "when doctrinal developments indicate otherwise." *Hicks v. Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

[1] Here, several doctrinal developments in the Court's analysis of both the Equal Protection Clause and the Due Process Clause as they apply to gay men and lesbians demonstrate that the Court's summary dismissal in *Baker* has little if any precedential effect today. Not only was *Baker* decided before the Supreme Court held that sex is a quasi-suspect classification, *see Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Frontiero v. Richardson,* 411 U.S. 677, 688, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (plurality op.), but also before the Court recognized that the Constitution protects individuals from discrimination on the basis of sexual orientation. *See Romer v. Evans,* 517 U.S. 620, 635–36, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Moreover, *Baker* was decided before the Supreme Court held in *Lawrence v. Texas* that it was unconstitutional for a state to "demean [the] existence [of gay men and lesbians] or control their destiny by making their private sexual conduct a crime." 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). As discussed below, the Supreme Court's decision in *Lawrence* removes a justification that states could formerly cite as a reason to prohibit same-sex marriage.

The State points out that, despite the doctrinal developments in these cases and others, a number of courts have found that *Baker* survives as controlling precedent and therefore precludes consideration of the issues in this lawsuit. *See, e.g., Massachusetts v. U.S. Dep't of Health & Human Servs.,* 682 F.3d 1, 8 (1st Cir.2012) (holding that *Baker* "limit[s] the arguments to ones that do not presume to rest on a constitutional right to same-sex marriage."); *Sevcik v. Sandoval,* 911 F.Supp.2d 996, 1002–03 (D.Nev.2012) (ruling that *Baker* barred the plaintiffs' equal protection claim). Other courts disagree and have decided substantially similar issues without consideration of *Baker. See, e.g., Perry v. Schwarzenegger,* 704 F.Supp.2d 921 (N.D.Cal.2010) (ruling that California's prohibition of same-sex marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment). In any event, all of these cases were decided before the Supreme Court issued its opinion in *Windsor.*

As discussed above, the Court's decision in *Windsor* does not answer the question presented here, but its reasoning is nevertheless highly relevant and is therefore a significant doctrinal development. Importantly, the *Windsor* Court foresaw that its ruling would precede a number of lawsuits in state and lower federal courts raising the question of a state's ability to prohibit same-sex marriage, a fact that was noted by two dissenting justices. The Honorable John Roberts wrote that the Court "may in the future have to resolve challenges to state marriage definitions affecting same-sex couples." *Windsor,* 133 S.Ct. at 2697 (Roberts, C.J., dissenting). And Justice Scalia even recommended how this court should interpret the *Windsor* decision when presented with the question that is now before it: "I do not mean to suggest disagreement ... that lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples." *Id.* at 2709 (Scalia, J., dissenting). It is also notable that while the Court declined to reach the merits in *Hollingsworth v. Perry* because the petitioners lacked standing to pursue the appeal, the Court did not dismiss the case outright for lack of a substantial federal question. *See* —— U.S. ——, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013). Given the Supreme Court's disposition of both *Windsor* and *Perry,* the court finds that there is no longer any doubt that the issue currently before the court in this lawsuit presents a substantial question of federal law.

As a result, *Baker v. Nelson* is no longer controlling precedent and the court proceeds to address the merits of the question presented here.

IV. Amendment 3 Violates the Plaintiffs' Due Process Rights

[2][3] The State of Utah contends that what is at stake in this lawsuit is the State's right to define marriage free from federal interference. The Plaintiffs counter that what is really at issue is an individual's ability to protect his or her fundamental rights from unreasonable interference by the state government. As discussed above, the parties have defined the two important principles that are in tension in this matter. While Utah exercises the "unquestioned authority" to regulate and define marriage, *Windsor,* 133 S.Ct. at 2693, it must nevertheless do so in a way that does not infringe the constitutional rights of its citizens. *See id.* at 2692 (noting that the "incidents, benefits, and obligations of marriage" may vary from state to state but are still "subject to constitutional guarantees"). As a result, the court's role is not to define marriage, an exercise that would be improper given the states' primary authority in this realm. Instead, the court's analysis is restricted to a determination of what individual rights are protected by the Constitution. The court must then decide whether the State's definition and regulation of marriage impermissibly infringes those rights.

[4][5] The Constitution guarantees that all citizens have certain fundamental rights. These rights vest in every person over whom the Constitution has authority and, because they are so important, an individual's fundamental rights "may not be submitted to vote; they depend on the outcome of no elections." *W.Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 87

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L.Ed. 1628 (1943). When the Constitution was first ratified, these rights were specifically articulated in the Bill of Rights and protected an individual from certain actions of the federal government. After the nation's wrenching experience in the Civil War, the people adopted the Fourteenth Amendment, which holds: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment applies to "matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal constitution from invasion by the States." *Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833, 846, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (quoting *Whitney v. California,* 274 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring)).

The most familiar of an individual's substantive liberties are those recognized by the Bill of Rights, and the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment incorporates most portions of the Bill of Rights against the States. *See, e.g., Duncan v. Louisiana,* 391 U.S. 145, 147–48, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (discussing incorporation of certain rights from the First, Fourth, Fifth, and Sixth Amendments); *McDonald v. City of Chicago,* —— U.S. ——, 130 S.Ct. 3020, 3050, 177 L.Ed.2d 894 (2010) (incorporating the Second Amendment). In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the Supreme Court recognized the authority of an argument first made by the Honorable John Marshall Harlan II that the Due Process Clause also protects a number of unenumerated rights from unreasonable invasion by the State:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.

Poe v. Ullman, 367 U.S. 497, 543, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds), *quoted in Casey,* 505 U.S. at 848–49, 112 S.Ct. 2791.

A. *Supreme Court Cases Protecting Marriage as a Fundamental Right*

[6] The right to marry is an example of a fundamental right that is not mentioned explicitly in the text of the Constitution but is nevertheless protected by the guarantee of liberty under the Due Process Clause. The Supreme Court has long emphasized that the right to marry is of fundamental importance. In *Maynard v. Hill,* the Court characterized marriage as "the most important relation in life" and as "the foundation of the family and society, without which there would be neither civilization nor progress." 125 U.S. 190, 205, 211, 8 S.Ct. 723, 31 L.Ed. 654 (1888). In *Meyer v. Nebraska,* the Court recognized that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause. 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). And in *Skinner v. Oklahoma ex rel. Williamson,* the Court ruled that marriage is "one of the basic civil rights of man." 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

In more recent cases, the Court has held that the right to marry implicates additional rights that are protected by the Fourteenth Amendment. For instance, the Court's decision in *Griswold v. Connecticut,* in which the Court struck down a Connecticut law that prohibited the use of contraceptives, established that the right to marry is intertwined with an individual's right of privacy. The Court observed:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). And in *M.L.B. v. S.L.J.,* the Court described marriage as an associational right: "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (citation omitted).

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The Supreme Court has consistently held that a person must be free to make personal decisions related to marriage without unjustified government interference. *See, e.g., Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 639–40, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Carey v. Population Servs. Int'l,* 431 U.S. 678, 684–85, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) ("[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education." (citations and internal quotation marks omitted)); *Hodgson v. Minnesota,* 497 U.S. 417, 435, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990) ("But the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made."). In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the Court emphasized the high degree of constitutional protection afforded to an individual's personal choices about marriage and other intimate decisions:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.
>
> *Casey,* 505 U.S. at 851, 112 S.Ct. 2791.

Given the importance of marriage as a fundamental right and its relation to an individual's rights to liberty, privacy, and association, the Supreme Court has not hesitated to invalidate state laws pertaining to marriage whenever such a law intrudes on an individual's protected realm of liberty. Most famously, the Court struck down Virginia's law against interracial marriage in *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). The Court found that Virginia's anti-miscegenation statute violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. *Id.* The Court has since noted that *Loving* was correctly decided, even though mixed-race marriages had previously been illegal in many states [FN7] and, moreover, were not specifically protected from government interference at the time the Fourteenth Amendment was ratified: "Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia.*" *Casey,* 505 U.S. at 847–48, 112 S.Ct. 2791; *see also Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 992 (N.D.Cal.2010) ("[T]he Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry.").

> FN7. In 1948, the California Supreme Court became the first court in the twentieth century to strike down an anti-miscegenation statute. *Perez v. Sharp,* 32 Cal.2d 711, 198 P.2d 17 (1948); *see also Loving,* 388 U.S. at 6 n. 5, 87 S.Ct. 1817.

In addition to the anti-miscegenation laws the Supreme Court struck down in *Loving,* the Supreme Court has held that other state regulations affecting marriage are unconstitutional where these laws infringe on an individual's access to marriage. In *Zablocki v. Redhail,* the Court considered a Wisconsin statute that required any Wisconsin resident who had children that were not currently in the resident's custody to obtain a court order before the resident was permitted to marry. 434 U.S. 374, 375, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). The statute mandated that the court should not grant permission to marry unless the resident proved that he was in compliance with any support obligation for his out-of-custody children, and could also show that any children covered by such a support order "[were] not then and [were] not likely thereafter to become public charges." *Id.* (quoting Wis. Stat. § 245.10 (1973)). The Court found that, while the State had a legitimate and substantial interest in the welfare of children in Wisconsin, the statute was nevertheless unconstitutional because it was not "closely tailored to effectuate only those interests" and "unnecessarily impinge[d] on the right to marry[.]" *Id.* at 388, 98 S.Ct. 673. The Court distinguished the statute at issue from reasonable state regulations related to marriage that would not require any heightened review:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

Id. at 386, 98 S.Ct. 673. As the Honorable John Paul Stevens noted in his concurring opinion, "A classification based on

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marital status is fundamentally different from a classification which determines who may lawfully enter into the marriage relationship." *Id.* at 403–04, 98 S.Ct. 673 (Stevens, J., concurring).

In *Turner v. Safley,* the Court struck down a Missouri regulation that prohibited inmates from marrying unless the prison superintendent approved of the marriage. 482 U.S. 78, 99–100, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). The Court held that inmates retained their fundamental right to marry even though they had a reduced expectation of liberty in prison. *Id.* at 96, 107 S.Ct. 2254. The Court emphasized the many attributes of marriage that prisoners could enjoy even if they were not able to have sexual relations:

> First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (*e.g.,* Social Security benefits), property rights (*e.g.,* tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.,* legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.
>
> *Id.* at 95–96, 107 S.Ct. 2254.

[7] These cases demonstrate that the Constitution protects an individual's right to marry as an essential part of the right to liberty. The right to marry is intertwined with the rights to privacy and intimate association, and an individual's choices related to marriage are protected because they are integral to a person's dignity and autonomy. While states have the authority to regulate marriage, the Supreme Court has struck down several state regulations that impermissibly burdened an individual's ability to exercise the right to marry. With these general observations in mind, the court turns to the specific question of Utah's ability to prohibit same-sex marriage.

B. *Application of the Court's Jurisprudence to Amendment 3*

[8] The State does not dispute, nor could it, that the Plaintiffs possess the fundamental right to marry that the Supreme Court has protected in the cases cited above. Like all fundamental rights, the right to marry vests in every American citizen. *See Zablocki,* 434 U.S. at 384, 98 S.Ct. 673 ("Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."). The State asserts that Amendment 3 does not abridge the Plaintiffs' fundamental right to marry because the Plaintiffs are still at liberty to marry a person of the opposite sex. But this purported liberty is an illusion. The right to marry is not simply the right to become a married person by signing a contract with someone of the opposite sex. If marriages were planned and arranged by the State, for example, these marriages would violate a person's right to marry because such arrangements would infringe an individual's rights to privacy, dignity, and intimate association. A person's choices about marriage implicate the heart of the right to liberty that is protected by the Fourteenth Amendment. *See Casey,* 505 U.S. at 851, 112 S.Ct. 2791. The State's argument disregards these numerous associated rights because the State focuses on the outward manifestations of the right to marry, and not the inner attributes of marriage that form the core justifications for why the Constitution protects this fundamental human right.

Moreover, the State fails to dispute any of the facts that demonstrate why the Plaintiffs' asserted right to marry someone of the opposite sex is meaningless. The State accepts without contest the Plaintiffs' testimony that they cannot develop the type of intimate bond necessary to sustain a marriage with a person of the opposite sex. The Plaintiffs have not come to this realization lightly, and their recognition of their identity has often risked their family relationships and work opportunities. For instance, Kody and Laurie both worried that they would lose their jobs as English teachers if they were open about their sexual identity. Kate's previous partner did lose her job because she was a lesbian, and Kate may have been let go from her position with the National Park Service for the same reason. Karen's family never accepted her identity, and Moudi testified that he remained cautious about openly discussing his sexuality because he feared that his mother might be ridiculed. The Plaintiffs' testimony supports their assertions that their sexual orientation is an inherent characteristic of their identities.

Forty years ago, these assertions would not have been accepted by a court without dispute. In 1973, the American Psychiatric Association still defined homosexuality as a mental disorder in the Diagnostic and Statistical Manual of Mental Disorders (DSM–II),

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and leading experts believed that homosexuality was simply a lifestyle choice. With the increased visibility of gay men and lesbians in the past few decades, a wealth of new knowledge about sexuality has upended these previous beliefs. Today, the State does not dispute the Plaintiffs' testimony that they have never been able to develop feelings of deep intimacy for a person of the opposite sex, and the State presents no argument or evidence to suggest that the Plaintiffs could change their identity if they desired to do so. Given these undisputed facts, it is clear that if the Plaintiffs are not allowed to marry a partner of the same sex, the Plaintiffs will be forced to remain unmarried. The effect of Amendment 3 is therefore that it denies gay and lesbian citizens of Utah the ability to exercise one of their constitutionally protected rights. The State's prohibition of the Plaintiffs' right to choose a same-sex marriage partner renders their fundamental right to marry as meaningless as if the State recognized the Plaintiffs' right to bear arms but not their right to buy bullets.

While admitting that its prohibition of same-sex marriage harms the Plaintiffs, the State argues that the court's characterization of Amendment 3 is incorrect for three reasons: (1) the Plaintiffs are not qualified to enter into a marriage relationship; (2) the Plaintiffs are seeking a new right, not access to an existing right; and (3) history and tradition have not recognized a right to marry a person of the same sex. The court addresses each of these arguments in turn.

1. *The Plaintiffs Are Qualified to Marry*

[9][10] First, the State contends that same-sex partners do not possess the qualifications to enter into a marriage relationship and are therefore excluded from this right as a definitional matter. As in other states, the purposes of marriage in Utah include "the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another[,] and to join in an economic partnership and support one another and any dependents." *Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 961 (N.D.Cal.2010). There is no dispute that the Plaintiffs are able to form a committed relationship with one person to the exclusion of all others. There is also no dispute that the Plaintiffs are capable of raising children within this framework if they choose to do so. The State even salutes "[t]he worthy efforts of same-sex couples to rear children." (Defs.' Mem. in Opp'n, at 46 n. 7, Dkt. 84.) Nevertheless, the State maintains that same-sex couples are distinct from opposite-sex couples because they are not able to naturally reproduce with each other. The State points to Supreme Court cases that have linked the importance of marriage to its relationship to procreation. *See, e.g., Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

The court does not find the State's argument compelling because, however persuasive the ability to procreate might be in the context of a particular religious perspective, it is not a defining characteristic of conjugal relationships from a legal and constitutional point of view. The State's position demeans the dignity not just of same-sex couples, but of the many opposite-sex couples who are unable to reproduce or who choose not to have children. Under the State's reasoning, a post-menopausal woman or infertile man does not have a fundamental right to marry because she or he does not have the capacity to procreate. This proposition is irreconcilable with the right to liberty that the Constitution guarantees to all citizens.

At oral argument, the State attempted to distinguish post-menopausal women from gay men and lesbians by arguing that older women were more likely to find themselves in the position of caring for a grandchild or other relative. But the State fails to recognize that many same-sex couples are also in the position of raising a child, perhaps through adoption or surrogacy. The court sees no support for the State's suggestion that same-sex couples are interested only in a "consent-based" approach to marriage, in which marriage focuses on the strong emotional attachment and sexual attraction of the two partners involved. *See Windsor,* 133 S.Ct. at 2718 (Alito, J., dissenting). Like opposite-sex couples, same-sex couples may decide to marry partly or primarily for the benefits and support that marriage can provide to the children the couple is raising or plans to raise. Same-sex couples are just as capable of providing support for future generations as opposite-sex couples, grandparents, or other caregivers. And there is no difference between same-sex couples who choose not to have children and those opposite-sex couples who exercise their constitutionally protected right not to procreate. *See Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

In any event, the State's argument also neglects to consider the number of additional important attributes of marriage that exist besides procreation. As noted above, the Supreme Court has discussed those attributes in the context of marriages between inmates. *Turner v. Safley,* 482 U.S. 78, 95–96, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). While the Supreme Court noted that some inmates might one day be able to consummate their marriages when they were released, the Court found that marriage was important irrespective of its relationship to procreation because it was an expression of emotional support and public commitment, it was spiritually significant, and it provided access to important legal and government benefits. *Id.* These attributes of marriage are as applicable to same-sex couples as they are to opposite-sex couples.

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2. *The Plaintiffs Seek Access to an Existing Right*

[11][12] The State's second argument is that the Plaintiffs are really seeking a new right, not access to an existing right. To establish a new fundamental right, the court must determine that the right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it] were sacrificed." *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (citations omitted). Because same-sex marriage has only recently been allowed by a number of states, the State argues that an individual's right to marry someone of the same sex cannot be a fundamental right. But the Supreme Court did not adopt this line of reasoning in the analogous case of *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Instead of declaring a new right to interracial marriage, the Court held that individuals could not be restricted from exercising their existing right to marry on account of the race of their chosen partner. *Id.* at 12, 87 S.Ct. 1817. Similarly, the Plaintiffs here do not seek a new right to same-sex marriage, but instead ask the court to hold that the State cannot prohibit them from exercising their existing right to marry on account of the sex of their chosen partner.

The alleged right to same-sex marriage that the State claims the Plaintiffs are seeking is simply the same right that is currently enjoyed by heterosexual individuals: the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond. This right is deeply rooted in the nation's history and implicit in the concept of ordered liberty because it protects an individual's ability to make deeply personal choices about love and family free from government interference. And, as discussed above, this right is enjoyed by all individuals. If the right to same-sex marriage were a new right, then it should make new protections and benefits available to all citizens. But heterosexual individuals are as likely to exercise their purported right to same-sex marriage as gay men and lesbians are to exercise their purported right to opposite-sex marriage. Both same-sex and opposite-sex marriage are therefore simply manifestations of one right—the right to marry—applied to people with different sexual identities.

While it was assumed until recently that a person could only share an intimate emotional bond and develop a family with a person of the opposite sex, the realization that this assumption is false does not change the underlying right. It merely changes the result when the court applies that right to the facts before it. Applying that right to these Plaintiffs, the court finds that the Constitution protects their right to marry a person of the same sex to the same degree that the Constitution protects the right of heterosexual individuals to marry a person of the opposite sex.

Because the right to marry has already been established as a fundamental right, the court finds that the *Glucksberg* analysis is inapplicable here. The Plaintiffs are seeking access to an existing right, not the declaration of a new right.

3. *Tradition and History Are Insufficient Reasons to Deny Fundamental Rights to an Individual.*

[13][14] Finally, the State contends that the fundamental right to marriage cannot encompass the right to marry someone of the same sex because this right has never been interpreted to have this meaning in the past. The court is not persuaded by the State's argument. The Constitution is not so rigid that it always mandates the same outcome even when its principles operate on a new set of facts that were previously unknown:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence v. Texas, 539 U.S. 558, 578–79, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). Here, it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian. The court cannot ignore the fact that the Plaintiffs are able to develop a committed, intimate relationship with a person of the same sex but not with a person of the opposite sex. The court, and the State, must adapt to this changed understanding.

C. *Summary of Due Process Analysis*

The Fourteenth Amendment protects the liberty rights of all citizens, and none of the State's arguments presents a compelling reason why the scope of that right should be greater for heterosexual individuals than it is for gay and lesbian individuals. If, as is clear from the Supreme Court cases discussing the right to marry, a heterosexual person's choices about intimate association and family life are protected from unreasonable government interference in the marital context, then a gay or lesbian person also

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enjoys these same protections.

The court's holding is supported, even required, by the Supreme Court's recent opinion concerning the scope of protection that the Fourteenth Amendment provides to gay and lesbian citizens. In *Lawrence v. Texas,* the Court overruled its previous decision in *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), and held that the Due Process Clause protected an individual's right to have sexual relations with a partner of the same sex. 539 U.S. at 578, 123 S.Ct. 2472. The Court ruled: "The Texas [sodomy] statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* While the Court stated that its opinion did not address "whether the government must give formal recognition to any relationship that homosexual persons seek to enter," *id.,* the Court confirmed that "our laws and tradition afford constitutional protection to personal decisions relating to *marriage,* procreation, contraception, family relationships, child rearing, and education" and held that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574, 123 S.Ct. 2472 (emphasis added). The court therefore agrees with the portion of Justice Scalia's dissenting opinion in *Lawrence* in which Justice Scalia stated that the Court's reasoning logically extends to protect an individual's right to marry a person of the same sex:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, ... what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "the liberty protected by the Constitution"?

Id. at 604–05, 123 S.Ct. 2472 (Scalia, J., dissenting) (citations omitted).

[15] The Supreme Court's decision in *Lawrence* removed the only ground—moral disapproval—on which the State could have at one time relied to distinguish the rights of gay and lesbian individuals from the rights of heterosexual individuals. The only other distinction the State has attempted to make is its argument that same-sex couples are not able to naturally reproduce with each other. But, of course, neither can thousands of opposite-sex couples in Utah. As a result, there is no legitimate reason that the rights of gay and lesbian individuals are any different from those of other people. All citizens, regardless of their sexual identity, have a fundamental right to liberty, and this right protects an individual's ability to marry and the intimate choices a person makes about marriage and family.

The court therefore finds that the Plaintiffs have a fundamental right to marry that protects their choice of a same-sex partner.

D. *Amendment 3 Does Not Survive Strict Scrutiny*

The court's determination that the fundamental right to marry encompasses the Plaintiffs' right to marry a person of the same sex is not the end of the court's analysis. The State may pass a law that restricts a person's fundamental rights provided that the law is "narrowly tailored to serve a compelling state interest." *Reno v. Flores,* 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). For instance, a state may permissibly regulate the age at which a person may be married because the state has a compelling interest in protecting children against abuse and coercion. Similarly, a state need not allow an individual to marry if that person is mentally incapable of forming the requisite consent, or if that prohibition is part of the punishment for a prisoner serving a life sentence. *See Butler v. Wilson,* 415 U.S. 953, 94 S.Ct. 1479, 39 L.Ed.2d 569 (1974) (summarily affirming decision to uphold a state law that prohibited prisoners incarcerated for life from marrying).

The court finds no reason that the Plaintiffs are comparable to children, the mentally incapable, or life prisoners. Instead, the Plaintiffs are ordinary citizens—business owners, teachers, and doctors—who wish to marry the persons they love. As discussed below, the State of Utah has not demonstrated a rational, much less a compelling, reason why the Plaintiffs should be denied their right to marry. Consequently, the court finds that Amendment 3 violates the Plaintiffs' due process rights under the Fourteenth Amendment.

V. Amendment 3 Violates the Plaintiffs' Right to Equal Protection

[16] The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws." U.S. Const. amend. XIV, § 1. The Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting). But the guarantee of equal protection coexists with the practical necessity that most legislation must classify for some purpose or another. *See Romer v. Evans,* 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

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[17][18] To determine whether a piece of legislation violates the Equal Protection Clause, the court first looks to see whether the challenged law implicates a fundamental right. “When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Zablocki,* 434 U.S. at 388, 98 S.Ct. 673; *see also Harper v. Va. State Bd. of Elections,* 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (“We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”). Here, the court finds that Amendment 3 interferes with the exercise of the Plaintiffs' fundamental right to marry. As discussed above, Amendment 3 is therefore unconstitutional because the State has not shown that the law is narrowly tailored to meet a compelling governmental interest. But even if the court disregarded the impact of Amendment 3 on the Plaintiffs' fundamental rights, the law would still fail for the reasons discussed below.

[19][20] The Plaintiffs argue that Amendment 3 discriminates against them on the basis of their sex and sexual identity in violation of the Equal Protection Clause. When a state regulation adversely affects members of a certain class, but does not significantly interfere with the fundamental rights of the individuals in that class, courts first determine how closely they should scrutinize the challenged regulation. Courts must not simply defer to the State's judgment when there is reason to suspect “prejudice against discrete and insular minorities ... which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities[.]” *United States v. Carolene Prods. Co.,* 304 U.S. 144, 152–53 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

[21] To decide whether a challenged state law impermissibly discriminates against members of a class in violation of the Equal Protection Clause, the Supreme Court has developed varying tiers of scrutiny that courts apply depending on what class of citizens is affected. “Classifications based on race or national origin” are considered highly suspect and “are given the most exacting scrutiny.” *Clark v. Jeter,* 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). On the other end of the spectrum, courts must uphold a legislative classification that does not target a suspect class “so long as it bears a rational relation to some legitimate end.” *Romer,* 517 U.S. at 631, 116 S.Ct. 1620. “Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.” *Clark,* 486 U.S. at 461, 108 S.Ct. 1910. Classifications receiving this intermediate level of scrutiny are quasi-suspect classifications that can be sustained only if they are “substantially related to an important governmental objective.” *Id.*

A. *Heightened Scrutiny*

The Plaintiffs assert three theories why the court should apply some form of heightened scrutiny to this case. While the court discusses each of these theories below, it finds that it need not apply heightened scrutiny here because Amendment 3 fails under even the most deferential level of review.

1. *Sex Discrimination*

[22] The Plaintiffs argue that the court should apply heightened scrutiny to Amendment 3 because it discriminates on the basis of an individual's sex. As noted above, classifications based on sex can be sustained only where the government demonstrates that they are “substantially related” to an “important governmental objective[.]” *United States v. Virginia,* 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (citation omitted); *Concrete Works v. City of Denver,* 36 F.3d 1513, 1519 (10th Cir.1994) (“Gender-based classifications ... are evaluated under the intermediate scrutiny rubric”).

[23] The State concedes that Amendment 3 involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman. Nevertheless, the State argues that Amendment 3 does not discriminate on the basis of sex because its prohibition against same-sex marriage applies equally to both men and women. The Supreme Court rejected an analogous argument in *Loving v. Virginia,* 388 U.S. 1, 8–9, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). In *Loving,* Virginia argued that its anti-miscegenation laws did not discriminate based on race because the prohibition against mixed-race marriage applied equally to both white and black citizens. *Id.* at 7–8, 87 S.Ct. 1817. The Court found that “the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.” *Id.* at 9, 87 S.Ct. 1817. Applying the same logic, the court finds that the fact of equal application to both men and women does not immunize Utah's Amendment 3 from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex.

But because the court finds that Amendment 3 fails rational basis review, it need not analyze why Utah is also unable to

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satisfy the more rigorous standard of demonstrating an “exceedingly persuasive” justification for its prohibition against same-sex marriage. *Virginia,* 518 U.S. at 533, 116 S.Ct. 2264.

2. *Sexual Orientation as a Suspect Class*

The Plaintiffs assert that, even if Amendment 3 does not discriminate on the basis of sex, it is undisputed that the law discriminates on the basis of a person's sexual orientation. The Plaintiffs maintain that gay men and lesbians as a class exhibit the “traditional indicia” that indicate they are especially at risk of discrimination. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). The Plaintiffs therefore urge the court to hold that sexual orientation should be considered at least a quasi-suspect class, a holding which would require the court to apply heightened scrutiny to its analysis of Amendment 3.

The court declines to address the Plaintiffs' argument because it finds that it is bound by the Tenth Circuit's discussion of this issue. In *Price–Cornelison v. Brooks,* the Tenth Circuit considered a claim that an undersheriff refused to enforce a protective order because the domestic violence victim was a lesbian. 524 F.3d 1103, 1105 (2008). The court held that the plaintiff's claim did not “implicate a protected class, which would warrant heightened scrutiny.” *Id.* at 1113. In a footnote, the court supported its statement with a number of citations to cases from the Tenth Circuit and other Courts of Appeal. *See id.* at 1113 n. 9.

[24] The American Civil Liberties Union submitted an amicus brief arguing that the Tenth Circuit had no occasion to decide whether heightened scrutiny would be appropriate in *Price–Cornelison* because the court found that the discrimination at issue did not survive even rational basis review. *Id.* at 1114. As a result, the ACLU contends that the Tenth Circuit's statement was dicta and not binding. The court is not persuaded by the ACLU's argument. Even if the Tenth Circuit did not need to reach this question, the court's extensive footnote in *Price–Cornelison* clearly indicates that the Tenth Circuit currently applies only rational basis review to classifications based on sexual orientation. Unless the Supreme Court or the Tenth Circuit hold differently, the court continues to follow this approach.

3. *Animus*

[25] The Plaintiffs contend that Amendment 3 is based on animus against gay and lesbian individuals and that the court should therefore apply a heightened level of scrutiny to the law. As discussed below, there is some support for the Plaintiffs' argument in the Supreme Court opinions of *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) and *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). But because the Supreme Court has not yet delineated the contours of such an approach, this court will continue to apply the standard rational basis test.

In *Romer,* the Supreme Court considered an amendment to the Colorado Constitution that prohibited any department or agency of the State of Colorado or any Colorado municipality from adopting any law or regulation that would protect gay men, lesbians, or bisexuals from discrimination. 517 U.S. at 624, 116 S.Ct. 1620. The amendment not only prevented future attempts to establish these protections, but also repealed ordinances that had already been adopted by the cities of Denver, Boulder, and Aspen. *Id.* at 623–24, 116 S.Ct. 1620. The Supreme Court held that the amendment was unconstitutional because it violated the Equal Protection Clause. *Id.* at 635, 116 S.Ct. 1620. While the Court cited the rational basis test, the Court also stated that the Colorado law “confound[ed] this normal process of judicial review.” *Id.* at 633, 116 S.Ct. 1620. The Court then held that the law had no rational relation to a legitimate end for two reasons. First, the Court ruled that it was not “within our constitutional tradition” to enact a law “declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government[.]” *Id.* Second, the Court held that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.” *Id.* at 634, 116 S.Ct. 1620. The Court's analysis focused more on the purpose and effect of the Colorado amendment than on a consideration of the purported legitimate interests the State asserted in support of its law.

The Supreme Court's opinion in *Windsor* is similar. The Court did not analyze the legitimate interests cited by DOMA's defenders as would be typical in a rational basis review. *See Windsor,* 133 S.Ct. at 2707 (Scalia, J., dissenting) (“[The majority] makes only a passing mention of the ‘arguments put forward’ by the Act's defenders, and does not even trouble to paraphrase or describe them.”). Instead, the Court focused on the “design, purpose, and effect of DOMA,” *id.* at 2689, and held that the law's “avowed purpose and practical effect” was “to impose a disadvantage, a separate status, and so a stigma” on same-sex couples that a state had permitted to wed. *Id.* at 2693. Because DOMA's “principal purpose” was “to impose inequality,” *id.* at 2694, the Court ruled that the law deprived legally wed same-sex couples of “an essential part of the liberty protected by the Fifth Amendment.” *Id.* at 2692.

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In both *Romer* and *Windsor,* the Court cited the following statement from *Louisville Gas & Elec. Co. v. Coleman:* "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." 277 U.S. 32, 37–38, 48 S.Ct. 423, 72 L.Ed. 770 (1928), *quoted in Romer,* 517 U.S. at 633, 116 S.Ct. 1620. Indeed, the *Windsor* Court held that "discriminations of an unusual character especially *require* careful consideration." 133 S.Ct. at 2693 (emphasis added) (citation omitted). The Court's emphasis on discriminations of an unusual character suggests that, when presented with an equal protection challenge, courts should first analyze the law's design, purpose, and effect to determine whether the law is subject to "careful consideration." If the principal purpose or effect of a law is to impose inequality, a court need not even consider whether the class of citizens that the law effects requires heightened scrutiny or a rational basis approach. Such laws are "not within our constitutional tradition," *Romer,* 517 U.S. at 633, 116 S.Ct. 1620, and violate the Equal Protection Clause regardless of the class of citizens that bears the disabilities imposed by the law. If, on the other hand, the law merely distributes benefits unevenly, then the law is subject to heightened scrutiny only if the disadvantages imposed by that law are borne by a class of people that has a history of oppression and political powerlessness.

While this analysis appears to follow the Supreme Court's reasoning in *Romer* and *Windsor,* the court is wary of adopting such an approach here in the absence of more explicit guidance. For instance, the Supreme Court has not elaborated how a court should determine whether a law imposes a discrimination of an unusual character. There are a number of reasons why Amendment 3 is similar to both DOMA and the Colorado amendment that the Supreme Court struck down in *Windsor* and *Romer.* First, the avowed purpose and practical effect of Amendment 3 is to deny the responsibilities and benefits of marriage to same-sex couples, which is another way of saying that the law imposes inequality. Indeed, Amendment 3 went beyond denying gay and lesbian individuals the right to marry and held that no domestic union could be given the same or substantially equivalent legal effect as marriage. This wording suggests that the imposition of inequality was not merely the law's effect, but its goal.

Second, Amendment 3 has an unusual character when viewed within the historical context in which it was passed. Even though Utah already had statutory provisions that restricted marriage to opposite-sex couples, the State nevertheless passed a constitutional amendment to codify this prohibition. This action is only logical when viewed against the developments in Massachusetts, whose Supreme Court held in 2003 that the Massachusetts Constitution required the recognition of same-sex marriages. *Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 798 N.E.2d 941, 948 (2003). The Utah legislature believed that a constitutional amendment was necessary to maintain Utah's ban on same-sex marriage because of the possibility that a Utah court would adopt reasoning similar to the Massachusetts Supreme Court and hold that the Utah Constitution already protected an individual's right to marry a same-sex partner. Amendment 3 thereby preemptively denied rights to gay and lesbian citizens of Utah that they may have already had under the Utah Constitution.

But there are also reasons why Amendment 3 may be distinguishable from the laws the Supreme Court has previously held to be discriminations of an unusual character. Most notably, the Court has not articulated to what extent such a discrimination must be motivated by a "bare ... desire to harm a politically unpopular group." *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). The Plaintiffs argue that Amendment 3 was motivated by animus and urge the court to consider the statements in the Voter Information Pamphlet that was provided to Utah voters. The Pamphlet includes arguments made by Amendment 3's proponents that the amendment was necessary to "maintain[ ] public morality" and to ensure the continuation of "the ideal relationship where men, women and children thrive best." (Utah Voter Information Pamphlet to General Election on Nov. 2, 2004, at 36, Dkt. 32–2.) The Plaintiffs submit that these statements demonstrate that Amendment 3 was adopted to further privately held moral views that same-sex couples are immoral and inferior to opposite-sex couples.

While the Plaintiffs argue that many Utah citizens voted for Amendment 3 out of a dislike of gay and lesbian individuals, the court finds that it is impossible to determine what was in the mind of each individual voter. Some citizens may have voted for Amendment 3 purely out of a belief that the amendment would protect the benefits of opposite-sex marriage. Of course, good intentions do not save a law if the law bears no rational connection to its stated legitimate interests, but this analysis is the test the court applies when it follows the Supreme Court's rational basis jurisprudence. It is unclear how a mix of animus and good intentions affects the determination of whether a law imposes a discrimination of such unusual character that it requires the court to give it careful consideration.

In any event, the theory of heightened scrutiny that the Plaintiffs advocate is not necessary to the court's determination of Amendment 3's constitutionality. The court has already held that Amendment 3 burdens the Plaintiffs' fundamental right to marriage and is therefore subject to strict scrutiny. And, as discussed below, the court finds that Amendment 3 bears no rational

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relationship to any legitimate state interests and therefore fails rational basis review. It may be that some laws neither burden a fundamental right nor target a suspect class, but nevertheless impose a discrimination of such unusual character that a court must review a challenge to such a law with careful consideration. But the court's analysis here does not hinge on that type of heightened review. The court therefore proceeds to apply the well-settled rational basis test to Amendment 3.

B. *Rational Basis Review*

[26][27][28] When a law creates a classification but does not target a suspect class or burden a fundamental right, the court presumes the law is valid and will uphold it so long as it rationally relates to some legitimate governmental purpose. *See Heller v. Doe,* 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). The court defers to the judgment of the legislature or the judgment of the people who have spoken through a referendum if there is at least a debatable question whether the underlying basis for the classification is rational. *See Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 464, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). But even under the most deferential standard of review, the court must still "insist on knowing the relation between the classification adopted and the object to be obtained." *Romer v. Evans,* 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *Lyng v. Int'l Union,* 485 U.S. 360, 375, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988) ("[L]egislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals."). This search for a rational relationship "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer,* 517 U.S. at 633, 116 S.Ct. 1620. As a result, a law must do more than disadvantage or otherwise harm a particular group to survive rational basis review. *See U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973).

[29][30] The State emphasizes that the court must accept any legislative generalizations, "even when there is an imperfect fit between means and ends." *Heller,* 509 U.S. at 321, 113 S.Ct. 2637. The court will uphold a classification provided "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison,* 415 U.S. 361, 383, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974). Based on this principle, the State argues that its extension of marriage benefits to opposite-sex couples promotes certain governmental interests such as responsible procreation and optimal child-rearing that would not be furthered if marriage benefits were extended to same-sex couples. But the State poses the wrong question. The court's focus is not on whether extending marriage benefits to heterosexual couples serves a legitimate governmental interest. No one disputes that marriage benefits serve not just legitimate, but compelling governmental interests, which is why the Constitution provides such protection to an individual's fundamental right to marry. Instead, courts are required to determine whether there is a rational connection between the challenged statute and a legitimate state interest. Here, the challenged statute does not grant marriage benefits to opposite-sex couples. The effect of Amendment 3 is only to disallow same-sex couples from gaining access to these benefits. The court must therefore analyze whether the State's interests in responsible procreation and optimal child-rearing are furthered by prohibiting same-sex couples from marrying.

This focus on a rational connection between the State's legitimate interests and the State's exclusion of a group from benefits is well-supported in a number of Supreme Court decisions. For instance, the Court held in *Johnson v. Robison* that the rational basis test was satisfied by a congressional decision to exclude conscientious objectors from receiving veterans' tax benefits because their lives had not been disrupted to the same extent as the lives of active service veterans. 415 U.S. at 381–82, 94 S.Ct. 1160. *See also City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 448–50, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (examining the city's interest in denying housing for people with developmental disabilities, not in continuing to allow residence for others); *Moreno,* 413 U.S. at 535–38, 93 S.Ct. 2821 (testing the federal government's interest in excluding unrelated households from food stamp benefits, not in maintaining food stamps for related households); *Eisenstadt v. Baird,* 405 U.S. 438, 448–53, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (requiring a state interest in the exclusion of unmarried couples from lawful access to contraception, not merely an interest in continuing to allow married couples access); *Loving v. Virginia,* 388 U.S. 1, 9–12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (examining whether Virginia's exclusion of interracial couples from marriage violated equal protection principles independent of Virginia's interest in providing marriage to same-race couples).

For the reasons stated below, the court finds that the legitimate government interests that Utah cites are not rationally related to Utah's prohibition of same-sex marriage.

1. *Responsible Procreation*

[31] The State argues that the exclusion of same-sex couples from marriage is justified based on an interest in promoting responsible procreation within marriage. According to the State, "[t]raditional marriage with its accompanying governmental benefits provides an incentive for opposite-sex couples to commit together to form [ ] a stable family in which their planned, and especially unplanned, biological children may be raised." (Defs.' Mot. Summ. J., at 28, Dkt. 33.) The Plaintiffs do not dispute the

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State's assertion, but question how disallowing same-sex marriage has any effect on the percentage of opposite-sex couples that have children within a marriage. The State has presented no evidence that the number of opposite-sex couples choosing to marry each other is likely to be affected in any way by the ability of same-sex couples to marry. Indeed, it defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts. Both opposite-sex and same-sex couples model the formation of committed, exclusive relationships, and both establish families based on mutual love and support. If there is any connection between same-sex marriage and responsible procreation, the relationship is likely to be the opposite of what the State suggests. Because Amendment 3 does not currently permit same-sex couples to engage in sexual activity within a marriage, the State reinforces a norm that sexual activity may take place outside the marriage relationship.

As a result, any relationship between Amendment 3 and the State's interest in responsible procreation "is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne,* 473 U.S. at 446, 105 S.Ct. 3249; *see also Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 972 (N.D.Cal.2010) ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriage."). Accordingly, the court finds no rational connection between Amendment 3 and the state's interest in encouraging its citizens to engage in responsible procreation.

2. *Optimal Child–Rearing*

[32] The State also asserts that prohibiting same-sex couples from marrying "promotes the ideal that children born within a state-sanctioned marriage will be raised by both a mother and father in a stable family unit." (Defs.' Mot. Summ. J., at 33, Dkt. 33.) Utah contends that the "gold standard" for family life is an intact, biological, married family. (*Id.* at 34.) By providing incentives for only opposite-sex marriage, Utah asserts that more children will be raised in this ideal setting. The Plaintiffs dispute the State's argument that children do better when raised by opposite-sex parents than by same-sex parents. The Plaintiffs claim that the State's position is demeaning not only to children of same-sex parents, but also to adopted children of opposite-sex parents, children of single parents, and other children living in families that do not meet the State's "gold standard." Both parties have cited numerous authorities to support their positions. To the extent the parties have created a factual dispute about the optimal environment for children, the court cannot resolve this dispute on motions for summary judgment. But the court need not engage in this debate because the State's argument is unpersuasive for another reason. Once again, the State fails to demonstrate any rational link between its prohibition of same-sex marriage and its goal of having more children raised in the family structure the State wishes to promote.

There is no reason to believe that Amendment 3 has any effect on the choices of couples to have or raise children, whether they are opposite-sex couples or same-sex couples. The State has presented no evidence that Amendment 3 furthers or restricts the ability of gay men and lesbians to adopt children, to have children through surrogacy or artificial insemination, or to take care of children that are biologically their own whom they may have had with an opposite-sex partner. Similarly, the State has presented no evidence that opposite-sex couples will base their decisions about having children on the ability of same-sex couples to marry. To the extent the State wishes to see more children in opposite-sex families, its goals are tied to laws concerning adoption and surrogacy, not marriage.

If anything, the State's prohibition of same-sex marriage detracts from the State's goal of promoting optimal environments for children. The State does not contest the Plaintiffs' assertion that roughly 3,000 children are currently being raised by same-sex couples in Utah. (Patterson Decl. ¶ 40, Dkt. 85.) These children are also worthy of the State's protection, yet Amendment 3 harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples. Amendment 3 "humiliates [ ] thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor,* 133 S.Ct. at 2694. Amendment 3 "also brings financial harm to children of same-sex couples," *id.* at 2695, because it denies the families of these children a panoply of benefits that the State and the federal government offer to families who are legally wed. Finally, Utah's prohibition of same-sex marriage further injures the children of both opposite-sex and same-sex couples who themselves are gay or lesbian, and who will grow up with the knowledge that the State does not believe they are as capable of creating a family as their heterosexual friends.

For these reasons, Amendment 3 does not make it any more likely that children will be raised by opposite-sex parents. As a result, the court finds that there is no rational connection between Utah's prohibition of same-sex marriage and its goal of fostering an ideal family environment for a child.

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3. *Proceeding with Caution*

[33] The State contends that it has a legitimate interest in proceeding with caution when considering expanding marriage to encompass same-sex couples. But the State is not able to cite any evidence to justify its fears. The State's argument is analogous to the City of Cleburne's position in *City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). In that case, the City was concerned about issuing a permit for a home for the developmentally disadvantaged because of the fears of the property owners near the facility. *Id.* at 448, 105 S.Ct. 3249. The Supreme Court held that "mere negative attitudes, or fear, ... are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." *Id.* The State can plead an interest in proceeding with caution in almost any setting. If the court were to accept the State's argument here, it would turn the rational basis analysis into a toothless and perfunctory review.

In any event, the only evidence that either party submitted concerning the effect of same-sex marriage suggests that the State's fears are unfounded. In an amicus brief submitted to the Ninth Circuit Court of Appeals by the District of Columbia and fourteen states that currently permit same-sex marriage, the states assert that the implementation of same-sex unions in their jurisdictions has not resulted in any decrease in opposite-sex marriage rates, any increase in divorce rates, or any increase in the number of nonmarital births. (Brief of State Amici in *Sevcik v. Sandoval,* at 24–28, Ex. 13 to Pls.' Mem. in Opp'n, Dkt. 85–14.) In addition, the process of allowing same-sex marriage is straightforward and requires no change to state tax, divorce, or inheritance laws.

For these reasons, the court finds that proceeding with caution is not a legitimate state interest sufficient to survive rational basis review.

4. *Preserving the Traditional Definition of Marriage*

[34] As noted in the court's discussion of fundamental rights, the State argues that preserving the traditional definition of marriage is itself a legitimate state interest. But tradition alone cannot form a rational basis for a law. *Williams v. Illinois,* 399 U.S. 235, 239, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack"); *see also Heller v. Doe,* 509 U.S. 312, 326, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis.").

[35] The traditional view of marriage has in the past included certain views about race and gender roles that were insufficient to uphold laws based on these views. *See Lawrence v. Texas,* 539 U.S. 558, 577–78, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack") (citation omitted); *Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 733–35, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (finding that government action based on stereotypes about women's greater suitability or inclination to assume primary childcare responsibility was unconstitutional). And, as Justice Scalia has noted in dissent, " 'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence,* 539 U.S. at 601, 123 S.Ct. 2472 (Scalia, J., dissenting). While "[p]rivate biases may be outside the reach of the law, ... the law cannot, directly or indirectly, give them effect" at the expense of a disfavored group's constitutional rights. *Palmore v. Sidoti,* 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984).

Although the State did not directly present an argument based on religious freedom, the court notes that its decision does not mandate any change for religious institutions, which may continue to express their own moral viewpoints and define their own traditions about marriage. If anything, the recognition of same-sex marriage expands religious freedom because some churches that have congregations in Utah desire to perform same-sex wedding ceremonies but are currently unable to do so. *See* Brief of Amici Curiae Bishops et al., at 8–15, *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013) (No. 12–307) (arguing that the inherent dignity of lesbian and gay individuals informs the theology of numerous religious beliefs, including the Unitarian Universalist Church and the United Church of Christ). By recognizing the right to marry a partner of the same sex, the State allows these groups the freedom to practice their religious beliefs without mandating that other groups must adopt similar practices.

For these reasons, the court finds that the State's interest in preserving its traditional definition of marriage is not sufficient to survive rational basis review.

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C. *Summary of Rational Basis Analysis*

In its briefing and at oral argument, the State was unable to articulate a specific connection between its prohibition of same-sex marriage and any of its stated legitimate interests. At most, the State asserted: "We just simply don't know." (Hr'g Tr., at 94, 97, Dec. 4, 2013, Dkt. 88.) This argument is not persuasive. The State's position appears to be based on an assumption that the availability of same-sex marriage will somehow cause opposite-sex couples to forego marriage. But the State has not presented any evidence that heterosexual individuals will be any less inclined to enter into an opposite-sex marriage simply because their gay and lesbian fellow citizens are able to enter into a same-sex union. Similarly, the State has not shown any effect of the availability of same-sex marriage on the number of children raised by either opposite-sex or same-sex partners.

In contrast to the State's speculative concerns, the harm experienced by same-sex couples in Utah as a result of their inability to marry is undisputed. To apply the Supreme Court's reasoning in *Windsor,* Amendment 3 "tells those couples, and all the world, that their otherwise valid [relationships] are unworthy of [state] recognition. This places same-sex couples in an unstable position of being in a second-tier [relationship]. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor,* 133 S.Ct. at 2694; *see also id.* at 2710 (Scalia, J., dissenting) (suggesting that the majority's reasoning could be applied to the state-law context in precisely this way). And while Amendment 3 does not offer any additional protection to children being raised by opposite-sex couples, it demeans the children of same-sex couples who are told that their families are less worthy of protection than other families.

The Plaintiffs have presented a number of compelling arguments demonstrating that the court should be more skeptical of Amendment 3 than of typical legislation. The law differentiates on the basis of sex and closely resembles the type of law containing discrimination of an unusual character that the Supreme Court struck down in *Romer* and *Windsor.* But even without applying heightened scrutiny to Amendment 3, the court finds that the law discriminates on the basis of sexual identity without a rational reason to do so. Because Amendment 3 fails even rational basis review, the court finds that Utah's prohibition on same-sex marriage violates the Plaintiffs' right to equal protection under the law.

VI. Utah's Duty to Recognize a Marriage Validly Performed in Another State

Plaintiffs Karen Archer and Kate Call contend that their rights to due process and equal protection are further infringed by the State's refusal to recognize their marriage that was validly performed in Iowa. The court's disposition of the other issues in this lawsuit renders this question moot. Utah's current laws violate the rights of same-sex couples who were married elsewhere not because they discriminate against a subsection of same-sex couples in Utah who were validly married in another state, but because they discriminate against all same-sex couples in Utah.

CONCLUSION

In 1966, attorneys for the State of Virginia made the following arguments to the Supreme Court in support of Virginia's law prohibiting interracial marriage: (1) "The Virginia statutes here under attack reflects [sic] a policy which has obtained in this Commonwealth for over two centuries and which still obtains in seventeen states"; (2) "Inasmuch as we have already noted the higher rate of divorce among the intermarried, is it not proper to ask, 'Shall we then add to the number of children who become the victims of their intermarried parents?' "; (3) "[I]ntermarriage constitutes a threat to society"; and (4) "[U]nder the Constitution the regulation and control of marital and family relationships are reserved to the States." Brief for Respondents at 47–52, *Loving v. Virginia,* 388 U.S. 1 (1967), 1967 WL 113931. These contentions are almost identical to the assertions made by the State of Utah in support of Utah's laws prohibiting same-sex marriage. For the reasons discussed above, the court finds these arguments as unpersuasive as the Supreme Court found them fifty years ago. Anti-miscegenation laws in Virginia and elsewhere were designed to, and did, deprive a targeted minority of the full measure of human dignity and liberty by denying them the freedom to marry the partner of their choice. Utah's Amendment 3 achieves the same result.

Rather than protecting or supporting the families of opposite-sex couples, Amendment 3 perpetuates inequality by holding that the families and relationships of same-sex couples are not now, nor ever will be, worthy of recognition. Amendment 3 does not thereby elevate the status of opposite-sex marriage; it merely demeans the dignity of same-sex couples. And while the State cites an interest in protecting traditional marriage, it protects that interest by denying one of the most traditional aspects of marriage to thousands of its citizens: the right to form a family that is strengthened by a partnership based on love, intimacy, and shared responsibilities. The Plaintiffs' desire to publicly declare their vows of commitment and support to each other is a testament to the strength of marriage in society, not a sign that, by opening its doors to all individuals, it is in danger of collapse.

The State of Utah has provided no evidence that opposite-sex marriage will be affected in any way by same-sex marriage. In

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the absence of such evidence, the State's unsupported fears and speculations are insufficient to justify the State's refusal to dignify the family relationships of its gay and lesbian citizens. Moreover, the Constitution protects the Plaintiffs' fundamental rights, which include the right to marry and the right to have that marriage recognized by their government. These rights would be meaningless if the Constitution did not also prevent the government from interfering with the intensely personal choices an individual makes when that person decides to make a solemn commitment to another human being. The Constitution therefore protects the choice of one's partner for all citizens, regardless of their sexual identity.

ORDER

The court GRANTS the Plaintiffs' Motion for Summary Judgment (Dkt. 32) and DENIES the Defendants' Motion for Summary Judgment (Dkt. 33). The court hereby declares that Amendment 3 is unconstitutional because it denies the Plaintiffs their rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution. The court hereby enjoins the State from enforcing Sections 30–1–2 and 30–1–4.1 of the Utah Code and Article I, § 29 of the Utah Constitution to the extent these laws prohibit a person from marrying another person of the same sex.

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Chapter 2

Constitutional Law

INTRODUCTION

Many people assume that a government acts from a vague position of strength and can enact any regulation it deems necessary or desirable. This chapter emphasizes a different perspective from which to view the law: action taken by the government must come from authority and this authority cannot be exceeded.

Neither Congress nor any state may pass a law in conflict with the Constitution. The Constitution is the supreme law in this country. The Constitution is the source of federal power and to sustain the legality of a federal law or action a specific federal power must be found in the Constitution. States have inherent sovereign power—that is, the power to enact legislation that has a reasonable relationship to the welfare of the citizens of that state. The power of the federal government was *delegated* to it by the states while the power of the states was *retained* by them when the Constitution was ratified.

The Constitution does not expressly give the states the power to regulate, but limits the states' exercise of powers not delegated to the federal government.

CHAPTER OUTLINE

I. The Constitutional Powers of Government

Before the U.S. Constitution, the Articles of Confederation defined the central government.

A. A FEDERAL FORM OF GOVERNMENT

The U.S. Constitution established a federal form of government, delegating certain powers to the national government. The states retain all other powers. The relationship between the national government and the state governments is a partnership—neither partner is superior to the other except within the particular area of exclusive authority granted to it under the Constitution.

B. THE SEPARATION OF POWERS

Deriving power from the Constitution, each of the three governmental branches (the executive, the legislative, and the judicial) performs a separate function. No branch may exercise the authority of another, but each has some power to limit the actions of the others. This is the system of *checks and balances*.

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- Congress, for example, can enact a law, but the president can veto it.
- The executive branch is responsible for foreign affairs, but treaties with foreign governments require the advice and consent of the members of the Senate.
- Congress determines the jurisdiction of the federal courts, but the courts have the power to hold acts of the other branches of the government unconstitutional.

C. THE COMMERCE CLAUSE

1. The Commerce Clause and the Expansion of National Powers

The Constitution expressly provides that Congress can regulate commerce with foreign nations, interstate commerce, and commerce that affects interstate commerce. This provision—the commerce clause—has had a greater impact on business than any other provision in the Constitution. This power was delegated to the federal government to ensure a uniformity of rules governing the movement of goods through the states.

CASE SYNOPSIS—

Case 2.1: *Heart of Atlanta Motel v. United States*

A motel owner, who refused to rent rooms to African Americans despite the Civil Rights Act of 1964, brought an action to have the Civil Rights Act of 1964 declared unconstitutional. The owner alleged that, in passing the act, Congress had exceeded its power to regulate commerce because his motel was not engaged in interstate commerce. The motel was accessible to state and interstate highways. The owner advertised nationally, maintained billboards throughout the state, and accepted convention trade from outside the state (75 percent of the guests were residents of other states). The district court sustained the constitutionality of the act and enjoined the owner from discriminating on the basis of race. The owner appealed. The case went to the United States Supreme Court.

The United States Supreme Court upheld the constitutionality of the Civil Rights Act of 1964. The Court noted that it was passed to correct "the deprivation of personal dignity" accompanying the denial of equal access to "public establishments." Congressional testimony leading to the passage of the act indicated that African Americans in particular experienced substantial discrimination in attempting to secure lodging. This discrimination impeded interstate travel, thus impeding interstate commerce. As for the owner's argument that his motel was "of a purely local character," the Court said, "[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze." Therefore, under the commerce clause, Congress has the power to regulate any local activity that has a harmful effect interstate commerce.

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Notes and Questions

Does the Civil Rights Act of 1964 actually regulate commerce or was it designed to end the practice of race (and other forms of) discrimination? In this case, the Supreme Court said, "[T]hat Congress was legislating against moral wrongs . . . rendered its enactments no less valid."

Are there any businesses in today's economy that are "purely local in character"? An individual who contracts to perform manual labor such as lawn mowing or timber cutting within a small geographic area might qualify, as long as the activity has no effect on interstate commerce. But in most circumstances it would be difficult if not impossible to do business "purely local in character" in today's U.S. economy. Federal

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statutes that derive their authority from the commerce clause often include requirements or limits to exempt small or arguably local businesses.

Which constitutional clause empowers the federal government to regulate commercial activities among the states? To prevent states from establishing laws and regulations that would interfere with trade and commerce among the states, the Constitution expressly delegated to the national government the power to regulate interstate commerce. The commerce clause—Article I, Section 8, of the U.S. Constitution—expressly permits Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. The Commerce Clause Today
The United States Supreme Court has recently limited the clause in its reach, in decisions that significantly enhanced the sovereign power of the states within the federal system. Some of these decisions are detailed in the text. Essentially, the holdings of these cases state that the clause does not support the national regulation of non-economic conduct.

3. The Regulatory Powers of the States
A state can regulate matters within its own borders under its police power.

4. The "Dormant" Commerce Clause
States do not have the authority to regulate interstate commerce. When state regulations impinge on interstate commerce, the state's interest in the merits and purposes of the regulation must be balanced against the burden placed on interstate commerce. It is difficult to predict the outcome in a particular case.

ENHANCING YOUR LECTURE—

DOES STATE REGULATION OF INTERNET PRESCRIPTION TRANSACTIONS VIOLATE THE COMMERCE CLAUSE?

Every year, about 30 percent of American households purchase at least some prescription drugs online. There is nothing inherently unlawful in such a transaction. Consider that Article X of the Constitution gives the states the authority to regulate activities affecting the safety and welfare of their citizens. In the late 1800s, the states developed systems granting physicians the exclusive rights to prescribe drugs and pharmacists the exclusive right to dispense prescriptions. The courts routinely upheld these state laws.[a] All states use their police power authority to regulate the licensing of pharmacists and the physicians who prescribe drugs.

AN EXTENSION OF STATE LICENSING LAWS

About 40 percent of the states have attempted to regulate Internet prescription transactions by supplementing their licensure rules in such a way to define a "safe" consulting relationship between the physician prescribing and the pharmacists dispensing prescription drugs. For example, certain states allow an electronic diagnosis. This consists of a patient filling out an online questionnaire that is then "approved" by a physician before an Internet prescription is filled and shipped. In contrast, other states specifically prohibit a physician from creating a prescription if there is no physical contact between the patient and the physician providing the prescription.

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SOME STATES ARE ATTEMPTING TO REGULATE INTERSTATE COMMERCE

Recently, the New York State Narcotic Bureau of Enforcement started investigating all companies in New Jersey and Mississippi that had been involved in Internet prescription medicine transactions with residents of New York. None of the companies under investigation has New York offices. The legal question immediately raised is whether the New York State investigations are violating the commerce clause. Moreover, it is the Food and Drug Administration (FDA) that enforces the regulation of prescription drugs, including their distributors.

ARE NEW YORK AND OTHER STATES VIOLATING THE DORMANT COMMERCE CLAUSE?

As you learned in this chapter, the federal government regulates all commerce not specifically granted to the states. This is called the dormant commerce clause. As such, this clause prohibits state regulations that discriminate against interstate commerce. Additionally, this clause prohibits state regulations that impose an undo burden on interstate commerce. The dormant commerce clause has been used in cases that deal with state regulation of pharmacy activities.[b]

In this decade, there is an opposing view based on a line of cases that suggest that state regulation of Internet activities do *not* violate the dormant commerce clause. In one case, a New York state law that banned the sale of cigarettes to its residents over the Internet was found not to violate the dormant commerce clause because of public health concerns.[d] In another case, a Texas statute that prohibited automobile manufacturers from selling vehicles on its Web site was upheld.[e] Whether the reasoning in these cases will be extended to cases involving Internet pharmacies remains to be seen. There exist state laws limiting Internet prescriptions. For example, in Nevada, no resident can obtain a prescription from an Internet pharmacy unless that pharmacy is licensed and certified under the laws of Nevada. Because this statute applies equally to in-state and out-of-state Internet pharmacies, it is undoubtedly nondiscriminatory. Additionally, the requirement that Internet pharmacies obtain a Nevada license prior to doing business in the state will probably be viewed as not imposing an undo burden on interstate commerce

WHERE DO YOU STAND?

Clearly, there are two sides to this debate. Many states contend that they must regulate the provision of prescription drugs via the Internet in order to ensure the safety and well-being of their citizens. In some instances, however, the states may be imposing such regulations at the behest of traditional pharmacies, which do not like online competition. What is your stand on whether state regulation of Internet prescription drug transactions violates the dormant commerce clause of the Constitution? Realize that if you agree that it does, then you probably favor less state regulation. If you believe that it does not, then you probably favor more state regulation.

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a. See, for example, *Dent v. West Virginia,* 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889).
b. See, for example, *Pharmaceutical Manufacturers' Association v. New Mexico Board of Pharmacy*, 86 N.M. 571, 525 P.2d 931 (N.M. App. 1974); *State v. Rasmussen*, 213 N.W.2d 661 (Iowa 1973).
c. See *American Libraries Association v. Pataki,* 969 F.Supp.160 (S.D.N.Y. 1997).
d. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2nd Cir. 2003).
e. *Ford Motor Company v. Texas Department of Transportation*, 264 F.3d 493 (5th Cir. 2001).

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D. THE SUPREMACY CLAUSE

The Constitution, laws, and treaties of the United States are the supreme law of the land. When there is a direct conflict between a federal law and a state law, the state law is held to be invalid.

1. Preemption

When Congress chooses to act exclusively in an area of concurrent federal and state powers, it is said to preempt the area, and a valid federal law will take precedence over a conflicting state or local law.

2. Congressional Intent

Generally, congressional intent to preempt will be found if a federal law is so pervasive, comprehensive, or detailed that the states have no room to supplement it. Also, when a federal statute creates an agency to enforce the law, matters that may come within the agency's jurisdiction will likely preempt state laws.

II. Business and the Bill of Rights

The first ten amendments to the Constitution embody protections against various types of interference by the federal government. These are listed in the text.

A. LIMITS ON FEDERAL AND STATE GOVERNMENTAL ACTIONS

Most of the rights and liberties in the Bill of Rights apply to the states under the due process clause of the Fourteenth Amendment. The United States Supreme Court determines the parameters.

B. THE FIRST AMENDMENT—FREEDOM OF SPEECH

The freedoms guaranteed by the First Amendment cover *symbolic* speech (gestures, clothing, and so on) if a reasonable person would interpret the conduct as conveying a message.

1. Reasonable Restrictions

A balance must be struck between the government's obligation to protect its citizens and those citizens' exercise of their rights.

a. Content-Neutral Laws

If a restriction imposed by the government is content neutral (aimed at combating a societal problem such as crime, not aimed at suppressing expressive conduct or its message), then a court may allow it.

b. Laws That Restrict the Content of Speech

To regulate the content of speech, a law must serve a compelling state interest and be narrowly written to achieve that interest.

2. Corporate Political Speech

Speech that otherwise would be protected does not lose that protection simply because its source is a corporation. For example, corporations cannot be entirely prohibited from making political contributions that individuals are permitted to make.

3. Commercial Speech

Commercial speech is not protected as extensively as noncommercial speech. Even if commercial speech concerns a lawful activity and is not misleading, a restriction on it will generally be considered valid as long as the restriction (1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) goes no further than necessary to accomplish its objective.

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CASE SYNOPSIS—

Case 2.2: *Bad Frog Brewery, Inc. v. New York State Liquor Authority*

Bad Frog Brewery, Inc., sells alcoholic beverages with labels that display a frog making a gesture known as "giving the finger." Bad Frog's distributor, Renaissance Beer Co., applied to the New York State Liquor Authority (NYSLA) for label approval, required before the beer could be sold in New York. The NYSLA denied the application, in part because children might see the labels in grocery and convenience stores. Bad Frog filed a suit in a federal district court against the NYSLA, asking for, among other things, an injunction against this denial. The court granted a summary judgment in favor of the NYSLA. Bad Frog appealed.

The U.S. Court of Appeals for the Second Circuit reversed. The NYSLA's ban on the use of the labels lacked a "reasonable fit" with the state's interest in shielding minors from vulgarity, and the NYSLA did not adequately consider alternatives to the ban. "In view of the wide currency of vulgar displays throughout contemporary society, including comic books targeted directly at children, barring such displays from labels for alcoholic beverages cannot realistically be expected to reduce children's exposure to such displays to any significant degree." Also, there were "numerous less intrusive alternatives."

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Notes and Questions

The free flow of commercial information is essential to a free enterprise system. Individually and as a society, we have an interest in receiving information on the availability, nature, and prices of products and services. Only since 1976, however, have the courts held that communication of this information ("commercial speech") is protected by the First Amendment.

Because some methods of commercial speech can be misleading, this protection has been limited, particularly in cases involving in-person solicitation. For example, the United States Supreme Court has upheld state bans on personal solicitation of clients by attorneys. Currently, the Supreme Court allows each state to determine whether or not in-person solicitation as a method of commercial speech is misleading and to restrict it appropriately.

Whose interests are advanced by banning certain ads? The government's interests are advanced when certain ads are banned. For example, in the *Bad Frog* case, the court acknowledged, by advising the state to restrict the locations where certain ads could be displayed, that banning of "vulgar and profane" advertising from children's sight arguably advanced the state's interest in protecting children from those ads.

ADDITIONAL CASES ADDRESSING THIS ISSUE—

Advertising and the Commerce Clause

Cases involving the **constitutionality of government restrictions on advertising under the commerce clause** include the following.

- Cases in which restrictions on advertising were held unconstitutional include *Thompson v. Western States Medical Center,* __ U.S. __, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) (restrictions on advertising of

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compounded drugs); and *This That and Other Gift and Tobacco, Inc. v. Cobb County*, 285 F.3d 1319 (11th Cir. 2002) (restrictions on advertising of sexual devices).

- Cases in which restrictions on advertising were held not unconstitutional include *Long Island Board of Realtors, Inc. v. Inc. Village of Massapequa Park,* 277 F.3d 622 (2d Cir. 2002) (restrictions on signs in residential areas); *Borgner v. Brooks,* 284 F.3d 1204 (11th Cir. 2002) (restrictions on dentists' ads*); Genesis Outdoor, Inc. v. Village of Cuyahoga Heights,* __ Ohio App.3d __, __ N.E.2d __ (8 Dist. 2002) (restrictions on billboard construction); and *Johnson v. Collins Entertainment Co.,* 349 S.C. 613, 564 S.E.2d 653 (2002) (restrictions on offering special inducements in video gambling ads).

4. Unprotected Speech

Constitutional protection has never been afforded to certain classes of speech—defamatory speech, threats, child pornography, "fighting" words, and statements of fact, for example.

a. Obscenity

Obscene material is unprotected. But other than child pornography, there is little agreement about what material qualifies as obscene. The United States Supreme Court has held that material is obscene if—

- The average person finds that it violates contemporary community standards.
- The work taken as a whole appeals to a prurient interest in sex.
- The work shows patently offensive sexual conduct.
- The work lacks serious redeeming literary, artistic, political, or scientific merit.

b. Virtual Child Pornography

Another exception is a law that makes it a crime to intentionally distribute *virtual child pornography*—which uses computer-generated images, not actual people—without indicating that it is computer-generated.

C. The First Amendment—Freedom of Religion

1. The Establishment Clause

Under the establishment clause, the government cannot establish a religion nor promote, endorse, or show a preference for any religion.

a. Applicable Standards

Federal or state law that does not promote, or place a significant burden on, religion is constitutional even if it has some impact on religion.

b. Religious Displays

Public displays that include nonreligious symbols or symbols of different religions, or that have historical, as well as religious, significance do not necessarily violate the establishment clause.

2. The Free Exercise Clause

Under the free exercise clause, the government cannot prohibit the free exercise of religious practices. In other words, a person cannot be compelled to do something contrary to his or her religious practices unless the practices contravene public policy or public welfare.

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a. Restrictions Must Be Necessary
The government must have a compelling state interest for restricting the free exercise of religion, and the restriction must be the only way to further that interest.

CASE SYNOPSIS—

Case 2.3: *Holt v. Hobbs*

Gregory Holt, an inmate in an Arkansas state prison, is a devout Muslim who wished to grow a beard in accord with his religious beliefs. The Arkansas Department of Correction prohibited inmates from growing beards (except for medical reasons). Holt asked for an exemption on religious grounds. Prison officials denied his request. Holt filed a suit in a federal district court against Ray Hobbs, the director of the department, and others, claiming a violation of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which governs religious exercise by institutionalized persons. The court dismissed the suit. The U.S. Court of Appeals for the Eighth Circuit affirmed**.** Hobbs appealed.

The United States Supreme Court reversed and remanded The prohibition against the beard did not likely further the department's compelling interest in stopping the flow of contraband—the beard was too short. And the policy was not shown to be the least restrictive means of furthering this interest. The department could simply search an inmate's beard when it searched his hair and clothing. And the department could photograph all inmates periodically to record changes in their appearances.

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Notes and Questions

Suppose that instead of a state prison regulation and an inmate, the facts of this case had involved a private employer and an employee who wished to grow a beard for religious reasons in contravention of the employer's dress code. Would the result have been the same? The result might have been the same, but the judgment and reasoning would have been based on federal statutory employment discrimination law instead of the U.S. Constitution. The Bill of Rights protects against interference with certain rights by the government, not private businesses. But under the Civil Rights Act of 1964, discrimination on the basis of religion is prohibited, and private businesses are required to reasonably accommodate the religious beliefs of their employees, unless that would cause the employer undue hardship.

b. Public Welfare Exception
When public safety is an issue, an individual's religious beliefs often must give way to the government's interests in protecting the public.

III. Due Process and Equal Protection

A. DUE PROCESS
Both the Fifth and the Fourteenth Amendments provide that no person shall be deprived "of life, liberty, or property, without due process of law."

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1. **Procedural Due Process**
   A government decision to take life, liberty, or property must be made fairly. Fair procedure has been interpreted as requiring that the person have at least an opportunity to object to a proposed action before a fair, neutral decision maker (who need not be a judge).

2. **Substantive Due Process**
   If a law or other governmental action limits a fundamental right, it will be held to violate substantive due process unless it promotes a compelling or overriding state interest. Fundamental rights include interstate travel, privacy, voting, and all First Amendment rights. Compelling state interests could include, for example, public safety. In all other situations, a law or action does not violate substantive due process if it rationally relates to any legitimate governmental end.

B. EQUAL PROTECTION

Under the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause applies to the federal government through the due process clause of the Fifth Amendment. Equal protection means that the government must treat similarly situated individuals in a similar manner. When a law or action distinguishes between or among individuals, the basis for the distinction (the classification) is examined.

1. **Strict Scrutiny**
   If the law or action inhibits some persons' exercise of a fundamental right or if the classification is based on a race, national origin, or citizenship status, the classification is subject to strict scrutiny—it must be necessary to promote a compelling interest.

2. **Intermediate Scrutiny**
   Intermediate scrutiny is applied in cases involving discrimination based on gender or legitimacy. Laws using these classifications must be substantially related to important government objectives.

3. **The "Rational Basis" Test**
   In matters of economic or social welfare, a classification will be considered valid if there is any conceivable rational basis on which the classification might relate to any legitimate government interest.

IV. Privacy Rights

A personal right to privacy is held to be so fundamental as to apply at both the state and the federal level. Although there is no specific guarantee of a right to privacy in the Constitution, such a right has been derived from guarantees found in the First, Third, Fourth, Fifth, and Ninth Amendments.

A. FEDERAL PRIVACY LEGISLATION

Federal laws relating to privacy include, among others—

- The Freedom of Information Act of 1966
- The Privacy Act of 1974
- The Electronic Communications Privacy Act of 1986
- The Health Insurance Portability and Accountability Act (HIPAA) of 1996

B. THE USA PATRIOT ACT

The USA Patriot Act of 2001 gave officials the authority to monitor Internet activities and access personal information without proof of any wrongdoing.

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ADDITIONAL BACKGROUND—

USA PATRIOT Act Tech Provisions

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act **(USA PATRIOT Act)** of 2001, which is mentioned in the text, touches on many topics, including immigration, money laundering, terrorism victim relief, intelligence gathering, and surveillance of Internet communications. Technology related provisions of the USA PATRIOT Act include the following, as summarized. (Some of these provisions were due to "sunset" in 2005.)

Wiretap Offenses

Sections 201 and 202—Crimes that can serve as a basis for law enforcement agencies (LEAs) to obtain a wiretap include crimes relating to terrorism and crimes relating to computer fraud and abuse.

Voice Mail

Section 209—LEAs can seize voice mail messages, with a warrant.

ESP Records

Sections 210 and 211—LEAs can obtain, with a subpoena, such information about e-communications service providers' (ESPs) subscribers as "name," "address," "local and long distance telephone connection records, or records of session times and durations," "length of service (including start date) and types of service utilized," "telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address," and "means and source of payment for such service (including any credit card or bank account number)."

Pen Registers, and Trap and Trace Devices

Section 216—LEAs can expand their use of pen registers and trap and trace devices (PR&TTs). A PR records the numbers that are dialed on a phone. TTs "capture the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted." PR&TTs can be used to capture routing, addressing, and other information in e-communications, but not the contents of the communication. This is considered one of the key sections of the act.

Computer Trespassers

Section 217—LEAs can assist companies, universities, and other entities that are subject to distributed denial of service, or other, Internet attacks by intercepting "computer trespasser's communications."

ESP Compensation

Section 222—An ESP "who furnishes facilities or technical assistance pursuant to section 216 shall be reasonably compensated for such reasonable expenditures incurred in providing such facilities or assistance."

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ENHANCING YOUR LECTURE—

9 CREATING A WEB SITE PRIVACY POLICY 8 8

Firms with online business operations realize that to do business effectively with their customers, they need to have some information about those customers. Yet online consumers are often reluctant to part with personal information because they do not know how that information may be used. To allay consumer fears about the privacy of their personal data, as well as to avoid liability under existing laws, most online businesses today are taking steps to create and implement Web site privacy policies.

PRIVACY POLICY GUIDELINES

In the last several years, a number of independent, nonprofit organizations have developed model Web site privacy policies and guidelines for online businesses to use. Web site privacy guidelines are now available from a number of online privacy groups and other organizations, including the Online Privacy Alliance, the Internet Alliance, and the Direct Marketing Association. Some organizations, including the Better Business Bureau, have even developed a "seal of approval" that Web-based businesses can display at their sites if they follow the organization's privacy guidelines.

One of the best known of these organizations is TRUSTe. Web site owners that agree to TRUSTe's privacy standards are allowed to post the TRUSTe "seal of approval" on their Web sites. The idea behind the seal, which many describe as the online equivalent of the "Good Housekeeping Seal of Approval," is to allay users' fears about privacy problems.

DRAFTING A PRIVACY POLICY

Online privacy guidelines generally recommend that businesses post notices on their Web sites about the type of information being collected, how it will be used, and the parties to whom it will be disclosed. Other recommendations include allowing Web site visitors to access and correct or remove personal information and giving visitors an "opt-in" or "opt-out" choice. For example, if a user selects an "opt-out" policy, the personal data collected from that user would be kept private.

In the last several years, the Federal Trade Commission (FTC) has developed privacy standards that can serve as guidelines. An online business that includes these standards in its Web site privacy policies—and makes sure that they are enforced—will be in a better position to defend its policy should consumers complain about the site's practices to the FTC. The FTC standards are incorporated in the following checklist.

CHECKLIST FOR A WEB SITE PRIVACY POLICY

1. Include on your Web site a notice of your privacy policy.
2. Give consumers a choice (such as opt-in or opt-out) with respect to any information collected.
3. Outline the safeguards that you will employ to secure all consumer data.

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4. Let consumers know that they can correct and update any personal information collected by your business.

5. State that parental consent is required if a child is involved.

6. Create a mechanism to enforce the policy.

TEACHING SUGGESTIONS

1. The concept of federalism is basic to students' understanding of the authority of the federal and state governments to regulate business. The Constitution has a significantly different impact on the regulation of business by the federal government that it does on the regulation of business by state governments. Emphasize that the federal government was *granted* specific powers by the states in the Constitution while the states *retained* the police power.

2. The commerce clause has become a very broad source of power for the federal government. It also restricts the power of the states to regulate activities that result in an undue burden on interstate commerce. Determining what constitutes an undue burden can be difficult. A court balances the benefit that the state derives from its regulation against the burden it imposes on commerce. The requirements for a valid state regulation under the commerce clause are (1) that it serve a legitimate end and (2) that its purpose cannot be accomplished as well by less discriminatory means.

To illustrate the balance, use a hypothetical involving a statute designed to protect natural resources. (Explain that this is an area traditionally left open to state regulation; that is, it is not considered preempted by a federal scheme of regulation.) For example, imagine a statute banning the importation of baitfish. The ban is a burden on interstate commerce, but the statute's concern is to protect the state's fish from nonnative predators and parasites, and there is no satisfactory way to inspect imported baitfish for parasites. This statute would likely be upheld as legitimate.

3. It might be explained to your students that constitutional law is concerned primarily with the exercise of judicial review. The emphasis is on the way that the courts in general, and the United States Supreme Court in particular, interpret provisions of the Constitution. *Stare decisis* does not have as much impact in constitutional law as in other areas of the law. In this area, the courts are not reluctant to overrule statutes, regulations, precedential case law, or other law.

Cyberlaw Link

Ask your students to consider the following issue. In most circumstances, it is not constitutional for the government to open private mail. ***Why is it then sometimes considered legal for the government to open e-mail between consenting adults?***

DISCUSSION QUESTIONS

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1. ***What is the basic structure of the American national government?*** The basic structure of the American government is federal—a form of government in which states form a union and power is shared with a central authority. The United States Constitution sets out the structure, powers, and limits of the government.

2. ***What is the national government's relation to the states?*** The relationship between the national and state governments is a partnership. Neither is superior to the other except as the Constitution provides. When conflicts arise as to which government should be exercising power in a particular area, the United States Supreme Court decides which governmental system is empowered to act under the Constitution.

3. ***What is the doctrine of separation of powers and what is its purpose?*** Each of the three governmental branches—executive, legislative, and judicial—performs a separate function. Each branch has some power to limit the actions of the others. This system of checks and balances prevents any branch from becoming too powerful.

4. ***What is the conflict between the states' police power and the commerce clause?*** The term *police power* refers to the inherent right of the states to regulate private activities within their own borders to protect or promote the public order, health, safety, morals, and general welfare. When state regulation encroaches on interstate commerce—which Congress regulates under the commerce clause—the state's interest in the merits and purposes of the regulation must be balanced against the burden placed on interstate commerce.

5. ***What is preemption?*** Preemption occurs when Congress chooses to act exclusively in an area of concurrent federal and state powers, and a valid federal law will override a conflicting state or local law on the same general subject. Generally, if a federal law is so pervasive, comprehensive, or detailed that the states have no room to supplement it, the federal law will be held to have preempted the area. When a federal statute creates an agency to enforce the law, matters within the agency's jurisdiction will likely preempt state law.

6. ***What is the distinction between the degrees of regulation that may be imposed on commercial and noncommercial speech?*** Commercial speech is not as protected as noncommercial speech. Even if commercial speech concerns a lawful activity and is not misleading, a restriction on it will generally be considered valid as long as the restriction (1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) goes no further than necessary to accomplish its objective. As for noncommercial speech, the government cannot choose what are and what are not proper subjects.

7. ***Should the First Amendment protect all speech?*** One argument in support of this suggestion is that all views could then be fully expressed, and subject to reasoned consideration, in the "marketplace of ideas" without the chilling effect of legal sanctions. One argument against this suggestion is exemplified by the yelling of "Fire!" in a crowded theater: there are statements that are too inflammatory to be allowed unfettered expression.

8. ***What does it mean that under the establishment clause the government cannot establish any religion or prohibit the free exercise of religious practices?*** Federal or state regulation that does not promote, or place a significant burden on, religion is constitutional even if it has some impact on religion. The clause mandates accommodation of all religions and forbids hostility toward any.

9. ***Would a state law imposing a fifteen-year term of imprisonment without allowing a trial on all businesspersons who appear in their own television commercials be a violation of substantive due process? Would it violate procedural due process?*** Yes, the law would violate both types of due process. The law would be unconstitutional on substantive due process grounds, because it abridges freedom of speech. The law would be unconstitutional on procedural due process grounds, because it imposes a penalty without giving an accused a chance to defend his or her actions.

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10. ***What are the tests used to determine whether a law comports with the equal protection clause?*** Equal protection means that the government must treat similarly situated individuals in a similar manner. Equal protection requires review of the substance of a law or other government action instead of the procedures used. If the law distinguishes between or among individuals, the basis for the distinction is examined. If the law inhibits some persons' exercise of a *fundamental right* or if the classification is based on race, national origin, or citizenship status, the classification must be necessary to promote a *compelling* interest. In matters of economic or social welfare, a classification will be upheld if there is any *rational* basis on which it might relate to any *legitimate* government interest. Laws using classifications that discriminate on the basis of gender or legitimacy must be *substantially related* to *important* government objectives. When a law or action limits the liberty of all persons, it may violate substantive due process; when a law or action limits the liberty of some persons, it may violate the equal protection clause.

ACTIVITY AND RESEARCH ASSIGNMENTS

1. Have students look through the local newspaper for current stories about proposed laws. Ask them where the government would find the authority within the Constitution to adopt a specific law under consideration.

2. ***Would the ten amendments in the Bill of Rights be part of the Constitution if it were introduced today?*** Have students phrase the Bill of Rights in more contemporary language and poll their friends, neighbors, and relatives as to whether they would support such amendments to the Constitution. ***If not, what rights might they be willing to guarantee?***

EXPLANATIONS OF SELECTED FOOTNOTES IN THE TEXT

Footnote 3: The regulation in ***Wickard v. Filburn*** involved a marketing quota. The United States Supreme Court upheld the regulation even though it would be difficult for the farmer alone to affect interstate commerce. Total supply of wheat clearly affects market price, as does current demand for the product. The marketing quotas were designed to control the price of wheat. If many farmers raised wheat for home consumption, they would affect both the supply for interstate commerce and the demand for the product. The Court deferred to congressional judgment concerning economic effects and the relationship between local activities and interstate commerce. This was a return to the broad view of the commerce power that John Marshall had defined in *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).

Footnote 14: At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a banner conveying a message that she regarded as promoting illegal drug use. Consistent with school policy, which prohibited such messages at school events, the principal told the students to take down the banner. One student refused. The principal confiscated the banner and suspended the student. The student filed a suit in a federal district court against the principal and others, alleging a violation of his rights under the U.S. Constitution. The court issued a judgment in the defendants' favor. On the student's appeal, the U.S. Court of Appeals for the Ninth Circuit reversed. The defendants appealed. In ***Morse v. Frederick,*** the United States Supreme Court reversed the lower court's judgment and remanded the case. The Supreme Court viewed this set of facts as a "school speech case." The Court acknowledged that the message on Frederick's banner was "cryptic," but interpreted it as advocating the use of illegal drugs. Congress requires schools to teach students that this use is "wrong and harmful." Thus it was reasonable for the principal in this case to order the banner struck.

Did—or should—the Court rule that Frederick's speech can be proscribed because it is "plainly offensive"? The petitioners (Morse and the school board) argued for this rule. The Court, however, stated, "We think

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this stretches [previous case law] too far; that case [law] should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use."

Footnote 25: Mount Soledad is in San Diego, California. There has been a forty-foot cross atop the peak since 1913. Since the 1990s, a war memorial has surrounded the cross. The site was privately owned until 2006 when the federal government acquired it to preserve the war memorial. Steve Trunk and others filed a suit in a federal district court against San Diego, claiming a violation of the establishment clause. The court determined that the government acted with a secular purpose and the memorial did not advance religion, and issued a summary judgment in its favor. The plaintiffs appealed. In ***Trunk v. City of San Diego,*** the U.S. Court of Appeals for the Ninth Circuit reversed and remanded. The government's purpose may have been nonreligious, but the memorial can be perceived as endorsing Christianity. Not all crosses at war memorials violate the Constitution. The context and setting must be examined. This cross physically dominates its site, was originally dedicated to religious purposes, and had a long history of religious use. From a distance, the cross was the only visible element. The court reasoned that "the use of a distinctively Christian symbol to honor all veterans sends a strong message of endorsement and exclusion."

If the forty-foot cross were replaced with a smaller, less visible symbol of the Christian religion and the symbols of other religions were added to the display, does it seem likely that any parties would object? Yes. Those who are offended by the association of any religion with their state would likely object to the inclusion of any religious symbols. And there are those who might object to the inclusion of symbols for religions other than their own—Christians who take offense at Wiccan symbols, Muslims who protest Stars of David, and so on. These objections are among the reasons that some would argue the Constitution's proscriptions on a mix of government and religion should be honored to the fullest.

If the cross in this case had been only six feet tall and had not had a long history of religious use, would the outcome of this case have been different? Why or why not? A main reason that the court in this case found an establishment clause violation was because the cross was so large that it physically dominated the entire memorial site. The government could not avoid the appearance of promoting Christianity because the religious elements of the memorial overshadowed the nonreligious elements. In addition, the cross had a long history of religious use by the community. The court's decision might well have been different if the cross had not dominated the landscape and the memorial, and had not had a history of religious use.

Can a religious display that is located on private property violate the establishment clause? Explain. Probably not. Individuals can erect religious displays on their own private property without constitutional implications. It makes sense that the only way the government can be accused of sponsoring or endorsing religion is for the display in question to appear on public property.

Should religious displays on public property be held to violate the establishment clause? It might be argued that if a religious symbol is only one part of a larger display that features secular symbols, such as reindeer and candy canes in a winter holiday display, the display of the religious symbol does not violate the establishment clause. The symbols' acceptability may depend on such factors as size, number, and how close the symbols are to each other.

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C.A.6 (Ohio),2009.
Gunasekera v. Irwin
551 F.3d 461, 240 Ed. Law Rep. 43
United States Court of Appeals,
Sixth Circuit.
Jay S. **GUNASEKERA**, Plaintiff-Appellant,
v.
Dennis **IRWIN** and Kathy Krendl, Defendants-Appellees.
No. 07-4303.
Argued: Sept. 19, 2008.
Decided and Filed: Jan. 8, 2009.
KAREN NELSON MOORE, Circuit Judge.
Jay S. Gunasekera ("Gunasekera") appeals the District Court's grant of dismissal under Federal Rule of Civil Procedure 12(b)(6) to Dennis Irwin and Kathy Krendl ("Irwin" and "Krendl"), of his 42 U.S.C. § 1983 claims that Irwin and Krendl deprived him of his property and liberty in violation of the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1, cl. 3. On appeal, Gunasekera argues that this dismissal should be reversed because: (1) the name-clearing hearing he was offered was not public and was therefore inadequate; (2) he has a property interest in his Graduate Faculty status and was denied notice and an opportunity***464** to be heard when that status was suspended; and (3) any determination of whether his constitutional rights were clearly established to defeat the defendants' qualified immunity defense must wait until a factual record has been developed.
We hold that Gunasekera has made an adequate allegation that he was not offered a sufficient name-clearing hearing to protect his liberty interest and that he was deprived of his property interest in his Graduate Faculty status without the required notice and opportunity to be heard to withstand dismissal pursuant to Rule 12(b)(6). Accordingly, we **REVERSE** the district court's judgment granting the dismissal of Gunasekera's property-based claims. We **REVERSE** the district court's judgment that Gunasekera was not entitled to a public name-clearing hearing and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the district court's judgment granting the dismissal of Gunasekera's liberty-based claims seeking civil damages because we conclude that Irwin and Krendl have qualified immunity with respect to these liberty-based damages claims.

I. BACKGROUND

In 2004, Gunasekera was the Moss Professor of Mechanical Engineering at the Russ College of Engineering and Technology of Ohio University ("Russ College") and had been Chair of the Department of Mechanical Engineering for fifteen years. He had worked at Ohio University ("the University") for more than two decades and had Graduate Faculty status at Russ College which enabled him to supervise graduate students' thesis work. That year, a student alleged widespread plagiarism in mechanical-engineering graduate-student theses. Two internal investigations uncovered plagiarism in collateral areas rather than in the analysis or conclusions. Following these probes, Krendl, the Provost of Ohio University, instructed Irwin, the Dean of Russ College, to take further action. In response, Irwin asked an administrator and a retired faculty member to investigate the alleged plagiarism. These men prepared a report known as the Meyer/Bloemer Report and submitted it to Irwin and Krendl on May 30, 2006.
On May 31, 2006, Krendl held a press conference to publicize the Meyer/Bloemer Report. As the district court explained, the report found "rampant and flagrant plagiarism in theses" and "singled out three faculty members, including Dr. Gunasekera, for ignoring their ethical responsibilities and contributing to an atmosphere of negligence toward issues of academic misconduct." *Gunasekera v. Irwin*, 517 F.Supp.2d 999, 1002 (S.D.Ohio 2007). In response to this report, the University suspended Gunasekera's Graduate Faculty status for three years and prohibited him from advising graduate students.
On August 28, 2006, Gunasekera filed this lawsuit in the United States District Court for the Southern District of Ohio. Suing under 42 U.S.C. § 1983, Gunasekera sought "compensatory and punitive damages, declaratory, equitable, and injunctive relief, and attorneys' fees and costs" from Irwin and Krendl for depriving him of his "property and/or liberty interests in violation of the Due Process Clause of the Fourteenth Amendment." Joint Appendix ("J.A.") at 1 (Compl.¶ 1). Gunasekera made two claims: (1) that Irwin violated his due-process rights when Irwin deprived him of his property interest in his Graduate Faculty status by suspending him without "notice and a mean-

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ingful opportunity to be heard," *id.;* and (2) that Irwin and Krendl deprived him of his liberty***465** in violation of his due-process rights when "they publicized accusations about his role in plagiarism by his graduate student advisees" without providing him with a "meaningful opportunity to clear his name." J.A. at 2 (Compl.¶ 1).
On October 23, 2006, Irwin and Krendl filed a motion to dismiss pursuant to Rule 12(b)(6). This motion presented four possible bases for dismissal: (1) Gunasekera had waived his federal cause of action by filing a defamation suit in state court; (2) Irwin and Krendl have absolute official immunity and qualified immunity in their individual capacities; (3) Gunasekera does not have a protected property interest; and (4) Gunasekera's liberty interest claim fails because he was "offered but rejected a name-clearing hearing." Mot. to Dismiss at 3.
On September 26, 2007, the district court granted Irwin and Krendl's motion to dismiss. The district court made four findings. The first two, which have not been raised on this appeal, are: (1) "sovereign immunity bars all but [Gunasekera's] claim for prospective equitable relief against [Irwin and Krendl] in their official capacities and [Gunasekera's] § 1983 claims for money damages against Defendants in the[ir] individual capacities, excluding back pay and fringe benefits,"; and (2) Gunasekera "did not waive his § 1983 claims against [Irwin and Krendl] by filing a defamation [suit] against the state in the Court of Claims" because the claims did not arise from the same act or omission. *Gunasekera,* 517 F.Supp.2d at 1005-06.
The district court's third holding concerned qualified immunity. The district court determined that because Gunasekera did not have a property interest in his Graduate Faculty status, there had been no constitutional violation, and Irwin and Krendl were entitled to dismissal based on qualified immunity. The district court next held that "[e]ven assuming, arguendo, that [Gunasekera] has been deprived of a liberty interest, due process does not entitle him to a hearing beyond what [Irwin and Krendl] already offered." *Id.* at 1013. After finding that Irwin and Krendl had provided sufficient process, the district court determined that there was no constitutional violation and granted them dismissal based on qualified immunity. Having concluded that Gunasekera had no property interest in Graduate Faculty status and that he had been offered sufficient process in connection with any liberty interest, the district court also dismissed Gunasekera's remaining claims for equitable relief.

On appeal Gunasekera raises three issues: (1) the offered name-clearing hearing was insufficient to satisfy due process because it was not public; (2) he has a property interest in his Graduate Faculty status and was deprived of that interest without due process; (3) the district court erred in determining whether a constitutional violation was clearly established for purposes of qualified immunity before a factual record had been developed.

In their response, Irwin and Krendl argue that Gunasekera was not entitled to, but was offered in any event, a public name-clearing hearing. They assert that the district court was correct in finding that Gunasekera had no property interest in his Graduate Faculty status. Finally, they state that because Gunasekera cannot establish a constitutional violation, they are entitled to qualified immunity.

II. ANALYSIS

A. Standard of Review

We review de novo a district court's ***466** grant of a motion to dismiss. [FN1] *Winget v. JP Morgan Chase Bank, N.A.,* 537 F.3d 565, 572 (6th Cir.2008). In *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007), the Supreme Court stated that in order to survive a Rule 12(b)(6) motion, the nonmoving party must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.... Factual allegations must be enough to raise a right to relief above the speculative level." Weeks later, the Supreme Court cited *Twombly* in support of the well-established principle that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Erickson v. Pardus,* 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007) (quoting *Twombly,* 127 S.Ct. at 1964). "We read the *Twombly* and *Erickson* decisions in conjunction with one an-

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other when reviewing a district court's decision to grant a motion to dismiss for failure to state a claim." *Sensations, Inc. v. City of Grand Rapids,* 526 F.3d 291, 295-96 (6th Cir.2008). Courts in and out of the Sixth Circuit have identified uncertainty regarding the scope of *Twombly* and have indicated that its holding is likely limited to expensive, complicated litigation like that considered in *Twombly. Id.* at 296 n. 1 (citing cases raising this uncertainty in the Sixth and Second Circuits); *U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.,* 532 F.3d 496, 503 n. 6 (6th Cir.2008) (" *Twombly* itself suggests that its holding may be limited to cases likely to produce "sprawling, costly, and hugely time-consuming" litigation." (quoting *Twombly,* 127 S.Ct. at 1973 n. 6)).

> FN1. Irwin and Krendl appended outside materials to their motion to dismiss and asked that it be converted into a motion for summary judgment. *See* Fed.R.Civ.P. 12(d), 56. In his response, Gunasekera discussed the standards for summary judgment and for a motion to dismiss. He attached materials to his response. He also included a footnote stating that if the district court converted Irwin and Krendl's motion to dismiss into a Rule 56 motion for summary judgment, he would demand discovery under Federal Rule of Civil Procedure 56(f). The district court opinion does not mention this issue and appears to apply the Rule 12(b)(6) standard without explicitly rejecting the outside materials.
>
> > In the context of Rule 12(c)'s identical conversion language, we have held that once outside materials have been presented, the district court need not "further consider or rely upon these outside matters before the obligation to convert is triggered; the plain language of Rule 12(c) does not require these additional steps; it only requires the presentation of matters outside the pleadings and the district court's failure to exclude such matters." *Max Arnold & Sons, LLC v. W.L. Hailey & Co.,* 452 F.3d 494, 503 (6th Cir.2006). In this case, however, we cannot convert Irwin and Krendl's Rule 12(b)(6) motion into a motion for summary judgment because Gunasekera was not afforded the opportunity to obtain discovery under Rule 56(f) as he requested. *See* J.A. at 26 (Resp. to Mot. to Dismiss at 4 n. 1). Additionally, neither party appeals this issue, so the Rule 12(b)(6) standard outlined above is applicable in this case.
> >
> > Because this case is before us on a Rule 12(b)(6) motion, we will not consider or discuss any of the outside materials attached by either party.

When we review a district court's decision to grant a Rule 12(b)(6) motion, "[w]e accept all the Plaintiffs' factual allegations as true and construe the complaint in the light most favorable to the Plaintiffs." *Hill v. Blue Cross & Blue Shield of Mich.,* 409 F.3d 710, 716 (6th Cir.2005); *see also Erickson,* 127 S.Ct. at 2200 ("[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint."). ***467** Accordingly, here we assume that the facts are as Gunasekera alleged in his complaint.

B. Due-Process Property Claim

[1] To prevail on the claim that he was unconstitutionally deprived of his property when his Graduate Faculty status was suspended, Gunasekera must " 'establish three elements; (1) that [he] ha[s] a life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment ..., (2) that [he] w[as] deprived of this protected interest within the meaning of the Due Process Clause, and (3) that the state did not afford [him] adequate procedural rights prior to depriving [him] of [his] protected interest.' " *Med Corp. v. City of Lima,* 296 F.3d 404, 409 (6th Cir.2002) (quoting *Hahn v. Star Bank,* 190 F.3d 708, 716 (6th Cir.1999), *cert. denied,* 529 U.S. 1020, 120 S.Ct. 1423, 146 L.Ed.2d 314 (2000)).

[2] Gunasekera has alleged that he has a property interest in his Graduate Faculty status protected by the Due Process Clause. On appeal, Gunasekera argues that his "property interest arises from a combination of *Kentucky Department of Corrections v. Thompson,* 490 U.S. 454, 463, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989), where rules es-

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tablished 'specific substantive predicates to limit discretion,' with *Perry v. Sindermann,* 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), where 'mutually explicit understandings' created a property interest." Gunasekera Br. at 28. He alleges that Graduate Faculty status is "a right intrinsic" that a professor maintains so long as he or she satisfies the four criteria the University requires of its Graduate Faculty. [FN2] *Id.* He argues that because these criteria limit the University's discretion to name Graduate Faculty and because "[i]n actual practice ... professors retain their appointment so long as they satisfy those criteria," he has a property interest in his Graduate Faculty status. *Id.*

> FN2. As presented in Gunasekera's complaint, these criteria are:
>
> a. Ph.D. in an appropriate engineering field or related area;
>
> b. Group I faculty status at Ohio University;
>
> c. having taught at least one year of advanced undergraduate or graduate-level courses within the five years immediately preceding nomination for appointment; and
>
> d. having demonstrated currency in the nominee's field of specialization through publication of at least five technical/professional journal or refereed conference papers, textbooks, or monographs within the five years immediately preceding nomination for appointment; or having served as Principle [sic] or Co-Principle [sic] investigator on externally funded activities.
>
> J.A. at 9 (Compl.¶ 43). The district court stated, and Irwin and Krendl did not dispute, that Gunasekera "currently meets the criteria, as he did at the time of his suspension." *Id.*

Gunasekera suggests that, per University custom, professors enjoy Graduate Faculty status so long as they meet the four criteria. J.A. at 9-10, 13 (Compl.¶¶ 43-46, 68). In the context of university employment, the Supreme Court has held that "rules and understandings, promulgated and fostered by state officials" can form the foundation of a protected property interest. *Perry,* 408 U.S. at 602-03, 92 S.Ct. 2694. Similarly, we have held that an employer's custom and practice can form the basis for a protected property interest. *Christian v. Belcher,* 888 F.2d 410, 417 (6th Cir.1989). The district court rejected Gunasekera's custom-based argument on the grounds that *Perry* involved university guidelines that explicitly restrained discretion, unlike the criteria for Graduate Faculty status. *See Town of Castle Rock v. Gonzales,* 545 U.S. 748, 756, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) ("[A] benefit ***468** is not a protected entitlement if government officials may grant or deny it in their discretion."); *see also Richardson v. Twp. of Brady,* 218 F.3d 508, 517 (6th Cir.2000) ("[Plaintiff] can have no legitimate claim of entitlement to a discretionary decision."). However, as in *Perry,* Gunasekera's argument does not turn on the language of the regulations, but rather on his ability to show that a common practice and understanding had developed which gave him a legitimate claim to Graduate Faculty status so long as he met the stated conditions. At oral argument, the University admitted that there is no precedent regarding when Graduate Faculty status is retained, because it has never been revoked or suspended. Viewing the allegations in the complaint in the light most favorable to Gunasekera, we believe that he has alleged that University custom gives him a property interest in his Graduate Faculty status. *See Bell Atl. Corp. v. Twombly,* 127 S.Ct. at 1968-69; *Christian,* 888 F.2d at 417 (holding that "custom and practice" could give an employee a protected property interest where there were allegations that the employer had never terminated an employee in violation of this custom).

In dismissing Gunasekera's property-interest claim, the district court asserted that any losses Gunasekera suffered were incidental to his suspension and that his suspension did not alter his employment enough to make Graduate Faculty status a property interest. The district court cited *Jackson v. City of Columbus,* 194 F.3d 737 (6th Cir.1999), a case in which this court held that there was no deprivation of property when a city suspended its police chief with

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pay while it investigated allegations of misconduct. However, *Jackson* held that the police chief had not been deprived of a property interest because he "was neither terminated *nor lost any pay or benefits.*" *Id.* at 749 (emphasis added). Gunasekera's complaint alleges that he lost both pay (including "a summer salary research stipend that complements annual salary" for Graduate Faculty) and benefits (such as a reduced teaching load). J.A. at 10 (Compl.¶¶ 49-50); *see Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 310 (4th Cir.2006) (finding an unwanted job transfer to be "a significant demotion to a position outside [plaintiff's] chosen field ... tantamount to an outright discharge"); *Newman v. Commonwealth*, 884 F.2d 19, 25 n. 6 (1st Cir.1989) ("In this case, plaintiff was barred from voting on degrees and from serving on important university committees or as chair of her department. A letter of censure for an act of 'objective plagiarism' and 'seriously negligent scholarship' was placed in her permanent file, an action that undoubtedly affects her ability to secure other employment in the future. *We think it obvious that this severe sanction substantially damaged plaintiff's property interest in her position*." (emphasis added)). Viewing the allegations in the complaint the light most favorable to Gunasekera, we believe that his extensive documentation of the ways in which this suspension affects his career suffices to allege that his suspension is a deprivation of property. J.A. at 10-12 (Compl.¶¶ 47-66).

[3] To survive this motion to dismiss, Gunasekera must also allege that Irwin and Krendl deprived him of his property interest without due process. Gunasekera asserts that he was not given notice or an opportunity to be heard regarding "his satisfaction of the criteria for appointment to Graduate Faculty status" before or after his suspension. J.A. at 8-9 (Compl.¶¶ 38-39); *see Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir.2005) ("Notice and *an opportunity to be heard* remain the most basic requirements of due process." (emphasis added)). At oral argument, Irwin and Krendl's lawyer conceded that ***469** Gunasekera had not been offered either a pre-or a post-deprivation hearing. "[W]e have held that prior to termination of a public employee who has a property interest in his employment, the due process clause requires that the employee be given 'oral or written notice of the charges against him or her, an explanation of the employer's evidence, and an opportunity to present his or her side of the story to the employer.' " *Farhat v. Jopke*, 370 F.3d 580, 595 (6th Cir.2004) (quoting *Buckner v. City of Highland Park*, 901 F.2d 491, 494 (6th Cir.), *cert. denied*, 498 U.S. 848, 111 S.Ct. 137, 112 L.Ed.2d 104 (1990)). Because Gunasekera asserts that he was never given any opportunity to be heard either before or after he was deprived of his property interest in his Graduate Faculty status, the district court's dismissal of Gunasekera's property-interest claim must be reversed.

C. Due-Process Liberty Claim

[4] Gunasekera also appeals the dismissal of his claim that Irwin and Krendl deprived him of his liberty without due process of law. In order to prevail at the Rule 12(b)(6) stage, Gunasekera must allege that he had a protected liberty interest and that he was deprived of this interest without due process of law. The first part of this test is not at issue, as on appeal Irwin and Krendl concede that Gunasekera "possesses a protected liberty interest." Irwin & Krendl Br. at 4. Given this concession, we do not need to apply our five-factor test used to decide whether someone is entitled to a name-clearing hearing due to a deprivation of his or her liberty interest. [FN3] *See Quinn v. Shirey*, 293 F.3d 315, 320 (6th Cir.) (describing five factor test), *cert. denied*, 537 U.S. 1019, 123 S.Ct. 538, 154 L.Ed.2d 426 (2002). The fact that Gunasekera requested a name-clearing hearing as required by this circuit is not contested. *Id.* at 322. The dispute boils down to what process is due and whether such a hearing must be public.[FN4]

> FN3. Even if Irwin and Krendl had contested the district court's assumption that Gunasekera has a liberty interest, Gunasekera has sufficiently alleged a protected liberty interest. The accusations regarding plagiarism were connected to his suspension (and as discussed above, Gunasekera's suspension deprived him of benefits and pay); the University alleged more than simple incompetence; the allegations were public; Gunasekera claims that the statements were false; and the University called a press conference to publicize its charges. *See Quinn v. Shirey*, 293 F.3d 315, 320 (6th Cir.2002).
>
> FN4. There is some dispute as to whether the hearing offered by the University was public or not. The Uni-

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versity asserted, and the district court agreed, that the proposed hearing was public because Gunasekera would have been allowed to bring anyone, including members of the press, to his hearing. *Gunasekera,* 517 F.Supp.2d at 1014 & n. 9. Gunasekera counters that the hearing offered was not public because the University specifically denied his request for a hearing publicized in the same way the Meyer/Bloemer report had been. *Id.* However, this dispute is contained in documents outside the pleadings which we cannot properly consider on a Rule 12(b)(6) motion. Taking the allegations in the complaint in the light most favorable to Gunasekera, we assume that he was not offered a public opportunity to clear his name.

[5] We have held that "a name-clearing hearing need only provide an opportunity to clear one's name and need not comply with formal procedures to be valid." *Chilingirian v. Boris,* 882 F.2d 200, 206 (6th Cir.1989); *see also Feterle v. Chowdhury,* 148 Fed.Appx. 524, 531-32 (6th Cir.2005) (unpublished opinion). However, we have yet to address whether a name-clearing hearing must include a *public* opportunity clear one's name. [FN5]

FN5. In *Flaim,* we held that a university disciplinary hearing need not be public. 418 F.3d at 635. Although both *Flaim* and this case involve universities, a disciplinary hearing is very different from a name-clearing hearing. A name-clearing hearing is not a venue for an employer to determine the proper punishment, but rather an opportunity for an individual to confront a public stigma that has already been imposed by an employer. However, as we discuss below, the concerns cited in *Flaim* may shape the nature of the publicity required in connection with a name-clearing hearing.

***470** [6] To decide whether due process demands a public name-clearing opportunity, we apply the standard set by the Supreme Court in *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). This three-part balancing test requires us to consider the following elements: "(1) the nature of the private interest affected-that is, the seriousness of the charge and potential sanctions, (2) the danger of error and the benefit of additional or alternate procedures, and (3) the public or governmental burden were additional procedures mandated." *Flaim,* 418 F.3d at 635 (describing test instituted by Supreme Court in *Mathews*). Considering the first prong of this test, we believe that it is clear that where, as here, the employer has inflicted a public stigma on an employee, the only way that an employee can clear his name of the public stigma is through publicity. The injury of which Gunasekera complains is the fact that he was publicly associated with and perhaps partially blamed for a plagiarism scandal. As to the second prong of *Mathews,* publicity adds a significant benefit to the hearing, and without publicity the hearing cannot perform its name-clearing function. A name-clearing hearing with no public component would not address this harm because it would not alert members of the public who read the first report that Gunasekera challenged the allegations. Similarly, if Gunasekera's name was cleared at an unpublicized hearing, members of the public who had seen only the stories accusing him would not know that this stigma was undeserved. The Second Circuit has held that an unpublicized, internal name-clearing hearing was insufficient because of the "substantial risk that the stigma against plaintiff would remain after such hearing." *Patterson v. City of Utica,* 370 F.3d 322, 337 (2nd Cir.2004). Following this conclusion, the Second Circuit held that: "Requiring the [employer] to address such risk by offering plaintiff the opportunity to publicly refute the charges made against him or publicising his refutations itself, does not place an undue burden upon the government's interest in terminating [employees] who either are not performing to expected standards or are behaving in an unacceptable fashion." *Id.* We agree with the Second Circuit that requiring that name-clearing hearings involve some form of publicity would not necessarily put an undue burden on the government.

[7] In order to determine what the name-clearing hearing should entail and what its limits might be in each case, courts should again turn to the *Mathews* balancing test described above. By applying this test to the facts of the case before it, a court can tailor a name-clearing hearing which allows the employee to challenge directly any public stigma while also accounting for any legitimate concerns of the employer. In this case, Gunasekera has a strong interest in his academic reputation. Requiring that a name-clearing hearing include a public component may be the only way to make such a hearing effective. If a name-clearing hearing has no public component, it may not be able

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to serve its function of curing the public stigma that necessitated the hearing. With respect to the third prong, government interests will shape the nature of the publicity required. ***471** For example, privacy concerns within the university setting might dictate the form of the publicity. *Cf. Flaim,* 418 F.3d at 637 n. 2 (noting that the publicity attending a "full-dress judicial hearing" "might be detrimental to the college's educational atmosphere"). Though we have few facts before us on this Rule 12(b)(6) motion, we observe that it is possible that concerns for the privacy of students implicated in plagiarism would impact the precise nature of the publicity required.

We hold that Gunasekera has sufficiently alleged that he was deprived of a protected liberty interest without due process of law to withstand this Rule 12(b)(6) motion. In order to satisfy due process, the university is required to offer Gunasekera a name-clearing hearing that is adequately publicized to address the stigma the university inflicted on him. The exact nature of that publicity depends on a fact-intensive review of the circumstances attending his case, and we leave to the district court the initial determination regarding the exact parameters of the name-clearing hearing due to Gunasekera.

D. Qualified Immunity

[8] Qualified immunity is an affirmative defense that will protect a state official sued in his individual capacity from damages liability when two questions have been answered: (1) "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"; and (2) if the answer to the first question is yes, we must decide whether the violated right was "clearly established." *Saucier v. Katz,* 533 U.S. 194, 200-01, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

[9] Taking the allegations contained in the complaint in the light most favorable to Gunasekera, we conclude that Irwin and Krendl would not be shielded by qualified immunity. Gunasekera, a long-time faculty member, alleges that he had his important Graduate Faculty status revoked, an action that Gunasekera asserts the University had not taken before, without any pre-or post-termination notice and opportunity to be heard. J.A. at 8-10 (Compl.¶¶ 38-39, 46). The revocation of this status deprived him of pay and benefits, also without notice and opportunity to be heard. These basic due-process requirements are clearly established, and Irwin and Krendl reasonably should have known that Gunasekera was due at least some process in connection with his suspension. *See, e.g., Flaim,* 418 F.3d at 635 ("Notice and an opportunity to be heard remain the most basic requirements of due process."). Because Gunasekera received no process, Irwin and Krendl are not protected by qualified immunity at this phase of the proceedings.

[10] Taking the allegations in the complaint in the light most favorable to Gunasekera, we conclude that qualified immunity does shield Irwin and Krendl from damages based on Gunasekera's liberty-interest claim. Our holding that a name-clearing hearing may require publicity in some circumstances was not clearly established law at the time that Irwin and Krendl acted. However, because qualified immunity does not bar injunctive relief, Gunasekera may proceed with respect to his request for a public name-clearing hearing as indicated above.

III. CONCLUSION

For the reasons discussed above, because Gunasekera has sufficiently alleged a property interest in his Graduate Faculty status which was deprived without due process of law, we **REVERSE** the district court's judgment granting the dismissal of Gunasekera's property-based claims. We ***472 REVERSE** the district court's judgment that Gunasekera was not entitled to a public name-clearing hearing and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the district court's judgment granting the dismissal of Gunasekera's liberty-based claims seeking civil damages because we conclude that Irwin and Krendl have qualified immunity with respect to these liberty-based damages claims.

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C.A.6 (Ohio),2011.
American Civil Liberties Union of Ohio Foundation, Inc. v. DeWeese
633 F.3d 424

United States Court of Appeals,
Sixth Circuit.
AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC., Plaintiff–Appellee,
v.
James DEWEESE, Defendant–Appellant.

No. 09–4256.
Argued: Dec. 1, 2010.
Decided and Filed: Feb. 2, 2011.
Rehearing and Rehearing En Banc Denied March 16, 2011.

Background: Civil liberties organization filed § 1983 action against state judge alleging that poster he hung in his courtroom violated Establishment Clauses of United States and Ohio Constitutions. The United States District Court for the Northern District of Ohio, Patricia A. Gaughan, J., entered summary judgment in organization's favor, and judge appealed.

Holdings: The Court of Appeals, Clay, Circuit Judge, held that:
(1) organization had standing to bring action;
(2) judge's display of poster in his state courtroom violated Establishment Clause; and
(3) poster was not private judicial speech protected by Free Speech Clause.

Affirmed.

West Headnotes

[1] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In general; injury or interest. Most Cited Cases

Federal Civil Procedure 170A 103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.3 k. Causation; redressability. Most Cited Cases

Standing to sue requires individual to demonstrate: (1) actual or threatened injury which is (2) fairly traceable to challenged action and (3) substantial likelihood that relief requested will redress or prevent plaintiff's injury.

[2] Associations 41 20(1)

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41 Associations
41k20 Actions by or Against Associations
41k20(1) k. In general. Most Cited Cases

Voluntary membership organization has standing to sue on behalf of its members when (1) its members otherwise have standing to sue in their own right; (2) interests it seeks to protect are germane to organization's purpose; and (3) neither claim asserted nor relief requested requires participation of individual members in lawsuit.

[3] Constitutional Law 92 825

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)8 Freedom of Religion and Conscience
92k825 k. In general. Most Cited Cases

In suits bought under Establishment Clause, direct and unwelcome contact with contested object demonstrates psychological injury in fact sufficient to confer standing. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 835

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)8 Freedom of Religion and Conscience
92k835 k. Government property and symbols in general. Most Cited Cases

Civil liberties organization had standing on behalf of its members to bring Establishment Clause challenge to poster hung in state courtroom entitled "Philosophies of Law in Conflict," containing version of Ten Commandments and religious comments; one of its members practiced law in county and frequently appeared in courthouse in regular course of his job, interest sought to be protected was germane to organization's purpose, and neither claims raised nor relief sought required participation of individual organization members. U.S.C.A. Const.Amend. 1.

[5] Federal Civil Procedure 170A 2467

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)1 In General
170Ak2465 Matters Affecting Right to Judgment
170Ak2467 k. Want of proper parties. Most Cited Cases

Federal Civil Procedure 170A 2543

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings

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170Ak2542 Evidence
170Ak2543 k. Presumptions. Most Cited Cases

Although party invoking federal jurisdiction bears burden of establishing elements of standing, to support standing at summary judgment stage plaintiff must only set forth by affidavit or other evidence specific facts, which for purposes of summary judgment motion will be taken as true.

[6] Constitutional Law 92 1296

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1294 Establishment of Religion
92k1296 k. Secular purpose. Most Cited Cases

In examining Establishment Clause challenge, government actor's stated reasons will generally get deference, but secular purpose required has to be genuine, not sham, and not merely secondary to religious objective. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 1295

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1294 Establishment of Religion
92k1295 k. In general. Most Cited Cases

In action alleging Establishment Clause violation, court must consider government's past violations of Establishment Clause when evaluating its present conduct. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 1381

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1373 Government Property
92k1381 k. Ten Commandments. Most Cited Cases

Courts 106 72

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k72 k. Courthouses and courtrooms. Most Cited Cases

State judge's display in his state courtroom of poster entitled “Philosophies of Law in Conflict,” which contained version of Ten Commandments and religious comments, violated Establishment Clause, despite judge's contention that poster was intended to express his views about two warring legal philosophies; judge had previously hung Ten Commandments poster in his courtroom, poster expressed judge's personal acknowledgment of “im-

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portance of Almighty God's fixed moral standards," and judge defined moral absolutes in accompanying pamphlet as standards of "the God of the Bible." U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 1768

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1768 k. Courthouses and courtrooms. Most Cited Cases

Courts 106 72

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k72 k. Courthouses and courtrooms. Most Cited Cases

State judge's hanging of poster in his courtroom was not private judicial speech protected by First Amendment's Free Speech Clause. U.S.C.A. Const.Amend. 1.

ARGUED: Francis J. Manion, American Center for Law and Justice, New Hope, Kentucky, for Appellant. Michael T. Honohan, Law Office, Rocky River, Ohio, for Appellee. **ON BRIEF:** Francis J. Manion, Geoffrey Richard Surtees, American Center for Law and Justice, New Hope, Kentucky, Edward Lawrence White, American Center for Law and Justice, Ann Arbor, Michigan, for Appellant. Michael T. Honohan, Law Office, Rocky River, Ohio, Carrie L. Davis, American Civil Liberties Union of Ohio, Cleveland, Ohio, for Appellee. Benjamin D. DuPre, Foundation for Moral Law, Montgomery, Alabama, for Amicus Curiae; Ayesha N. Khan and Alex J. Luchenitser, Americans United for Separation of Church and State, Washington, DC, for Amicus Curiae.

Before: SILER, CLAY, and GIBBONS, Circuit Judges.

OPINION

CLAY, Circuit Judge.

Defendant James DeWeese appeals from a judgment entered on October 6, 2009 by the United States District Court for the Northern District of Ohio. The district court granted Plaintiff American Civil Liberties Union of Ohio Foundation, Inc.'s summary judgment motion for declaratory and injunctive relief, holding that the poster Defendant hung in his Richland County, Ohio courtroom violated the Establishment Clauses of the United States and Ohio Constitutions. For the reasons stated below we **AFFIRM** the district court's judgment.

STATEMENT OF FACTS

In July of 2000, Defendant James DeWeese, a duly elected judge in the General Division of the Common Pleas Court in Richland County, Ohio, created and hung two posters in his courtroom, one of the Bill of Rights and one of the Ten Commandments. The American Civil Liberties Union ("ACLU") brought an action against Judge DeWeese in the United States District Court for the Northern District of Ohio seeking a declaration that the Ten Commandments poster violated the Establishment Clause, and requesting an injunction preventing Judge DeWeese from continuing to hang the poster in his courtroom. Both the district court and the United States Court of Appeals for the Sixth Circuit ruled in favor of the ACLU, declaring the hanging of the poster in the courtroom unconstitutional and enjoining Judge DeWeese from continuing to display it in his courtroom. *ACLU of Ohio v. Ashbrook*, 211 F.Supp.2d 873 (N.D.Ohio 2002); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir.2004). Judge DeWeese thereafter removed the Ten Commandments poster from his courtroom.

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In June 2006, Defendant created a second poster ("the poster") which he hung in his courtroom containing the Ten Commandments entitled "Philosophies of Law in Conflict." Immediately under the title on the poster are three numbered comments:

1. There is a conflict of legal and moral philosophies raging in the United States. That conflict is between moral relativism and moral absolutism. We are moving towards moral relativism.

2. All law is legislated morality. The only question is whose morality. Because morality is based on faith, there is no such thing as religious neutrality in law or morality.

3. Ultimately, there are only two views: Either God is the final authority, and we acknowledge His unchanging standards of behavior. Or man is the final authority, and standards of behavior change at the whim of individuals or societies. Here are examples.

(R. 17, Def. Opp'n to Mot. for Summ. J., Ex. A–3.)

Below these three comments are two columns covering the majority of the poster, one entitled "Moral Absolutes: The Ten Commandments," and the other entitled "Moral Relatives: Humanist Precepts." *Id.* Under the "Moral Absolutes" column are listed the following:

I am the LORD your God ...

I. You shall have no other gods before Me.

II. You shall not make for yourself an idol.

III. You shall not take the name of the LORD your God in vain.

IV. Remember the Sabbath day, to keep it holy.

V. Honor your father and your mother.

VI. You shall not murder.

VII. You shall not commit adultery.

VIII. You shall not steal.

IX. You shall not bear false witness against your neighbor.

X. You shall not covet anything that is your neighbor's.

Id. Under the second, "Moral Relatives," column, set up in opposition to the first, are listed seven statements:
I. The universe is self-existent and not created. Man is a product of cosmic accidents, and there is nothing higher than man. (Humanist Manifesto I)

II. Ethics depend on the person and the situation. Ethics need no religious or ideological justification. (Humanist

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Manifesto II)

III. There is no absolute truth. What's true for you may not be true for me. (Humanist John Dewey)

IV. The meaning of law evolves. "We are under a Constitution, but the Constitution is what the judges say it is." (U.S. Sup. Ct. Justice Chas. Hughes)

V. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life." (Planned Parenthood v. Casey)

IV. Personal autonomy is a higher good than responsibility to your neighbor or obedience to fixed moral duties. (Humanist Manifesto II)

VII. Quality-of-life decisions justify assisting the death of a fetus, defective infant, profoundly disabled or terminally ill person. (Princeton U. Prof. Peter Singer)

Id.

At the bottom of the poster, below the two columns, is a fourth comment by Defendant:

4. The cases passing through this courtroom demonstrate we are paying a high cost in increased crime and other social ills for moving from moral absolutism to moral relativism since the mid 20th century. Our Founders saw the necessity of moral absolutes. President John Adams said, "We have no government armed with power capable of contending with human passions unbridled by morality and religion. Our Constitution was made for a moral and religious people. It is wholly inadequate for the government of any other." The Declaration of Independence acknowledges God as Creator, Lawgiver, "Supreme Judge of the World," and the One who providentially superintends the affairs of men. Ohio's Constitution acknowledges Almighty God as the source of our freedom. I join the Founders in personally acknowledging the importance of Almighty God's fixed moral standards for restoring the moral fabric of this nation. Judge James DeWeese.

Id. Finally, in the lower right hand corner of the frame, readers are invited to obtain from the court receptionist a pamphlet further explaining Defendant's philosophy. *Id.*

In 2008 Plaintiff filed a motion to show cause against Defendant, arguing that Defendant violated the district court's order enjoining the first poster by displaying this poster. The district court, however, found that as the two posters were not identical, Defendant was not in contempt of the court's order to remove the previous poster. *ACLU v. DeWeese,* No. 08–2372, slip op. at 2 (N.D. Ohio Oct 8, 2009) (memorandum and order).

Plaintiff then filed a new suit against Defendant in the United States District Court for the Northern District of Ohio. Count One of Plaintiff's new suit was a claim for declaratory relief contending that Defendant's display of the poster violated the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. Count Two of Plaintiff's suit requested an injunction against Defendant's continued display of the poster. Count Three requested a declaration that Defendant's display of the poster violated the Ohio Constitution. *Id.* at 3.

The parties cross-moved for summary judgment, and the district court granted Plaintiff's summary judgment motion, and denied Defendant's motion. The district court found that Defendant's display of the poster in his courtroom violated the First and Fourteenth Amendments of the United States Constitution as well as the Ohio Constitution. The district court enjoined Defendant from continuing to display the poster in his courtroom. *Id.* at 23.

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Defendant appealed the district court's decision.

DISCUSSION

I. Standard of Review

We review the district court's award of summary judgment *de novo*. *Binay v. Bettendorf*, 601 F.3d 640, 646 (6th Cir.2010). The moving party is entitled to summary judgment "if the pleadings, the discovery and the disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a material issue of fact. "[A] party seeking summary judgment always bears the initial responsibility of informing the [court] of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

II. Standing

A. Analysis

[1][2] To sue in federal court a plaintiff must demonstrate that he or she has standing under Article III of the Constitution. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). "Standing to sue requires an individual to demonstrate (1) actual or threatened injury which is (2) fairly traceable to the challenged action and (3) a substantial likelihood the relief requested will redress or prevent the plaintiff's injury." *ACLU v. Ashbrook*, 375 F.3d 484, 489 (6th Cir.2004). *See also Steel Co.*, 523 U.S. at 103, 118 S.Ct. 1003. Moreover, the ACLU, as a "voluntary membership organization has standing to sue on behalf of its members when (a) its members otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit." *Id.* at 489 (internal citations omitted).

[3][4] In suits bought under the Establishment Clause, "direct and unwelcome" contact with the contested object demonstrates psychological injury in fact sufficient to confer standing. *Id.* at 489–90 (finding that plaintiff had sufficiently demonstrated standing to challenge Ten Commandments poster in defendant's courtroom when "ACLU–Ohio ... identified member Bernard Davis, a lawyer who travels to and must practice law within DeWeese's courtroom from time to time. There, Davis has and would continue to come into direct, unwelcome contact with the Ten Commandments display."); *Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 681–82 (6th Cir.1994) (holding that plaintiff had standing to challenge a portrait of Jesus in the hallway of his high school, even after graduation. As plaintiff "still visite[d] the school and will confront the portrait whenever he is in the hall ... plaintiff claime [d] that ... he continued to suffer actual injury."); *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir.2002) (holding that plaintiffs had standing to challenge a Ten Commandments display at the state capitol as plaintiffs "frequently travel to the State Capitol to engage in political advocacy for a variety of organizations and that they will endure direct and unwelcome contact with the Ten Commandments Monument.").[FN1] In this case, Plaintiff demonstrates injury through the affidavit of Bernard Davis, a member of the ACLU whose affidavit also supported the ACLU's standing in its prior case against Defendant. *Ashbrook*, 375 F.3d at 489–90. The Davis affidavit states that he is,

> FN1. In raising the issue of standing, Defendant argues that in *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), the Supreme Court held that psychological injury can never be the basis for Article III standing. (Br. of Appellant at 14.) This Court has consistently rejected this argument. *Ashbrook*, 375 F.3d at 489 n. 3 ("we do not take the Supreme Court's decision in *Valley Forge Christian College v. Americans United for the Separation of Church and State* to stand for the proposition that psychological injury can *never* be a sufficient basis for the conferral of Article III Standing."); *Washegesic*, 33 F.3d at 682 (stating that whether plaintiffs have standing based on psychological injury "depends on the directness of the harm. *Valley Forge* was a citizens suit.... Their grievance had a vicarious quality.... They had no direct contact with the dispute."); *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir.1985).

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an attorney licensed to practice law in the State of Ohio.... As an attorney in Richland County I frequently and routinely appear in Richland County Common Pleas Court, and in the courtroom of Judge James DeWeese. I have witnessed on many occasions the poster displayed entitled "Philosophies of Law in Conflict" containing a version of the Ten Commandments ... and the expressed espousal of a legal philosophy which is, in my opinion, clearly a religious message. The display offends me personally, in that I perceive it as an inappropriate expression of a religious viewpoint as well as a display of a sacred text in a public building.
(R. 16, Pl.'s Mot. for Summ. J., Ex. 4.)

[5] The Davis affidavit supports the ACLU's standing. Davis states that he personally has and does come in direct contact with Defendant's poster in the course of his professional work, and that this contact is unwelcome due to the poster's allegedly religious content.[FN2] Furthermore, the Establishment Clause violation of which Davis complains is germane to the interests that the ACLU seeks to protect, as Davis' civil liberties are at issue, and "the ACLU–Ohio's stated purpose [is] the preservation of the constitutional separation of church and state." *Ashbrook*, 375 F.3d at 490. Finally, Davis' participation is not required to pursue this suit.

FN2. Defendant argues that whether Davis suffered actual injury sufficient to confer standing is a question of material fact that should not be resolved on summary judgment. However, although "[t]he party invoking federal jurisdiction bears the burden of establishing" the elements of standing, to support standing at the summary judgment stage a plaintiff must only "set forth by affidavit or other evidence specific facts which for purposes of the summary judgment motion will be taken as true." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Davis' affidavit averring psychological injury is sufficient to establish injury in fact for the purposes of determining standing in this suit.

B. Summary

Plaintiff has standing to sue under the Establishment Clause. Therefore, we **AFFIRM** the district court's decision with respect to standing, and address the merits of Plaintiff's complaint.

III. Establishment Clause of the First Amendment

The Establishment Clause of the First Amendment, applied to the states by incorporation into the Fourteenth Amendment, *Everson v. Bd. of Educ.*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), states, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. This language is "at best opaque," *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and far from self-defining. Courts are, therefore, in need of some interpretive help in determining the bounds of the Establishment Clause. *See McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 859 n. 10, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (" *McCreary* ").[FN3]

FN3. Defendant's appellate brief includes several quotes and facts from American history to justify hanging the poster in his courtroom. However, the Supreme Court has stated that "[t]here have been breaches of this command [separating church and state] throughout this Nation's history, but they cannot diminish in any way the force of the command." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 604–05, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). Moreover, the Supreme Court's more recent decision in *McCreary* discounted the value of historical evidence relating to the Establishment Clause's parameters. The Supreme Court stated that historical evidence shows that "there was no common understanding about the limits of the establishment prohibition.... What the evidence does show is a group of statesmen, like others before and after them, who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined." *McCreary*, 545 U.S. at 879–81, 125 S.Ct. 2722.

In *Lemon* the Supreme Court set out a three part test for determining whether government conduct violated the Establishment Clause. The test "ask [s] (1) [whether] the challenged government action has a secular purpose; (2) [whether] the action's primary effect neither advances nor inhibits religion; and (3) [whether] the action fosters an

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excessive entanglement with religion." *Ashbrook,* 375 F.3d at 490 (quoting *Lemon,* 403 U.S. at 612–13, 91 S.Ct. 2105). *See also McCreary,* 545 U.S. at 859, 125 S.Ct. 2722; *Stone v. Graham,* 449 U.S. 39, 40, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980); *ACLU v. McCreary Cnty.,* 607 F.3d 439, 445 (6th Cir.2010) (" *McCreary II* "); *ACLU v. Mercer Cnty.,* 432 F.3d 624, 635 (6th Cir.2005); *ACLU v. McCreary Cnty.,* 354 F.3d 438, 446 (6th Cir.2003) (" *McCreary I* "); *Adland,* 307 F.3d at 479; *Baker v. Adams Cnty.,* 310 F.3d 927, 929 (6th Cir.2002); *Washegesic,* 33 F.3d at 683. Both this Court and the Supreme Court have questioned the *Lemon* test's utility in Establishment Clause cases. *Van Orden v. Perry,* 545 U.S. 677, 685–86, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005); *Lynch v. Donnelly,* 465 U.S. 668, 679, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984); *Mercer,* 432 F.3d at 635–36. Indeed, Establishment Clause cases do not readily lend themselves to neat disposition through categorical bright line tests, *Van Orden,* 545 U.S. at 683, 125 S.Ct. 2854 ("Our cases, Janus-like, point in two directions in applying the Establishment Clause."); *Walz v. Tax Comm'n of the City of New York,* 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) ("In attempting to articulate the scope of the two religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis."), and have often produced inconsistent holdings. *Compare, e.g., Van Orden,* 545 U.S. at 684 n. 3, 125 S.Ct. 2854 ("Despite Justice Stevens' recitation of occasional language to the contrary, we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion."), *with McCreary,* 545 U.S. at 860, 125 S.Ct. 2722 ("The touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."). Nevertheless, *Lemon* remains the law governing Establishment Clause cases. *McCreary II,* 607 F.3d at 445 ("As was true the last time we heard this matter, the governing standard for determining whether a particular government action violates the Establishment Clause remains *Lemon v. Kurtzman.*").

In the years since the Supreme Court announced the *Lemon* test, the Supreme Court has refined its first two prongs. *Lemon's* purpose prong "is now the predominant purpose test." *Mercer,* 432 F.3d at 635. *Lemon's* second prong, reformulated as the "endorsement test, asks whether the government action has the purpose or effect of endorsing religion." *Id. Lemon's* third prong remains the excessive entanglement test. Failure under any of *Lemon's* three prongs "deems governmental action violative of the Establishment Clause." *McCreary I,* 354 F.3d at 458.

A. Purpose Test

[6] In determining the government's purpose under the first prong of the *Lemon* test, "a [government actor's] stated reasons will generally get deference." *McCreary II,* 607 F.3d at 445 (quoting *McCreary,* 545 U.S. at 864, 125 S.Ct. 2722). However, "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *Id.* Thus, "[t]he eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the ... official act," from "readily discoverable fact." *McCreary,* 545 U.S. at 862, 125 S.Ct. 2722. "[T]he objective observer is considered to have reasonable memories, and Supreme Court precedents sensibly forbid an observer to turn a blind eye to ... context.... [R]eviewing courts must look with the eye of an observer familiar with the history of the government's actions and competent to learn [what] history has to show." *McCreary II,* 607 F.3d at 446.

[7] Under the *Lemon* purpose inquiry, courts have consistently found the history and context of the action significant. "The [purpose] inquiry, of necessity, turns upon the context in which the contested object appears." *McCreary,* 545 U.S. at 868, 125 S.Ct. 2722 (internal quotations omitted). In evaluating the purpose of posting a religious text, "it will matter to [the] objective observer[ ] whether posting the Commandments follows on the heels of displays motivated by sectarianism, or whether it lacks a history demonstrating that purpose." *Id.* at 866 n. 14, 125 S.Ct. 2722. *See also McCreary II,* 607 F.3d at 446–49 (finding that the displays' extended sectarian history in which counties reformulated displays on several occasions "would probably lead an objective observer to suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody neutrality.") (internal citations omitted). This Court is "compel[led] to consider the government's past violations of the Establishment Clause when evaluating its present conduct." *McCreary I,* 354 F.3d at 457 (finding "it significant that Defendants' original displays, containing only the Ten Commandments, were erected in violation of the Supreme Court's clear ruling in *Stone.* This defiance ... imprinted the Defendants' purpose, from the beginning with an unconstitutional taint.") (internal citations and quotations omitted).

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[8] Defendant's stated purpose for hanging the poster is "to express [his] views about two warring legal philosophies that motivate behavior and the consequences that [he] ha[s] personally witnessed in [his] 18 years as a trial judge of moving to a moral relativist philosophy and abandoning a moral absolutist legal philosophy." (R. 17, Def. Opp'n to Mot. for Summ. J., Ex. A, ¶ 2.) It is questionable whether Defendant has articulated a facially secular purpose. However, assuming for the sake of argument that Defendant has stated a facially secular purpose, and giving that stated purpose its due deference, the history of Defendant's actions demonstrates that any purported secular purpose is a sham.

In 2000, Defendant hung a Ten Commandments poster in his courtroom. Judge DeWeese's stated purpose in hanging this poster was:

> to use [it] occasionally in educational efforts when community groups come to the courtroom and ask [him] to speak to them. These documents are useful in talking about the origins of law and legal philosophy and about the rule of law as opposed to the rule of man. [DeWeese] ... chose the Ten Commandments because they were emblematic of moral absolutism and [Deweese] chose them to express the belief that law comes either from God or man, and to express his belief that God is the ultimate authority.

Ashbrook, 375 F.3d at 491. This Court agreed with the district court in *Ashbrook* that DeWeese's purpose in posting this first Ten Commandments poster was:

> (1) to instruct individuals that our legal system is based on moral absolutes from divine law handed down by God through the Ten Commandments and (2) to help foster debate between the philosophical position of moral absolutism (as set forth in the Ten Commandments) and moral relativism in order to address what he perceives to be a moral crisis in this country.

Id. at 492. Therefore, "[d]espite his stated intent to use the display for educational purposes," this Court concluded that "DeWeese has not described a role for the Ten Commandments poster in his educational errand other than to admonish participants in talks or programs in his courtroom to look to the Commandments as a source of law. His own testimony belie[d] the secular purpose he wishe[d] to ascribe to it." *Id.* Finding that "DeWeese's purpose in posting the Ten Commandments revealed a predominate non-secular purpose for the display," this Court stated that "Judge DeWeese's display of the Ten Commandments violate[d] the Establishment Clause of the First Amendment." *Id.* This Court thus affirmed an order of the district court ordering Judge DeWeese to remove the poster of the Ten Commandments from his courtroom. *Ashbrook,* 375 F.3d at 495. Defendant complied with this injunction. However, in 2006 Defendant created the poster at issue in this case, which includes the text of the Ten Commandments as well as religious editorial commentary.

Defendant's history of Establishment Clause violation casts aspersions on his purportedly secular purpose in hanging the poster in his courtroom. So too do the similarities between Defendant's stated purpose in this case, and his unconstitutional purpose in *Ashbrook.* Defendant attempts to distinguish his purpose in hanging the poster from his purpose in hanging the poster in *Ashbrook.* He states that his "purpose was not clear from looking at the display [in *Ashbrook*] and was misinterpreted by the district court as a religious purpose. Consequently, [he] was careful in the new 2006 display to explain his philosophical purpose in the text of the poster." (R. 17, Def. Opp'n to Mot. for Summ. J., Ex. A, ¶ 2.). However, Defendant's statements are unconvincing. As borne out by this Court's decision in *Ashbrook,* Defendant's "views about warring legal philosophies" and his concern over society's "abandoning a moral absolutist legal philosophy," (R. 17, Def. Opp'n to Mot. for Summ. J., Ex. A, ¶ 2.), that support his decision to hang the poster are based on his belief that "our legal system is based on moral absolutes from divine law handed down by God through the Ten Commandments." *Ashbrook,* 375 F.3d at 492. This plainly constitutes a religious purpose in violation of *Lemon's* first prong.

Although the history of Defendant's Establishment Clause violations is sufficient to reveal his religious purpose,

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the texts of the challenged poster and Defendant's supplementary pamphlet are also illuminating. Courts have found the challenged text itself significant in determining purpose under *Lemon*. *McCreary*, 545 U.S. at 868, 125 S.Ct. 2722 ("Where the text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view."); *Stone*, 449 U.S. at 41–42, 101 S.Ct. 192; *Ashbrook*, 375 F.3d at 491. In addition to a redacted text of the Ten Commandments, the poster includes editorial statements by Defendant. These include religious statements such as "God is the final authority, and we acknowledge His unchanging standards of behavior," and "I join the Founders in personally acknowledging the importance of Almighty God's fixed moral standards for restoring the moral fabric of this nation," among others. (R. 17, Def. Opp'n to Mot. for Summ. J., Ex. A–3.) Similarly, in his supplemental pamphlet Defendant states,

> We are engaged in a great civil war of legal philosophies in the United States.... The historically established philosophy bases its distinctions between right and wrong on the God of the Bible. It holds that God has defined for humanity's own good and happiness what is right and wrong and that those standards cannot be altered or abolished. It is a standard of moral absolutes.

(R. 16, Pl.'s Mot. for Summ. J., Ex. 5–A.) Defendant's definition of moral absolutes as the standards of "the God of the Bible," (R. 16, Pl.'s Mot. for Summ. J., Ex. 5–A.), coupled with his statements regarding the "necessity of moral absolutes," (R. 17, Def. Opp'n to Mot. for Summ. J., Ex. A–3.), reveal Defendant's religious purpose.

Although Defendant attempts to veil his religious purpose by casting his religious advocacy in philosophical terms, "[a] finding of religious purpose is militated by the blatantly religious content of the display[ ]." *McCreary I*, 354 F.3d at 455. Replacing the word religion with the word philosophy does not mask the religious nature of Defendant's purpose. The poster's patently religious content reveals Defendant's religious purpose, violating *Lemon's* first prong, and thus the Establishment Clause.

B. Endorsement Test

Although "failure under any one of the *Lemon* prongs deems governmental action violative of the Establishment Clause," *McCreary I*, 354 F.3d at 458, and Defendant violated the Establishment Clause based on *Lemon's* first prong, its is also helpful to consider *Lemon's* second, endorsement, prong.

As reformulated in recent years, the second prong of *Lemon* asks whether "the government action has the purpose or effect of endorsing religion." *Mercer*, 432 F.3d at 635.

> Under the endorsement test, the government violates the Establishment Clause when it acts in a manner that a reasonable person would view as an endorsement of religion. This is an objective standard, similar to the judicially-created reasonable person standard of tort.... [T]he inquiry here is whether the reasonable person would conclude that [defendant's] display has the effect of endorsing religion.

Id. at 636. *See also* *McCreary I*, 354 F.3d at 458 (internal citations omitted). In this case, as in the prior case involving Judge DeWeese, the Court asks,

> whether a reasonable observer acquainted with the text, history, and implementation of DeWeese's display of the Ten Commandments in his courtroom would view it as a state endorsement of religion. The inquiry must be viewed under the totality of the circumstances surrounding the display, including the contents and the presentation of the display, because the effect of the government's use of religious symbolism depends on context.

Ashbrook, 375 F.3d at 492.

> In determining what constitutes a constitutionally permissible display of the Ten Commandments in a governmental building ... the symbols must be interconnected in a manner that is facially apparent to the observer and the interconnection must be secular in nature. When secular and non-secular items are displayed together, we consider

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whether the secular image detracts from the message of endorsement; or if rather, it specifically links religion and civil government.

Id. at 493.

In contrast to the Ten Commandments displays in *Stone,* the *McCreary* cases, *Van Orden, Mercer,* and *Ashbrook,* the poster in this case is not merely a display of the Ten Commandments in Defendant's courtroom. It sets forth overt religious messages and religious endorsements. It is a display of the Ten Commandments editorialized by Defendant, a judge in an Ohio state court, exhorting a return to "moral absolutes" which Defendant himself defines as the principles of the "God of the Bible." The poster is an explicit endorsement of religion by Defendant in contravention of the Establishment Clause.

The poster includes both the Ten Commandments, and seven secular "Humanist Precepts," (R. 17, Def. Opp'n to Mot. for Summ. J., Ex. A–3), in addition to four editorial comments written by Defendant. Defendant's prior poster of the Ten Commandments was invalidated partially because we found that "DeWeese's display conveys a message of religious endorsement because of the complete lack of any analytical connection between the Ten Commandments and the Bill of Rights that could yield a unifying cultural or historical theme that is also secular for a reasonable observer." *Ashbrook,* 375 F.3d at 494. Defendant's second poster, at issue in this case, does not suffer from the same defect. Defendant's editorial comments explicitly link the Ten Commandments and the "Humanist Precepts." The poster reads "There is a conflict of legal and moral philosophies ... All law is legislated morality. The only question is whose.... Ultimately, there are only two views: Either God ... or man ... Here are examples." (R. 17, Def. Opp'n to Mot. for Summ. J., Ex. A–3). The poster then sets out the Ten Commandments and the "Humanist Precepts" in two opposing columns.

However, while the poster effectively links the Ten Commandments and secular principles, the poster fails the endorsement test for a different reason. To survive endorsement test scrutiny, "the interconnection [between the religious and secular displays] must be secular in nature." *Ashbrook,* 375 F.3d at 493. Here it is not. Rather, by stating that the "moral absolutes" of "the God of the Bible" are the "fixed moral standards for restoring the moral fabric of this nation," (R. 17, Def. Opp'n to Mot. for Summ. J., Ex. A–3), that should triumph in the "conflict of legal and moral philosophies raging in the United States," the poster "specifically links religion and civil government." *Ashbrook,* 375 F.3d at 493. Defendant's poster thus violates the Establishment Clause under *Lemon's* endorsement test.

Finally, we will not discuss *Lemon's* third entanglement prong inasmuch as parties did not address it in their briefs. *Brown v. Crowley,* 229 F.3d 1150 (6th Cir.2000) (table) (noting that inadequate briefing constitutes waiver).

C. Summary

For the reasons discussed above, the hanging of Defendant's poster in the courtroom violates the Establishment Clause both under *Lemon's* purpose and endorsement prongs. Therefore, we **AFFIRM** the district court's decision. FN4

FN4. In view of our disposition of this case pursuant to the U.S. Constitution's Establishment Clause, we need not decide whether the poster is similarly violative of the Ohio State Constitution's establishment clause.

IV. Protected Speech Under the First Amendment

A. Analysis

[9] Defendant contends that his hanging of the poster in his courtroom constitutes protected speech under the First Amendment of the United States Constitution. The Supreme Court has stated that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise clauses protect." *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S.

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290, 302, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). However, although Defendant is correct that "judges are not First Amendment orphans," (Br. of Appellant at 43), Defendant's hanging of the poster in his courtroom is not the private judicial speech protected by the First Amendment's Free Speech clause. *See Republican Party of Minnesota v. White,* 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (holding unconstitutional a statute prohibiting judges running for election from expressing a view on political issues during campaigns).

Defendant presented the identical argument to defend his first Ten Commandments poster. We rejected this argument in *Ashbrook,* explaining:

> DeWeese's posters are situated in a courtroom, a public space, and were placed on the wall by a sitting judge charged with the decoration of that space while in office and presiding in the same courtroom. As such, we reject DeWeese's contention that the display constitutes private religious expression protected by the Free Speech Clause, falling beyond the bounds of Establishment Clause scrutiny. Indeed, they constituted government speech subject to the strictures of the Establishment Clause.

375 F.3d at 490 n. 4. This analysis is equally applicable and controlling in this case.

B. Summary

Defendant's hanging of the poster in the courtroom is not protected by the First Amendment's Free Speech Clause. Therefore, we **AFFIRM** the district court's decision.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's decision.

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C.A.1 (Puerto Rico),2012.
Antilles Cement Corp. v. Fortuno
670 F.3d 310

United States Court of Appeals,
First Circuit.
ANTILLES CEMENT CORPORATION, Plaintiff, Appellee,
v.
Luis FORTUÑO, Governor of the Commonwealth of Puerto Rico; Antonio M. Sagardía–de–Jesús, Secretary of the Department of Justice; Luis G. Rivera–Marín, Secretary of the Department of Consumer Affairs; Ruben A. Hernández–Gregorat, Secretary of the Department of Transportation and Public Works, Defendants, Appellants,
Cemex de Puerto Rico, Inc., f/k/a Puerto Rican Cement Co., Inc., Defendant.
Antilles Cement Corporation, Plaintiff, Appellee,
v.
Cemex de Puerto Rico, Inc., f/k/a Puerto Rican Cement Co., Inc., Defendant, Appellant,
Luis Fortuño, Governor of the Commonwealth of Puerto Rico; Antonio M. Sagardía–de–Jesús, Secretary of the Department of Justice; Luis G. Rivera–Marín, Secretary of the Department of Consumer Affairs; Ruben A. Hernández–Gregorat, Secretary of the Department of Transportation and Public Works, Defendants.

Nos. 09–1314, 09–1583.
Heard June 8, 2010.
Decided Jan. 17, 2012.

Background: Cement importer brought Commerce Clause challenge against Commonwealth statutes prohibiting use of non-Puerto Rican cement in construction projects funded by Commonwealth or by United States, and requiring corresponding warning labels on imported-cement bags. The district court, 288 F.Supp.2d 187, granted summary judgment for importer. Commonwealth appealed. The Court of Appeals, 408 F.3d 41, remanded. On remand, the United States District Court for the District of Puerto Rico, Jamie Pieras, Jr., J., 2005 WL 2138753, granted summary judgment for importer. Commonwealth appealed.

Holdings: The Court of Appeals, Howard, Circuit Judge, held that:
(1) injury was redressable;
(2) district court did not abuse its discretion in finding implied consent to litigate preemption issue;
(3) Buy American Act (BAA) applied to Commonwealth of Puerto Rico even though it did not apply to states;
(4) BAA did not expressly preempt Puerto Rico statutes or preempt field in which those statutes operated;
(5) irreconcilable conflict did not exist between BAA and Puerto Rico statutes;
(6) on issue of first impression, Puerto Rico could not violate dormant Foreign Commerce Clause by enforcing its statutes if it acted as market participant;
(7) Puerto Rico acted as market participant when it enforced its statutes prohibiting use of non-Puerto Rican cement in construction projects funded by Commonwealth; and
(8) Puerto Rico acted as market regulator when it enforced its statutes requiring companies that sold foreign cement to place different label on their products than companies that sold domestic cement.

Affirmed in part and reversed in part.

West Headnotes

[1] Federal Courts 170B 1024

170B Federal Courts
170BX Territorial Courts; Puerto Rico

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170Bk1024 k. Puerto Rico. Most Cited Cases

Injury that cement importer suffered from Puerto Rico statutes prohibiting use of non-Puerto Rican cement in construction projects funded by Commonwealth would have been redressable by judgment in its favor, as required to have standing to claim that those statutes were preempted by Buy American Act (BAA) which required that certain public projects use only domestically produced materials, since BAA provided significantly greater opportunity than did Puerto Rico statutes for suppliers of foreign cement to participate in Commonwealth's public construction projects and BAA did not impose any burdensome labeling requirements on sellers of foreign cement. U.S.C.A. Const. Art. 3, § 1 et seq.; U.S.C.A. Const. Art. 6, cl. 2; Buy American Act, § 3, 41 U.S.C.A. §§ 8302, 8303; 48 C.F.R. §§ 25.003, 25.204(b); 3 L.P.R.A. §§ 927(d), 927e; 10 L.P.R.A. § 167e.

[2] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In general; injury or interest. Most Cited Cases

Article III standing is a jurisdictional question that must be resolved whenever it arises. U.S.C.A. Const. Art. 3, § 1 et seq.

[3] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.2 k. In general; injury or interest. Most Cited Cases

Federal Civil Procedure 170A 103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.3 k. Causation; redressability. Most Cited Cases

To establish Article III standing, a plaintiff must allege a concrete and particularized injury in fact, a causal connection that permits tracing the claimed injury to the defendant's actions, and a likelihood that prevailing in the action will afford some redress for the injury. U.S.C.A. Const. Art. 3, § 1 et seq.

[4] Federal Civil Procedure 170A 103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing
170Ak103.3 k. Causation; redressability. Most Cited Cases

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To carry its burden of establishing Article III redressability, a plaintiff need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm. U.S.C.A. Const. Art. 3, § 1 et seq.

[5] Federal Civil Procedure 170A 837

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak835 Conforming to Proof
170Ak837 k. Issues tried by consent of parties. Most Cited Cases

District court did not abuse its discretion by considering whether Puerto Rico statutes prohibiting use of non-Puerto Rican cement in construction projects funded by Commonwealth was preempted by Buy American Act (BAA) without formal amendment of complaint, on basis that Commonwealth gave its implied consent to adjudication of preemption claim, since Commonwealth did not object when it became clear that BAA preemption was at heart of proceeding and it actively contested BAA preemption claim on the merits. U.S.C.A. Const. Art. 6, cl. 2; Buy American Act, § 3 et seq., 41 U.S.C.A. § 8301 et seq.; Fed.Rules Civ.Proc.Rule 15(b), 28 U.S.C.A.; 3 L.P.R.A. § 927 et seq.; 10 L.P.R.A. § 167e.

[6] Federal Civil Procedure 170A 837

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak835 Conforming to Proof
170Ak837 k. Issues tried by consent of parties. Most Cited Cases

An unpleaded claim may be considered when the parties' conduct demonstrates their express or implied consent to litigate the claim. Fed.Rules Civ.Proc.Rule 15(b), 28 U.S.C.A.

[7] Federal Civil Procedure 170A 837

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(E) Amendments
170Ak835 Conforming to Proof
170Ak837 k. Issues tried by consent of parties. Most Cited Cases

A party can give implied consent to the litigation of an unpleaded claim by treating a claim introduced outside the complaint as having been pleaded, either through the party's effective engagement of the claim or through his silent acquiescence or by acquiescing during trial in the introduction of evidence which is relevant only to that issue. Fed.Rules Civ.Proc.Rule 15(b), 28 U.S.C.A.

[8] Territories 375 18

375 Territories
375k18 k. Application and operation in territories of acts of Congress. Most Cited Cases

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Territories 375 25

375 Territories
375k25 k. Contracts in general. Most Cited Cases

Buy American Act (BAA) applied to Commonwealth of Puerto Rico even though it did not apply to states; although Puerto Rico had been transformed from territory into self-governing commonwealth by Federal Relations Act (FRA), BAA and FRA coexisted in perfect harmony, FRA permitted Congress to treat Puerto Rico differently from states, BAA expressly included "Puerto Rico" among entities enumerated in BAA even after Congress overhauled BAA, and Congress historically had been diligent in amending BAA to remove entities that it no longer intended to cover. Buy American Act, § 3 et seq., 41 U.S.C.A. § 8301 et seq.; Organic Act of Puerto Rico, § 9, 48 U.S.C.A. § 734; 3 L.P.R.A. § 927(f).

[9] Territories 375 18

375 Territories
375k18 k. Application and operation in territories of acts of Congress. Most Cited Cases

Whether and how a federal statute applies to Puerto Rico is a question of Congressional intent.

[10] Statutes 361 184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and purpose of act. Most Cited Cases

Statutes 361 208

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k208 k. Context and related clauses. Most Cited Cases

Statutes 361 217.4

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.4 k. Legislative history in general. Most Cited Cases

A court must evaluate a statute's language within the statutory scheme and look to the legislative history and policy only if that language is unclear.

[11] Territories 375 25

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375 Territories
375k25 k. Contracts in general. Most Cited Cases

Buy American Act (BAA) encompasses public construction projects undertaken by the government of Puerto Rico. Buy American Act, § 3 et seq., 41 U.S.C.A. § 8301 et seq.

[12] Territories 375 18

375 Territories
375k18 k. Application and operation in territories of acts of Congress. Most Cited Cases

Although federal courts generally presume that Congress intends its laws to have the same effect on Puerto Rico as they do on any state, that presumption can be overcome by specific evidence to the contrary or by clear policy reasons embedded in a statute.

[13] Statutes 361 159

361 Statutes
361V Repeal, Suspension, Expiration, and Revival
361k159 k. Implied repeal by inconsistent or repugnant act. Most Cited Cases

Statutes 361 161(1)

361 Statutes
361V Repeal, Suspension, Expiration, and Revival
361k160 Implied Repeal by Act Relating to Same Subject
361k161 In General
361k161(1) k. In general. Most Cited Cases

Repeals by implication are not favored; implied repeal occurs only where two acts are in irreconcilable conflict or when a later act covers the whole subject of the earlier one and is clearly intended as a substitute.

[14] Territories 375 18

375 Territories
375k18 k. Application and operation in territories of acts of Congress. Most Cited Cases

Congress is permitted to treat Puerto Rico differently despite its state-like status.

[15] Statutes 361 55

361 Statutes
361I Enactment, Requisites, and Validity in General
361k53 Validity of Provisions of Territorial Statutes
361k55 k. Contravention of organic act or other fundamental law. Most Cited Cases

United States 393 64.15

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393 United States
393III Contracts
393k64 Proposals or Bids for Contracts
393k64.15 k. Preferences; conditions and restrictions on bidders. Most Cited Cases

Buy American Act (BAA) did not expressly preempt Puerto Rico statutes prohibiting use of non-Puerto Rican cement in construction projects funded by Commonwealth and requiring corresponding warning labels on imported-cement bags, or preempt field in which those statutes operated; BAA was only federal statute that purposed to regulate Puerto Rico's acquisitions of foreign products and its scope was not pervasive, and Congress did not intend to commandeer Puerto Rico's spending power insofar as it related to foreign products. U.S.C.A. Const. Art. 6, cl. 2; Buy American Act, § 3 et seq., 41 U.S.C.A. § 8301 et seq.; 3 L.P.R.A. § 927 et seq.; 10 L.P.R.A. § 167e.

[16] States 360 18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or conforming laws or regulations. Most Cited Cases

State laws that interfere with, or are contrary to, the laws of Congress are void ab initio. U.S.C.A. Const. Art. 6, cl. 2.

[17] States 360 18.11

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.11 k. Congressional intent. Most Cited Cases

When determining the preemptive effect of a federal law, a court must look to the intent of Congress.

[18] States 360 18.11

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.11 k. Congressional intent. Most Cited Cases

When determining the preemptive effect of a federal law, a federal court begins with the presumption that a federal act does not preempt an otherwise valid state law, and the court sets aside that postulate only in the face of clear and contrary congressional intent; in some instances, that intent can appear haec verba on the face of a statute, but in the absence of express language, a court must look to the structure and purpose of the statute.

[19] States 360 18.7

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption

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360k18.7 k. Occupation of field. Most Cited Cases

A court can infer Congress's intent to preempt an entire field of law when it enacts a scheme of regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it; by like token, when a state law directly conflicts with a federal statute, such as where it is physically impossible to comply with both laws or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress, a court can presume that Congress intended preemption to occur.

[20] Statutes 361 55

361 Statutes
361I Enactment, Requisites, and Validity in General
361k53 Validity of Provisions of Territorial Statutes
361k55 k. Contravention of organic act or other fundamental law. Most Cited Cases

United States 393 64.15

393 United States
393III Contracts
393k64 Proposals or Bids for Contracts
393k64.15 k. Preferences; conditions and restrictions on bidders. Most Cited Cases

Irreconcilable conflict did not exist between Buy American Act (BAA) and Puerto Rico statutes prohibiting use of non-Puerto Rican cement in construction projects funded by Commonwealth and requiring corresponding warning labels on imported-cement bags, and thus statutes were not preempted; Puerto Rico simply built upon BAA's floor of protectionism by raising price discrepancy that had to exist before Commonwealth would purchase foreign materials, and Puerto Rico exercised its option, as permitted by BAA, to determine whether purchasing foreign goods for its own public works was in public interest by declaring its belief that doing so would never be in public interest. U.S.C.A. Const. Art. 6, cl. 2; Buy American Act, § 3 et seq., 41 U.S.C.A. § 8301 et seq.; 48 C.F.R. § 25.204(b); 3 L.P.R.A. § 927 et seq.; 10 L.P.R.A. § 167e.

[21] States 360 18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or conforming laws or regulations. Most Cited Cases

A state law must yield to a federal law when compliance with both state and federal regulations is impossible or when state law interposes an obstacle to the achievement of Congress's discernible objectives.

[22] States 360 18.3

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.3 k. Preemption in general. Most Cited Cases

A state may supplement a federal statute with stronger regulations.

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[23] States 360 18.11

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.11 k. Congressional intent. Most Cited Cases

By legislating in an area, Congress generally does not mean that States and localities are barred from imposing further requirements in the field.

[24] States 360 18.5

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or conforming laws or regulations. Most Cited Cases

State statutes that flatly contradict policies embedded in a federal statute are preempted.

[25] Commerce 83 82.25

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(K) Miscellaneous Subjects and Regulations
83k82.25 k. Contracts in general. Most Cited Cases

Territories 375 25

375 Territories
375k25 k. Contracts in general. Most Cited Cases

Puerto Rico could not violate dormant Foreign Commerce Clause by enforcing its statutes prohibiting use of non-Puerto Rican cement in construction projects funded by Commonwealth, if it acted as market participant, since Commonwealth's refusal, as market participant, to transact business with foreign company did not undermine cohesiveness of national trade policy, but, instead, refusal merely removed one entry from foreign company's customer list. U.S.C.A. Const. Art. 1, § 8, cl. 3; 3 L.P.R.A. § 927 et seq.

[26] Commerce 83 12

83 Commerce
83I Power to Regulate in General
83k11 Powers Remaining in States, and Limitations Thereon
83k12 k. In general. Most Cited Cases

The Commerce Clause not only gives Congress the express power to regulate commerce but also implicitly protects against state laws inimical to foreign or national trade; although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.

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U.S.C.A. Const. Art. 1, § 8, cl. 3.

[27] Commerce 83 ⚿4

83 Commerce
83I Power to Regulate in General
83k2 Constitutional Grant of Power to Congress
83k4 k. Commerce with foreign nations. Most Cited Cases

Commerce 83 ⚿12

83 Commerce
83I Power to Regulate in General
83k11 Powers Remaining in States, and Limitations Thereon
83k12 k. In general. Most Cited Cases

Territories 375 ⚿8

375 Territories
375k8 k. Application of Constitution and laws of United States to territory acquired. Most Cited Cases

Puerto Rico is subject to the strictures of the dormant Commerce Clause in regard to both interstate and foreign commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[28] Commerce 83 ⚿12

83 Commerce
83I Power to Regulate in General
83k11 Powers Remaining in States, and Limitations Thereon
83k12 k. In general. Most Cited Cases

Commerce 83 ⚿56

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(B) Conduct of Business in General
83k56 k. Regulation and conduct in general; particular businesses. Most Cited Cases

Like a state, Puerto Rico generally may not enact policies that discriminate against out-of-state commerce; however, like any state, Puerto Rico is unchained from the shackles of the Commerce Clause when it acts as a participant in the free market as opposed to a sovereign regulating the market. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[29] Commerce 83 ⚿56

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(B) Conduct of Business in General
83k56 k. Regulation and conduct in general; particular businesses. Most Cited Cases

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A state acting as a buyer in a particular market may discriminate in favor of in-state sellers; conversely, when a state is acting as a regulator rather than as a market participant, it cannot institute discriminatory policies. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[30] Commerce 83 12

83 Commerce
83I Power to Regulate in General
83k11 Powers Remaining in States, and Limitations Thereon
83k12 k. In general. Most Cited Cases

The need for national uniformity in foreign affairs is important, and therefore state laws that burden foreign trade necessarily deserve closer scrutiny than those that burden only interstate commerce; consequently, the dormant Foreign Commerce Clause places stricter constraints on states than its interstate counterpart. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[31] Commerce 83 56

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(B) Conduct of Business in General
83k56 k. Regulation and conduct in general; particular businesses. Most Cited Cases

A state may discriminate against foreign commerce when it participates in the free market. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[32] Commerce 83 4

83 Commerce
83I Power to Regulate in General
83k2 Constitutional Grant of Power to Congress
83k4 k. Commerce with foreign nations. Most Cited Cases

Commerce 83 12

83 Commerce
83I Power to Regulate in General
83k11 Powers Remaining in States, and Limitations Thereon
83k12 k. In general. Most Cited Cases

The dormant Foreign Commerce Clause exists to ensure that the United States speaks with a unified voice when it engages in foreign trade. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[33] Commerce 83 56

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(B) Conduct of Business in General

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83k56 k. Regulation and conduct in general; particular businesses. Most Cited Cases

A state cannot violate the dormant Foreign Commerce Clause when acting as a market participant. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[34] Commerce 83 82.25

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(K) Miscellaneous Subjects and Regulations
83k82.25 k. Contracts in general. Most Cited Cases

Territories 375 25

375 Territories
375k25 k. Contracts in general. Most Cited Cases

Puerto Rico acted as market participant when it enforced its statutes prohibiting use of non-Puerto Rican cement in construction projects funded by Commonwealth, and thus statutes did not violate Foreign Commerce Clause, since it was acting as buyer in market for construction services and private party could easily insert similar enforcement mechanisms in private construction contract. U.S.C.A. Const. Art. 1, § 8, cl. 3; 3 L.P.R.A. § 927 et seq.

[35] Commerce 83 56

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(B) Conduct of Business in General
83k56 k. Regulation and conduct in general; particular businesses. Most Cited Cases

In order to qualify for the prophylaxis of the market participant doctrine under the dormant Foreign Commerce Clause, a state must be acting as a private company would act, not in its distinctive governmental capacity; conversely, when a state flexes its sovereign muscle to regulate the behavior of other players in the market, the market participant exception does not apply. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[36] Commerce 83 56

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(B) Conduct of Business in General
83k56 k. Regulation and conduct in general; particular businesses. Most Cited Cases

Under the dormant Foreign Commerce Clause, a state-proprietor may discriminate against foreign commerce only within the narrow market realm in which it operates. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[37] Commerce 83 75

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(H) Imports and Exports

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83k75 k. Subjects and regulations in general. Most Cited Cases

Territories 375 25

375 Territories
375k25 k. Contracts in general. Most Cited Cases

Puerto Rico acted as market regulator when it enforced its statutes requiring companies that sold foreign cement to place different label on their products than companies that sold domestic cement, and thus statutes violated Foreign Commerce Clause, since discriminatory labeling requirement placed sellers of foreign cement at competitive disadvantage and purported justification for law of insuring that contractors complied with Buy American Act (BAA) and statutes prohibiting use of non-Puerto Rican cement in construction projects funded by Commonwealth easily could have been accomplished by less discriminatory means. U.S.C.A. Const. Art. 1, § 8, cl. 3; Buy American Act, § 3 et seq., 41 U.S.C.A. § 8301 et seq.; 3 L.P.R.A. § 927 et seq.; 10 L.P.R.A. § 167e(a)(4).

[38] Commerce 83 54.1

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(A) In General
83k54 Preferences and Discriminations
83k54.1 k. In general. Most Cited Cases

Commerce 83 56

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(B) Conduct of Business in General
83k56 k. Regulation and conduct in general; particular businesses. Most Cited Cases

Where the market participant exception does not apply and where Congress has not spoken otherwise, state laws that on their face discriminate against foreign commerce are almost always invalid under the dormant Foreign Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

West Codenotes
Preempted10 L.P.R.A. § 167e(a)(4) Angel E. Rotger–Sabat, with whom Maymí, Rivera & Rotger, P.S.C. was on brief, for appellant Commonwealth of Puerto Rico.

Juan Ramón Cancio–Ortiz, with whom José Raúl Cancio–Bigas, Charles E. Vilaró–Valderrábano and Cancio Covas & Santiago, LLP were on brief, for appellant Cemex de Puerto Rico, Inc.

Hector Saldaña–Egozcue, with whom Carlos Lugo–Fiol and Saldaña & Saldaña–Egozcue, PSC were on brief, for appellee.

Before HOWARD, SELYA and THOMPSON, Circuit Judges.

HOWARD, Circuit Judge.
These appeals present two complex questions of first impression: Does the Buy American Act (BAA), 41 U.S.C. §§ 8301–8305 (formerly codified at 41 U.S.C. §§ 10a–10d), preempt two Puerto Rico statutes? And if not,

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do those Puerto Rico statutes unconstitutionally interfere with Congress's power to regulate foreign commerce?

The district court initially struck down the two local laws on the ground that they contravene the dormant Foreign Commerce Clause. *Antilles Cement Corp. v. Calderón (Antilles I),* 288 F.Supp.2d 187, 197–202 (D.P.R.2003). On appeal, we vacated that decision and remanded for consideration of the role of the BAA. *Antilles Cement Corp. v. Acevedo Vilá (Antilles II),* 408 F.3d 41, 47–49 (1st Cir.2005). On remand, the district court again invalidated the local laws, this time concluding that they are preempted by the BAA. We affirm in part and reverse in part.

I. BACKGROUND

We presume the reader's familiarity with our prior decision in this matter and recount here only the facts needed to illuminate the issues under appeal. Additional background may be found in the related district court decisions. *See Antilles Cement Corp. v. Calderón (Antilles IV),* No. Civ. 02–1643, slip op. (D.P.R. Jan. 9, 2009); *Antilles Cement Corp. v. Acevedo Vilá (Antilles III),* No. Civ. 02–1643, 2005 WL 2138753 (D.P.R. Sept. 1, 2005); *Antilles I,* 288 F.Supp.2d 187.

A. *The Statutes at Issue.*

The BAA was enacted during the Great Depression to promote American industry and jobs by requiring that certain public projects use only domestically produced materials. *See United States v. Rule Indus., Inc.,* 878 F.2d 535, 538 (1st Cir.1989); *see also* 76 Cong. Rec. 1892 (1933) (statement of Rep. John J. Cochran) ("In times such as we are now experiencing let us put American labor to work on Government supplies and material."); *see generally* Charles F. Szurgot, Comment, *The Buy American Act: Reverse Discrimination against Domestic Manufacturers; Implications of the Trade Agreements Act of 1979 on the Rule of Origin Test,* 7 Admin. L.J. Am. U. 737, 739–40 (1993). Specifically, the BAA ordains, subject to certain exceptions, that only materials that are mined, produced, and/or manufactured in the United States may be employed for "public use" or utilized in the construction, alteration, or repair of "any public building or public work." 41 U.S.C. §§ 8302–8303. "Public building," "public use," and "public work" are terms of art, defined as "a public building of, use by, and a public work of, the Federal Government, the District of Columbia, *Puerto Rico,* American Samoa, and the Virgin Islands." *Id.* § 8301 (emphasis supplied).

We turn now to the two local laws that are challenged here. The first, P.R. Laws Ann. tit. 3, §§ 927–927h (Law 109), is a preference statute enacted in 1985 to promote the Puerto Rican construction industry. It requires that local construction projects financed with funds from the federal government or the Commonwealth use only "construction materials manufactured in Puerto Rico," *id.* §§ 927a–927c, with certain limited exceptions relating to the price, quality, and available quantity of local materials, *id.* § 927e. Of particular pertinence for present purposes, cement is deemed "manufactured in Puerto Rico" only if it is composed entirely of raw materials from Puerto Rico (unless a particular component is unavailable in industrial quantities locally). *Id.* § 927(d).

The second challenged statute is P.R. Laws Ann. tit. 10, § 167e (Law 132). Enacted in 2001, it imposes certain labeling requirements on cement sold in Puerto Rico. Among other things, Law 132 requires that foreign-manufactured cement carry a special label warning against its use in government-financed construction projects unless one of the exceptions contained in the BAA and Law 109 applies. *See id.* § 167e(a)(4). Law 132 also prohibits the sale or distribution of foreign-manufactured cement that is not so labeled and imposes fines for any violation of the labeling requirements. *See id.* §§ 167e(b), 167f.

B. *Travel of the Case.*

Antilles Cement Corporation, a firm that imports foreign cement, commenced this action by filing a complaint in the United States District Court for the District of Puerto Rico. Antilles sought a declaratory judgment that Laws 109 and 132 violate the dormant Foreign Commerce Clause and conflict with the BAA. In the early going, Antilles amended its complaint to withdraw the BAA preemption claim.

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The district court initially granted summary judgment for Antilles, concluding that Laws 109 and 132 as applied to foreign materials violate the dormant Foreign Commerce Clause. *See Antilles I,* 288 F.Supp.2d at 197–202. On direct review, we questioned whether the BAA might preempt the laws being challenged, thereby obviating the need for constitutional analysis. *See Antilles II,* 408 F.3d at 47–49. Moreover, we found the record lacking in factual development. *See id.* at 49–51. Given these concerns, we vacated the lower court's decision and remanded to determine (1) whether the BAA applies to public projects undertaken by the Commonwealth of Puerto Rico, and, if so, whether it preempts Law 109; (2) whether Law 109 has been applied only to the Commonwealth's own construction projects or, conversely, whether it has been applied to private construction projects subsidized in part by government funds; [FN1] and (3) whether the status of Law 132 was altered in light of the answers to these first two questions. *See id.* at 51.

> FN1. This factual determination is relevant to whether the Commonwealth acts as a market participant or a market regulator when it enforces Law 109.

On remand, the district court concluded that the BAA applies to public projects undertaken by the government of Puerto Rico. *See Antilles IV,* No. Civ. 02–1643, slip op. at 58–64. It further concluded that the BAA preempts Laws 109 and 132 because the Puerto Rico statutes limit the use of foreign construction materials more stringently than the BAA requires. *Id.* at 64–66. In view of this holding, the court recognized the lack of need for further constitutional analysis. *Id.* at 67. Nonetheless, in compliance with our mandate, the court determined that Law 109 has been applied only to public works projects undertaken by the Commonwealth itself. *Id.* at 67–68.

The Commonwealth and Cemex de Puerto Rico, Inc., an intervenor, now appeal.

II. PRELIMINARY MATTERS

[1][2] At the threshold, we must address the appellants' contention that Antilles lacks standing to challenge Laws 109 and 132 under a preemption theory. According to the appellants, Antilles stands to gain nothing by arguing that the BAA trumps the Puerto Rico statutes; for even if Antilles successfully advances that challenge, its cement would nevertheless remain barred from use in the Commonwealth's public works projects under the terms of the BAA itself. Although the appellants failed to raise this argument during the remanded proceeding, Article III standing is a jurisdictional question that must be resolved whenever it arises. *See Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council,* 589 F.3d 458, 467 (1st Cir.2009).

[3] To establish Article III standing, Antilles must allege "a concrete and particularized injury in fact, a causal connection that permits tracing the claimed injury to the defendant's actions, and a likelihood that prevailing in the action will afford some redress for the injury." *Id.* (internal quotation marks omitted). The loss of sales resulting from the local laws' discrimination against foreign cement is plainly a "concrete and particularized injury" to Antilles that is traceable to the challenged laws. Our inquiry must therefore focus on the final element of standing: whether Antilles's injury will be redressed if Laws 109 and 132 are held to be preempted by the BAA.

[4] To carry its burden of establishing redressability, Antilles need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm. *See, e.g., Monsanto Co. v. Geertson Seed Farms,* —— U.S. ——, 130 S.Ct. 2743, 2752–54, 177 L.Ed.2d 461 (2010) (holding that plaintiffs had standing to challenge an injunction preventing them from planting a regulated crop, even though a decision vacating the injunction would enable plaintiffs only to petition for partial deregulation); *see also Weaver's Cove,* 589 F.3d at 467–68 (holding that a favorable decision would provide plaintiff "effectual relief" by removing "a barrier to achieving approval" even though additional regulatory hurdles would need to be cleared before project could be commenced). Antilles has met that requirement here. As we explain below, the BAA provides significantly greater opportunity than does Law 109 for suppliers of foreign cement to participate in the Commonwealth's public construction projects. Accordingly, Antilles stands to benefit if Law 109 is nullified, leaving the company subject only to the looser strictures of the BAA.

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A simple side-by-side comparison of the BAA and Law 109 underscores the more formidable burden that the Puerto Rico statute places on sellers of foreign cement. For example, under the BAA, a construction material is considered "domestic" if it is manufactured in the United States and if the cost of its components that were mined, produced, or manufactured in the United States exceeds half of its total component cost. *See* 48 C.F.R. § 25.003; *see also* Exec. Order No. 10582, 19 Fed.Reg. 8723 (Dec. 17, 1954). Pursuant to this definition, concrete manufactured from foreign cement could be considered a domestic product (and thus eligible for use in public paving projects) because, according to record evidence, cement represents only about 42 percent of the cost of concrete's components. By contrast, Law 109 would rarely permit the public use of concrete made with foreign cement due to its requirement that *all* cement used in public works be manufactured using raw materials from Puerto Rico. *See* P.R. Laws Ann. tit. 3, § 927(d). Obviously, the opportunities for Antilles to sell its cement in Puerto Rico would be greater under the BAA because that law allows concrete manufacturers who sell to the Commonwealth to purchase and employ foreign cement.

The BAA also permits government purchasers to ignore the domestic preference rule if adherence is impracticable or not in the public interest, *see* 41 U.S.C. §§ 8302–8303, or if the domestic material is greater than six percent more expensive than its foreign counterpart, *see id.;* 48 C.F.R. § 25.204(b). Law 109's exceptions are much narrower: domestic preferences may be ignored only when indigenous construction materials are not available in sufficient quantity or quality, *see* P.R. Laws Ann. tit. 3, § 927e(b), or if the domestic material is at least fifteen percent more expensive than a comparable foreign-made material, *see id.* § 927e(a); *Antilles II,* 408 F.3d at 44. Given the relative strictness of Law 109's domestic preference requirements, Antilles would be more likely to sell its cement to contractors carrying out public works projects in Puerto Rico if that law were preempted by the BAA.

Law 132 is susceptible to a similar comparative analysis. Unlike that law, the BAA does not impose any burdensome labeling requirements on sellers of foreign cement. According to the evidence of record, those idiosyncratic labels frighten away potential customers.

In sum, Laws 109 and 132 place more onerous burdens on Antilles than does the BAA. Antilles has therefore demonstrated that its injury would at least be alleviated by a finding that the BAA preempts Laws 109 and 132.

[5] One other bit of procedural underbrush must be cleared before we can proceed to the merits of these appeals. The appellants contend that Antilles waived its preemption claim by failing to amend its complaint to reassert that claim after we sent the case back to the district court. The district court determined that it could consider the issue even without a formal amendment because the Commonwealth and Cemex had fair warning that BAA preemption would be litigated. We review that determination for abuse of discretion. *See Kenda Corp. v. Pot O'Gold Money Leagues, Inc.,* 329 F.3d 216, 232 (1st Cir.2003).

[6][7] Federal Rule of Civil Procedure 15(b) allows an unpleaded claim to be considered when the parties' conduct demonstrates their express or implied consent to litigate the claim. *See Rodriguez v. Doral Mortg. Corp.,* 57 F.3d 1168, 1172 (1st Cir.1995). The rule provides in relevant part:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Fed.R.Civ.P. 15(b)(2). A party can give implied consent to the litigation of an unpleaded claim in two ways: by treating a claim introduced outside the complaint "as having been pleaded, either through [the party's] effective engagement of the claim or through his silent acquiescence"; or by acquiescing during trial "in the introduction of evidence which is relevant only to that issue." *Doral Mortg.,* 57 F.3d at 1172.

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Here, the appellants plainly gave their implied consent to the adjudication of the preemption claim. For one thing, they never objected when it became clear that BAA preemption would be at the heart of the remanded proceeding. At its first scheduling conference following remand, the district court discussed with the parties the scope of the *Antilles II* mandate. When the court issued its scheduling order, it listed the BAA's preemptive effect among the controverted issues. There was no objection. The parties then engaged in extensive discovery, which included numerous matters related to the BAA and preemption. Later, the parties briefed several issues, including the applicability of the BAA to Puerto Rico and its preemptive effect. Throughout all of these proceedings, the appellants never suggested that BAA preemption went beyond the scope of the issues properly before the district court. Indeed, the appellants joined the preemption issue by arguing that the BAA represented a congressional authorization of the challenged statutes.

By actively contesting the BAA preemption claim on the merits, the appellants effectively conceded that it had been incorporated into the complaint. Moreover, given the extensive notice that BAA preemption would be litigated upon remand, *see, e.g.,* *Antilles II*, 408 F.3d at 47–49, the appellants cannot show that they were prejudiced by the court's consideration of that issue.[FN2] We therefore uphold the district court's ruling that the BAA preemption claim was properly before it.

> FN2. The cases cited by the appellants in which implied consent was not found are inapposite. *See, e.g.,* *United States v. Davis*, 261 F.3d 1, 59 (1st Cir.2001) (finding no abuse of discretion when court denied plaintiff's belated request to amend complaint); *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 13–14 (1st Cir.1993) (affirming denial of motion to amend where claim raised far into discovery); *Campana v. Eller*, 755 F.2d 212, 215–16 (1st Cir.1985) (same). In none of those cases did the parties, at the court's direction, engage the issue in question.

III. THE MERITS

The parties have stipulated to the salient facts, and the issues before us are legal in nature. Those issues engender de novo review. *See* *Morales Feliciano v. Rullán*, 378 F.3d 42, 49 (1st Cir.2004).

A. *Preemption.*

[8] According to the district court, Laws 109 and 132 unduly restrict Puerto Rico's ability to procure foreign materials for its public projects and, in the process, undermine the BAA's delicate balancing of protectionism and foreign trade and its policy of encouraging flexibility in procurement decisions. We do not agree.

As a preliminary matter, the appellants concede (as they must) that the BAA places restrictions on federal construction projects in Puerto Rico. They likewise concede that Law 109, which purports to govern public projects that are financed with either federal or Commonwealth funds, *see* P.R. Laws Ann. tit. 3, § 927(f), is preempted by the BAA to the extent that it tries to restrict federal projects in Puerto Rico. But the appellants dispute the district court's ruling that the BAA preempts Laws 109 and 132 as they apply to public projects that are funded by the Commonwealth. Refined to its bare essence, the appellants' argument is that the Commonwealth has the same degree of sovereignty as the several states; and that because the BAA does not pertain to state governments, it should not be construed to restrict public projects undertaken by Puerto Rico.

[9][10] We reject the appellants' contention that the BAA has no application to Puerto Rico. Whether and how a federal statute applies to Puerto Rico is a question of Congressional intent. *Jusino Mercado v. Puerto Rico*, 214 F.3d 34, 40 (1st Cir.2000). The critical inquiry in this instance, then, is whether Congress intended for Puerto Rico to be treated as a state under the BAA. *See* *id.* Because this poses a question of statutory interpretation, we employ the usual tools. *See* *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 168 (1st Cir.2009) (limning general principles of statutory construction). We must evaluate the statute's language within the statutory scheme and look to the legislative history and policy only if that language is unclear. *See* *Gen. Motors Corp. v. Darling's*, 444

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F.3d 98, 108 (1st Cir.2006).

[11] Under the express terms of the BAA (and leaving its exceptions to one side), only domestic materials may be acquired for "public use" or used in the construction, alteration, or repair of any "public building" or "public work." 41 U.S.C. §§ 8302–8303. The statute applies only to "a public building of, use by, and a public work of, the Federal Government, the District of Columbia, *Puerto Rico,* American Samoa, and the Virgin Islands." *Id.* § 8301 (emphasis supplied). By its plain terms, then, the BAA encompasses public construction projects undertaken by the government of Puerto Rico. We find this explicit language dispositive. *See In re Pharm. Indus.*, 582 F.3d at 168 ("The Supreme Court has repeatedly emphasized the importance of the plain meaning rule, stating that if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written." (quoting *Textron Inc. v. Comm'r of Internal Revenue,* 336 F.3d 26, 31 (1st Cir.2003))).

The appellants attempt to dampen the impact of the BAA's plain language by arguing that the explicit reference to Puerto Rico is a vestige of a time when Puerto Rico was a federally administered territory. They point out that, more than a decade after the BAA's enactment in 1933, Puerto Rico was transformed from a territory into a self-governing commonwealth. *See* Federal Relations Act of 1950(FRA), Pub.L. No. 81–600, 64 Stat. 319 (codified at 48 U.S.C. §§ 731b–731e). In *Cordova & Simonpietri Insurance Agency Inc. v. Chase Manhattan Bank N.A.,* we recognized that, following the adoption of the FRA, federal statutes that had applied to Puerto Rico as a territory might no longer pertain to it in its capacity as a commonwealth. 649 F.2d 36, 38 (1st Cir.1981). The appellants argue that the BAA is such a statute. They contend that the BAA's framers would not have intended for the law to apply to an autonomous commonwealth like Puerto Rico and that the words "Puerto Rico" remain in the statute due only to the inadvertence of subsequent Congresses.

This argument is not without some force, but it is defeated by the fact that Congress recently overhauled the BAA yet left the words "Puerto Rico" intact. *See* Act of Jan. 4, 2011, Pub.L. No. 111–350, § 3, 124 Stat. 3677, 3830–33. The stated purpose of this overhaul was to clarify ambiguities in the BAA (and other laws codified in Title 41 of the United States Code) and better effect the intent of the drafters of those laws. *See id.* § 2, 124 Stat. at 3677. As part of this legislative refurbishment, among other things, Congress restructured and re-enacted the BAA, removed the "[Panama] Canal Zone" from the list of covered entities, and rechristened the "United States" as "the Federal Government." Yet Congress did not delete the BAA's reference to Puerto Rico. We can think of no better indicator of Congress's intent to continue to include Puerto Rico within the reach of the BAA than its overhauling the BAA yet preserving the law's explicit application to the Commonwealth.

Even beyond this recent overhaul, we note that Congress historically has been diligent in amending the BAA to remove entities that it no longer intends to cover. For example, when the BAA was initially enacted, it expressly applied to the territories of Alaska and Hawaii. But when Alaska and Hawaii achieved statehood, Congress amended the BAA to remove them from its purview. *See* Hawaii Omnibus Act, Pub.L. No. 86–624, § 28, 74 Stat. 411, 419 (1960); Alaska Omnibus Act, Pub.L. No. 86–70, § 43, 73 Stat. 141, 151 (1959). Congress's failure similarly to amend the BAA following the FRA's enactment strongly suggests an intent that the BAA continue to apply to Puerto Rico. *See Caribbean Tubular Corp. v. Fernandez Torrecillas,* 67 B.R. 172, 175 (D.P.R.1986) ("[H]ad Congress intended to oust Puerto Rico from the coverage of the BAA it would have done so in 1959 when it excluded Alaska and Hawaii.").

[12] *Cordova* does not compel a different conclusion.[FN3] There, we observed that following passage of the FRA Puerto Rico now enjoys "the degree of autonomy and independence normally associated with a State of the Union." 649 F.2d at 41 (quoting *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero,* 426 U.S. 572, 594, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976)). But we recognized that Puerto Rico is not a state. *See id.* (referencing Puerto Rico's "unique status of Commonwealth"). Accordingly, although we now generally presume that Congress intends its laws to have the same effect on Puerto Rico as they do on any state, that presumption can be overcome by "specific evidence" to the contrary or by "clear policy reasons embedded in" a statute. *Id.* at 42; *see Jusino Mercado,* 214 F.3d at 42 (listing "two possible avenues to differential treatment: an express direction in the statutory text or some

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other compelling reason"). Here, the explicit reference to Puerto Rico in the BAA and Congress's decision to retain that reference notwithstanding its recent overhaul of the statute are overwhelming and express evidence that Congress intends the BAA to apply to the Commonwealth even though it does not apply to any of the fifty states.

> FN3. In *Cordova,* we determined that the Sherman Act applies in Puerto Rico the same as it does in any state in part because the law did not expressly refer to the Commonwealth. 649 F.2d at 42. The BAA, by contrast, explicitly references Puerto Rico.

In an effort to blunt the force of this reasoning, the appellants note that a 1988 amendment to the BAA added several references to "Federal agenc[ies]." *See* Act of Aug. 23, 1988, Pub.L. No. 100–418, §§ 7002, 7005, 102 Stat. 1107. They assert that this amendment demonstrates that the BAA applies only to the federal government, not to the autonomous government of Puerto Rico. But the 1988 amendment did not eliminate the BAA's explicit reference to Puerto Rico and, in all events, that amendment ceased to be effective on April 30, 1996. *See id.* § 7004.

[13] We also reject the appellants' asseveration that the BAA's inclusion of Puerto Rico was impliedly repealed when Congress passed the FRA. It is a "cardinal rule ... that repeals by implication are not favored." *Morton v. Mancari,* 417 U.S. 535, 549, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (quotation marks omitted). Implied repeal occurs only where two acts are in irreconcilable conflict or when a later act "covers the whole subject of the earlier one and is clearly intended as a substitute." *Posadas v. Nat'l City Bank of N.Y.,* 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936).

Here, there is no basis for arguing that the FRA was intended to replace the BAA (and, indeed, the appellants abjure any such argument). What is more, the BAA and the FRA coexist in perfect harmony. It is beyond hope of contradiction that the FRA permits Congress to treat Puerto Rico differently from the states. *See Jusino Mercado,* 214 F.3d at 40; *Cordova,* 649 F.2d at 42. The BAA does exactly that, imposing unique procurement restraints on the Commonwealth's government. There is simply no conflict between the FRA's granting of autonomy to Puerto Rico and the BAA's imposition of rules applicable to the Commonwealth. Moreover, even if the BAA and FRA were in irreconcilable conflict, the BAA holds the trump card. After all, Congress re-enacted the BAA in 2011, making it the more recent expression of Congress's intent. *See* Pub.L. No. 111–350.

We are also unpersuaded by the appellants' reliance on 48 U.S.C. § 734, which states that: "The statutory laws of the United States not locally inapplicable ... shall have the same force and effect in Puerto Rico as in the United States...." As we have made pellucid, this provision is without force where Congress intends to treat Puerto Rico differently from the states. *See Jusino Mercado,* 214 F.3d at 42. By expressly including "Puerto Rico" among the entities enumerated in the BAA, Congress plainly intended the law to apply to the Commonwealth even though it does not apply to the states.

[14] Equally misplaced is the appellants' reliance on the 1950 Act of Congress that granted Puerto Rico the right to ratify a constitution. Section 6 of that Act states that "All laws or parts of laws inconsistent with this Act are hereby repealed." FRA, § 6, 64 Stat. at 320. We see nothing "inconsistent" between the BAA and the 1950 Act. Congress is permitted to treat Puerto Rico differently despite its state-like status, *Jusino Mercado,* 214 F.3d at 42, and the BAA is merely an instance of Congress exercising that prerogative.[FN4]

> FN4. At any rate, the 1950 Act repealed only "inconsistent" laws then in existence; it has no effect on Congress's 2011 re-enactment of the BAA.

To say more on this point would be supererogatory. We conclude that the BAA by its express terms imposes restrictions on public construction projects undertaken by the Commonwealth of Puerto Rico. But this conclusion, in and of itself, does not resolve the preemption inquiry. We turn next to the preemptive effect, if any, of the BAA on the local laws at issue here.

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[15][16] It is a matter of bedrock that "the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2; *see* *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819) ("It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments...."). Consequently, state laws that "interfere with, or are contrary to the laws of Congress" are void ab initio. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23 (1824); *see* *Free v. Bland,* 369 U.S. 663, 666, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962) (stating that "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield"). For preemption purposes, the laws of Puerto Rico are the functional equivalent of state laws. *See* *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.,* 485 U.S. 495, 499, 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988).

[17][18][19] In determining the preemptive effect of a federal law, we must look to the intent of Congress. *Altria Grp., Inc. v. Good,* 555 U.S. 70, 76, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008). We begin with the presumption that a federal act does not preempt an otherwise valid state law, and we set aside that postulate only in the face of clear and contrary congressional intent. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.,* 536 U.S. 424, 432, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). In some instances, that intent can appear haec verba on the face of a statute. *See, e.g.,* *Sprietsma v. Mercury Marine,* 537 U.S. 51, 58–59, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002). In the absence of express language, however, we must look to the structure and purpose of the statute. *See* *Barnett Bank of Marion Cnty., N.A. v. Nelson,* 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). For example, we can infer Congress's intent to preempt an entire field of law when it enacts a scheme of regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). By like token, when a state law directly conflicts with a federal statute—such as where it is "physically impossible" to comply with both laws or "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress"—we can presume that Congress intended preemption to occur. *La. Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 368–69, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986).

No express language in the BAA evinces an intent to preempt state law. Nor can we perceive any field that Congress attempted to occupy through the enactment of the BAA.

To be sure, Antilles proposes that Congress intended by means of the BAA to exercise full dominion over "the field of acquisitions of foreign products, insofar as Puerto Rico and the other territories of the United States are concerned." Appellee's Br. at 33. There are two problems with this concept. First, the BAA is the only federal statute that purposes to regulate Puerto Rico's acquisitions of foreign products, and its scope is hardly pervasive. Second, there is a strong presumption that Congress does not intend to preempt a field traditionally occupied by the states unless Congress makes such an intention "clear and manifest." *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.,* 471 U.S. 707, 715, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). Puerto Rico's ability to spend its money as it chooses is a basic aspect of its autonomy, and we cannot believe that Congress intended to commandeer Puerto Rico's spending power insofar as it relates to foreign products without making that intent clear.

Antilles suggests that Congress demonstrated its intent to preempt Puerto Rico's procurement policies by enacting the BAA. But this is little more than a tautology, and the Supreme Court has cautioned against the tautological inference that whenever the federal government steps into a field, its regulations will be exclusive. *See* *id.* at 717, 105 S.Ct. 2371. The Court added that "[s]uch a rule ... would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." *Id.* Consistent with this guidance, we conclude that the mere fact that Congress enacted the BAA is not enough to evince a manifest intent to preempt all Puerto Rico laws relating to the Commonwealth's purchase of foreign products.

[20][21] Having determined that the BAA neither expressly preempts Laws 109 and 132 nor preempts the field in which those statutes operate, we are left with the question of whether there is any irreconcilable conflict between

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the BAA and those laws. We undertake this inquiry mindful that a state law must yield to a federal law "when compliance with both state and federal regulations is impossible or when state law interposes an obstacle to the achievement of Congress's discernible objectives." *Grant's Dairy–Me., LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res.,* 232 F.3d 8, 15 (1st Cir.2000).

It is surely possible to comply simultaneously with both the BAA and the challenged Puerto Rico statutes. Laws 109 and 132 stiffen, but do not contradict, the protectionist requirements of the BAA. A few examples will serve to illustrate this point.

Under the BAA, Puerto Rico must purchase domestic materials for use in public construction projects unless the cost of comparable foreign materials would be at least six percent lower. *See* 48 C.F.R. § 25.204(b). Law 109, however, demands adherence to the domestic preference unless the foreign product is at least fifteen percent cheaper. *See Antilles II,* 408 F.3d at 44. Similarly, the BAA's domestic preference requirement can be waived if a department head determines that it is not in the "public interest." 41 U.S.C. §§ 8302(a)(1); 8303(b)(3). Law 109 eviscerates this exemption. Up and down the line, Law 109 imposes more severe obstacles to the Commonwealth's ability to purchase foreign goods than does the BAA. It follows that if the Commonwealth is in compliance with Law 109, then it by definition has satisfied the BAA's more relaxed standards. After all, the greater necessarily includes the lesser.

The district court implicitly agreed that it is possible to comply with both the BAA and the challenged statutes. It nonetheless found that the former preempted the latter because Laws 109 and 132 undercut Congress's aims. We are not persuaded.

[22][23][24] There is nothing unusual about a state supplementing a federal statute with stronger regulations. *See, e.g., Attrezzi, LLC v. Maytag Corp.,* 436 F.3d 32, 41 (1st Cir.2006). By legislating in an area, Congress generally does "not mean that States and localities [are] barred from ... imposing further requirements in the field." *Hillsborough Cnty.,* 471 U.S. at 717, 105 S.Ct. 2371. Thus, courts routinely have upheld state statutes that impose tougher restrictions than their federal counterparts as long as the state law does not undermine the purposes of the federal statute. *See, e.g., Cal. Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 288–92, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987); *Keebler Co. v. Rovira Biscuit Corp.,* 624 F.2d 366, 372 n.3 (1st Cir.1980), *abrogated on other grounds, Two Pesos, Inc. v. Taco Cabana, Inc.,* 505 U.S. 763, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1992). Conversely, state statutes that flatly contradict policies embedded in a federal statute are preempted. *See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 159–60, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989).

Among other things, then, determining whether state and federal statutes can coexist requires us to consider the extent to which their policy aims are harmonious. *See United States v. Locke,* 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000). The core policy of the BAA is the protection of American industry (and, by extension, the American worker) from foreign competition. *See Rule Indus.,* 878 F.2d at 538; *Allis–Chalmers Corp., Hydro–Turbine Div. v. Friedkin,* 635 F.2d 248, 257 (3d Cir.1980); *see also* 76 Cong. Rec. 1893 (statement of Rep. Riley J. Wilson) (explaining, in his role as the BAA's principal sponsor, that "the purpose of this bill is to establish a policy by the Government assuring the use of American materials for the execution and carrying on of public works in every place where the United States has jurisdiction"); 155 Cong. Rec. *S13321, *S13322 (statement of Sen. Russ Feingold) (noting that the name of the BAA "accurately describes its purpose: to ensure that the Federal Government supports domestic companies and domestic workers by buying American-made goods"). Laws 109 and 132, which are protectionist in nature, comport perfectly with that policy.

Of course, the BAA makes some exceptions to its essentially protectionist regime, and the Executive Branch has sometimes blunted its thrust. *See, e.g.,* Exec. Order No. 10582, 19 Fed.Reg. 8723 (Dec. 17, 1954). But that nibbling around the edges does not mean, as Antilles would have it, that the BAA embodies a federal policy of "allow[ing] a reasonable flux of foreign commerce." Appellee's Br. at 36. The fact that either Congress or the Executive Branch has determined, in particular circumstances, that a covered entity is not bound by the BAA's strictures does not show that the BAA manifests any type of pro-trade policy; those exceptions merely recognize that the

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BAA's protectionist regime may be impracticable in some situations. Indeed, if the BAA were concerned with encouraging international trade, then we would expect a covered entity to be *required* to purchase foreign goods when a BAA exception applies. But that is not the case. The BAA simply gives covered entities the *option* to buy foreign goods in certain circumstances, but it never demands engagement in foreign commerce. *See, e.g.,* 41 U.S.C. §§ 8302(a)(1)–(2); 8303(b) (limning situations where "Buy American" requirement does not apply); 48 C.F.R. § 25.204(b) (expressly permitting covered entity to ignore cost exception to BAA).

The district court found that Law 109 contravenes the BAA's policy of encouraging "flexibility" in procurement decisions. Leaving to one side whether "flexibility" is a "policy" indulging the BAA, Law 109 strikes us as a manifestation of the flexibility contemplated by the statute. The BAA sets a floor of protectionism—not a ceiling. It then invites the covered entities to build upon that floor. For example, the BAA requires a covered entity to procure domestic materials as long as their foreign counterparts are not more than six percent cheaper; but the covered entity, if it so chooses, can require a higher price discrepancy before it looks overseas. *See* 48 C.F.R. § 25.204(b). By enacting Law 109, Puerto Rico—as explicitly permitted by the BAA—has raised from six to fifteen percent the price discrepancy that must exist before the Commonwealth will purchase foreign materials. In doing so, Puerto Rico has simply built upon the BAA's floor of protectionism. *See Atherton v. FDIC,* 519 U.S. 213, 227, 117 S.Ct. 666, 136 L.Ed.2d 656 (1997) (finding no preemption where federal statute "provides only a floor" that "does not stand in the way of a stricter standard that the laws of some States provide").

A second example may also prove helpful. The BAA confers upon a covered entity the option—but not the obligation—to buy foreign goods if it determines that doing so would be in the public interest. *See* 41 U.S.C. §§ 8302(a)(1); 8303(b)(3). In Law 109, Puerto Rico has declared its belief that purchasing foreign goods for its own public works is never in the public interest. So viewed, to the extent that the BAA embodies a policy of providing covered entities with flexibility in procurement decisions, Law 109 is merely an outgrowth of that policy. We find no conflict and, therefore, no preemption.[FN5]

> FN5. We need not address the suggestion that Laws 109 and 132 undermine the BAA's exemption for certain purchases made pursuant to reciprocal defense procurement agreements. *See* 41 U.S.C. § 8304. This exemption applies only to military procurements and is unaffected by the challenged Puerto Rico statutes.

B. *Dormant Foreign Commerce Clause.*

[25][26] Our conclusion that the BAA does not preempt Laws 109 and 132 brings us to the question of whether the challenged statutes violate the dormant Foreign Commerce Clause. In our federal system, Congress is imbued with the sole power "[t]o regulate Commerce with foreign Nations, and among the several States...." U.S. Const. art. I, § 8, cl. 3. There are two sides to the Commerce Clause coin: the Clause not only gives Congress the express power to regulate commerce but also implicitly protects against state laws inimical to foreign or national trade. *Barclays Bank PLC v. Franchise Tax Bd. of Cal.,* 512 U.S. 298, 310–11, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994). In other words, "[a]lthough the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *S.–Cent. Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 87, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984).

In the case at bar, Antilles insists that Laws 109 and 132 impermissibly infringe upon Congress's constitutional prerogative to regulate trade with foreign nations and thus violate the dormant aspect of the Foreign Commerce Clause. This argument is difficult to unpack because the Supreme Court has had few occasions to offer guidance regarding the contours of the dormant Foreign Commerce Clause. *See Antilles II,* 408 F.3d at 46. Each of these few instances involved the inapposite issue of state taxation of foreign commerce. *See id.* (collecting cases). Even so, there are principles that can be gleaned from cases discussing a closely related concept: the dormant Interstate Commerce Clause. *See id.* ("Although the language of dormant Commerce Clause jurisprudence most often concerns interstate commerce, essentially the same doctrine applies to international commerce.").

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[27][28][29] To begin, those cases make it clear that Puerto Rico is subject to the strictures of the dormant Commerce Clause in regard to both interstate and foreign commerce. *See* *Trailer Marine Transp. Corp. v. Rivera Vazquez,* 977 F.2d 1, 6–9 (1st Cir.1992). Like a state, therefore, Puerto Rico generally may not enact policies that discriminate against out-of-state commerce. *See, e.g.,* *Dep't of Revenue of Ky. v. Davis,* 553 U.S. 328, 338, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008). But like any state, Puerto Rico is unchained from the shackles of the Commerce Clause when it acts as a participant in the free market as opposed to a sovereign regulating the market. *See* *White v. Mass. Council of Constr. Emp'rs, Inc.,* 460 U.S. 204, 208, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983) (holding that "when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause"); *Reeves, Inc. v. Stake,* 447 U.S. 429, 437, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980) (finding "no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market"). For example, when a state sells cement from a factory that it owns, it is free to sell exclusively to in-state customers. *See* *Reeves,* 447 U.S. at 440, 100 S.Ct. 2271. Similarly, a state acting as a buyer in a particular market may discriminate in favor of in-state sellers. *See* *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 808–09, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976). Conversely, when a state is acting as a regulator rather than as a market participant, it cannot institute discriminatory policies. *See, e.g.,* *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 277–78, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988).

It cannot be gainsaid that Laws 109 and 132 discriminate against products that are produced outside Puerto Rico. The constitutionality of these laws therefore turns on whether Puerto Rico acts as a market participant or a market regulator when it enforces them.

[30] Before we proceed further, we must add a coda. To date, the market participant exception has been recognized by the Supreme Court only in cases implicating the dormant Interstate Commerce Clause. The Court has not said one way or the other whether the exception applies in cases—like this one—in which a state law is challenged under the Foreign Commerce Clause. *See* *Reeves,* 447 U.S. at 437 n. 9, 100 S.Ct. 2271. There is some reason to believe that the market participant exception might be inapplicable to state laws that discriminate against foreign commerce. The need for national uniformity in foreign affairs is important, *see* *Wardair Can., Inc. v. Fla. Dep't of Revenue,* 477 U.S. 1, 8, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986), and therefore state laws that burden foreign trade necessarily deserve closer scrutiny than those that burden only interstate commerce, *see* *Barclays,* 512 U.S. at 311, 114 S.Ct. 2268. Put another way, the dormant Foreign Commerce Clause places stricter constraints on states than its interstate counterpart. *See* *Japan Line, Ltd. v. Cnty. of L.A.,* 441 U.S. 434, 448, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) ("Although the [Commerce Clause] grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater.").

[31] The issue of whether the market participant exception can save state laws that discriminate against foreign commerce is one of first impression for this court. *See* *Nat'l Foreign Trade Council v. Natsios,* 181 F.3d 38, 65–66 (1st Cir.1999) (leaving question open), *aff'd on other grounds sub nom.* *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). After careful consideration, we hold that a state may discriminate against foreign commerce when it participates in the free market. *Accord* *Trojan Techs., Inc. v. Pennsylvania,* 916 F.2d 903, 910–12 (3d Cir.1990); *K.S.B. Technical Sales Corp. v. N. Jersey Dist. Water Supply Comm'n of N.J.,* 75 N.J. 272, 381 A.2d 774, 787 (1977).

Our conclusion is justified by the Supreme Court's oft-repeated mantra that a state, when acting as a market participant, is not "subject to the limitations of the negative Commerce Clause." *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 592, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997). Even though the Court once expressly reserved judgment on whether this principle applies to the negative Foreign Commerce Clause, *see* *Reeves,* 447 U.S. at 437 n. 9, 100 S.Ct. 2271 (dictum), it has not otherwise suggested that the market participant exception is limited to interstate commerce. To the contrary, the Court has frequently employed sweeping language to the effect that the Commerce Clause in its entirety does not apply to market participants. *See, e.g.,* *Camps Newfound,* 520 U.S. at 592–93, 117 S.Ct. 1590; *New Energy,* 486 U.S. at 277, 108 S.Ct. 1803; *S.–Cent. Timber,* 467 U.S. at 94, 104 S.Ct.

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2237; *White,* 460 U.S. at 208, 210, 103 S.Ct. 1042; *Alexandria Scrap,* 426 U.S. at 810, 96 S.Ct. 2488.

Furthermore, extending the market participant exception to the context of foreign commerce is consistent with the purposes undergirding the exemption. As the Court has explained, the exception recognizes that a state that delves into the free market is akin to a private business—and the law has long respected the unfettered discretion of private businesses to deal with whomever they please. *See Reeves,* 447 U.S. at 438–39, 100 S.Ct. 2271; *see also S.–Cent. Timber,* 467 U.S. at 94, 104 S.Ct. 2237 (concluding that "the Commerce Clause places no limitations on a State's refusal to deal with particular parties when it is participating in the interstate market in goods"). This makes perfect sense. After all, a state that participates in the market is burdened by the same regulations as private companies. *Reeves,* 447 U.S. at 439, 100 S.Ct. 2271. To ensure a level playing field, "when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Id.* While these principles have been developed in the interstate commerce context, they apply with equal force when a state-proprietor discriminates against foreign commerce. Private businesses are permitted to refuse to deal with foreign companies, and so states, acting as market participants, deserve the same leeway.

A contrary rule would lead to anomalous results. Indeed, any law that discriminates against out-of-state companies necessarily impedes both interstate and foreign commerce. The Supreme Court has repeatedly relied on the market participant doctrine to uphold discriminatory laws against Commerce Clause challenges with respect to interstate commerce. If the market participant exception cannot also excuse barriers to foreign trade, however, then all of these laws would be suspect and the Supreme Court's forging of the market participant doctrine would have been little more than an exercise in futility.

[32] At bottom, we can see no reason why a state participating in the market should not be permitted to choose with whom it does business. The dormant Foreign Commerce Clause exists to ensure that the United States speaks with a unified voice when it engages in foreign trade. *Wardair,* 477 U.S. at 8, 106 S.Ct. 2369; *Japan Line,* 441 U.S. at 448–51, 99 S.Ct. 1813. A particular state's refusal, as a market participant, to transact business with a foreign company does not undermine the cohesiveness of our national trade policy; it merely removes one entry from the foreign company's customer list. Indeed, given that the federal government has adopted a protectionist posture regarding its own public procurements, it can even be argued that a state Buy American statute—such as Law 109—actually fosters more uniformity in our trade policy.

Some commentators have expressed concern that foreign countries will view a state-proprietor's decision not to do business with them as a trade barrier erected by the United States and will seek to retaliate against the nation as whole. *See Natsios,* 181 F.3d at 66. But this fear makes sense only when discussing state regulations that burden trade between foreign companies and private entities within that state. If such laws were permitted, foreign countries would face a confusing array of protectionist state regulations and, as a result, might either eschew trade with the United States or erect their own barriers to American products. But when a state-proprietor chooses to transact business with only domestic entities, foreign companies face "no problems of reconciling conflicting policy among multiple national sovereigns." *Trojan Techs.,* 916 F.2d at 912. The companies can still do business anywhere in the United States under the same terms; they simply cannot contract with the government of the state that enacted the protectionist statute.

[33] To sum up, we hold that a state cannot violate the dormant Foreign Commerce Clause when acting as a market participant. This holding applies equally to Puerto Rico.

[34] But this conclusion does not end our odyssey. The question remains whether Puerto Rico acts as a market participant or a market regulator when enforcing Laws 109 and 132.

[35] In order to qualify for the prophylaxis of the market participant doctrine, a state must be acting as a private company would act, not "in its distinctive governmental capacity." *New Energy Co.,* 486 U.S. at 277, 108 S.Ct.

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1803. Conversely, when a state flexes its sovereign muscle to regulate the behavior of other players in the market, the market participant exception does not apply. *See, e.g., id.* at 277–78, 108 S.Ct. 1803.

[36] We add, moreover, that a state-proprietor may discriminate against foreign commerce only within the narrow market realm in which it operates. *See S.–Cent. Timber,* 467 U.S. at 99, 104 S.Ct. 2237 (holding that a state "may not avail itself of the market-participant doctrine to immunize its downstream regulation of [a] market in which it is not a participant").

We turn from the general to the specific. Law 109 states (with exceptions not relevant here) that when the Commonwealth either uses public funds to hire a contractor or engages in construction work itself, the materials used in the construction must originate from Puerto Rico. *See* P.R. Laws Ann. tit. 3, §§ 927a–927c. These provisions do not implicate the Commerce Clause. When the Commonwealth uses its own funds to undertake a construction project, it is acting as a buyer in the market for construction services. *Cf. Alexandria Scrap,* 426 U.S. at 808–10, 96 S.Ct. 2488 (holding that state acting as a buyer of scrap metal is a market participant). Because it is a market participant, the Commonwealth is entitled (as any private company would be) to demand contractual conditions that relate directly to the service being purchased. *See S.–Cent. Timber,* 467 U.S. at 97, 104 S.Ct. 2237 (explaining that "market-participant doctrine permits a State to influence 'a discrete, identifiable class of economic activity in which [it] is a major participant' " (quoting *White,* 460 U.S. at 211 n. 7, 103 S.Ct. 1042 (1983))).

This case is unlike *South–Central Timber,* where the Supreme Court prevented Alaska from imposing downstream restrictions on its customers. Under the invalidated Alaska statute, customers who gathered timber from state land were required to process that timber in Alaska. The Court held that Alaska had no business telling its customers what they could do with their timber after their transactions with the state were completed. *Id.* at 96–99, 104 S.Ct. 2237. The market participant doctrine was inapplicable because Alaska, by regulating behavior that was unrelated to its timber sales transactions, acted more like a sovereign than a private company. *See id.* at 99, 104 S.Ct. 2237. Here, by contrast, Puerto Rico has legislated domestic preference requirements that are directly tied to its activities as a participant in the market for construction services. When the Commonwealth acts as a run-of-the-mill buyer, the market participant doctrine allows it to demand discriminatory concessions that are proximately related to the transactions at issue.

It is important to note that the parties do not challenge the district court's finding that Law 109 has no bearing on private construction projects that are subsidized by the Commonwealth. If the Commonwealth had been enforcing Law 109 against such private projects, then arguably it would be acting as a market regulator, and the outcome of this appeal might be different.

We are unconvinced by Antilles's attempts to characterize Law 109 as a market regulation. It first points to the law's enforcement mechanism, which provides the Commonwealth with greater recourse against a contractor who violates Law 109 than a private party would have against a breaching counterparty under general law. *See* P.R. Laws Ann. tit. 3, §§ 927f–927g. By including these "punitive" measures, Antilles says, the Commonwealth is regulating its contractors as a sovereign would. This line of reasoning goes nowhere because a private party could easily insert similar enforcement mechanisms in a private construction contract. The Commonwealth has merely codified in legislation the sort of concessions that a private business could codify in an agreement, and doing so does not divest Puerto Rico of market participant status.

Antilles next contends that Law 109 essentially regulates the entire construction industry because it restrains the various subcontractors who work on large government projects. We are not prepared to take such a leap. Law 109 regulates subcontractors only to the extent that they are providing a service to the Commonwealth. And, as we have already established, the Commonwealth is permitted to place protectionist demands on its service providers when it participates as a buyer in the marketplace.

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That ends this aspect of the matter. We conclude that Law 109 is shielded from Commerce Clause scrutiny by the market participant doctrine.

[37] This leaves only Law 132, which requires companies that sell cement in Puerto Rico to place certain labels on their products. *See* P.R. Laws Ann. tit. 10, § 167e. That law is quite clearly an attempt to regulate the cement market.

The Commonwealth does not participate in the cement market. Rather, it has by means of Law 132 imposed labeling regulations that affect transactions between its citizens and private companies. That is the essence of acting as a market regulator. *See Pharm. Research & Mfrs. of Am. v. Concannon,* 249 F.3d 66, 80 (1st Cir.2001).

[38] Where, as here, the market participant exception does not apply and where Congress has not spoken otherwise, state laws that on their face discriminate against foreign commerce are almost always invalid. *See Fulton Corp. v. Faulkner,* 516 U.S. 325, 331, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996). Law 132 is such a law: it requires companies that sell foreign cement to place a different label on their products than companies that sell domestic cement. *See* P.R. Laws Ann. tit. 10, § 167e(a)(4). The record adequately evinces that this discriminatory labeling requirement has placed the sellers of foreign cement at a competitive disadvantage. Law 132 can thus survive only if the Commonwealth can show that the law advances a legitimate local goal that could not have been served as well by nondiscriminatory means. *See Maine v. Taylor,* 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986).

The Commonwealth has not made such a showing here. The purported justification for Law 132—insuring that contractors comply with the BAA and Law 109—can easily be accomplished by less discriminatory means. For example, the Commonwealth could maintain a database of companies that sell qualified cement and share that information with contractors who work on projects covered by the BAA and Law 109.[FN6]

> FN6. Indeed, it appears that the Commonwealth already maintains precisely this type of database. *See* P.R. Laws Ann. tit. 3, § 927d.

We hold, therefore, that, to the extent that Law 132 discriminates against sellers of foreign cement, it contravenes the Foreign Commerce Clause. Withal, we leave intact the labeling requirements of Law 132 that apply evenhandedly to sellers of foreign and domestic cement. *See Ayotte v. Planned Parenthood of N. New Eng.,* 546 U.S. 320, 328–29, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) ("We prefer ... to sever [a statute's] problematic portions while leaving the remainder intact.").

IV. CONCLUSION

To recapitulate, we uphold Law 109 as a permissible action taken by Puerto Rico in its capacity as a market participant, but we strike down those provisions of Law 132 that discriminate against sellers of foreign cement (leaving the remainder of that law intact).

Affirmed in part, reversed in part. All parties shall bear their own costs.

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Mo.,2013.
State v. Wooden
388 S.W.3d 522, 2013 WL 85688 (Mo.)
NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Missouri,
En Banc.
STATE of Missouri, Respondent,
v.
Mark WOODEN, Appellant.

No. SC 92846.
Jan. 8, 2013.

Background: Defendant was convicted in the Circuit Court, City of St. Louis, Paula Bryant, J., of two counts of harassment and one count of possession of marijuana, and he appealed.

Holdings: The Supreme Court, held that:
(1) harassment statute, prohibiting one from using coarse language offensive to one of average sensibility, was not unconstitutional as applied to defendant, and
(2) evidence was sufficient to support defendant's conviction for harassment.

Affirmed in part and reversed in part.

West Headnotes

[1] Criminal Law 110 1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In general. Most Cited Cases

Supreme Court reviews the circuit court's determination of the constitutional validity of a state statute de novo.

[2] Constitutional Law 92 990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In general. Most Cited Cases

Constitutional Law 92 996

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92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k996 k. Clearly, positively, or unmistakably unconstitutional. Most Cited Cases

Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision.

[3] Constitutional Law 92 1827

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(I) Harassment and Threats
92k1826 Harassment
92k1827 k. In general. Most Cited Cases

Extortion and Threats 165 25.1

165 Extortion and Threats
165II Threats
165k25 Nature and Elements of Offenses
165k25.1 k. In general. Most Cited Cases

Statute, providing that person commits the crime of harassment if he, when communicating with another person, knowingly uses coarse language offensive to one of average sensibility and thereby puts such person in reasonable apprehension of offensive physical contact or harm, was not unconstitutional as applied to defendant, who sent email to alderwoman mentioning dusting off a sawed-off shotgun, referring to himself as a domestic terrorist, and referring to presidential assassination, the murder of a federal judge, and the shooting of a congresswoman; resort to epithets or personal abuse was not in any proper sense communication of information or opinion safeguarded by First Amendment. U.S.C.A. Const.Amend. 1; V.A.M.S. § 565.090(1)(2).

[4] Constitutional Law 92 1507

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1507 k. Viewpoint or idea discrimination. Most Cited Cases

Constitutional Law 92 1517

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General

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92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1517 k. In general. Most Cited Cases

First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 1550

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1550 k. Criticism of government or officials. Most Cited Cases

Ability to criticize the government and public officials are privileges that are afforded to all citizens under the First Amendment and State Constitution. U.S.C.A. Const.Amend. 1; V.A.M.S. Const. Art. 1, § 8.

[6] Constitutional Law 92 1490

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1490 k. In general. Most Cited Cases

Constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within narrowly limited classes of speech. U.S.C.A. Const.Amend. 1; V.A.M.S. Const. Art. 1, § 8.

[7] Constitutional Law 92 1498

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1498 k. Absolute nature of right. Most Cited Cases

Right to free speech is not absolute at all times and under all circumstances, and instead, there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. U.S.C.A. Const.Amend. 1; V.A.M.S. Const. Art. 1, § 8.

[8] Constitutional Law 92 1545

92 Constitutional Law

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92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1545 k. In general. Most Cited Cases

Constitutional Law 92 2161

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(X) Defamation
92k2160 In General
92k2161 k. In general. Most Cited Cases

Constitutional Law 92 2191

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Y) Sexual Expression
92k2189 Obscenity in General
92k2191 k. Lack of constitutional protection. Most Cited Cases

Unprotected speech includes the lewd and obscene, the profane, the libelous, and the insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. U.S.C.A. Const.Amend. 1; V.A.M.S. Const. Art. 1, § 8.

[9] Constitutional Law 92 1800

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(H) Law Enforcement; Criminal Conduct
92k1800 k. In general. Most Cited Cases

Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the First Amendment, and its punishment as a criminal act raises no question under that instrument. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 1830

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(I) Harassment and Threats
92k1829 Threats
92k1830 k. In general. Most Cited Cases

Speech that causes a fear of physical harm is not speech protected by either the United States or Missouri constitutions, and instead, it falls into the category of words that, by their very utterance, inflict injury or tend to incite an immediate breach of the peace and do not receive constitutional pro-

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tection. U.S.C.A. Const.Amend. 1; V.A.M.S. Const. Art. 1, § 8.

[11] Criminal Law 110 1144.13(4)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(4) k. Evidence accepted as true. Most Cited Cases

Criminal Law 110 1144.13(5)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(5) k. Inferences or deductions from evidence. Most Cited Cases

Criminal Law 110 1144.13(6)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(6) k. Evidence considered; conflicting evidence. Most Cited Cases

Criminal Law 110 1159.2(9)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(9) k. Weighing evidence. Most Cited Cases

When judging the sufficiency of the evidence to support a conviction, appellate courts do not weigh the evidence but accept as true all evidence tending to prove guilt together with all reasonable inferences that support the verdict and ignore all contrary evidence and inferences.

[12] Criminal Law 110 1159.2(3)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts

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110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(3) k. Verdict supported by evidence. Most Cited Cases

In determining whether the evidence was sufficient to support a conviction, Supreme Court asks only whether there was sufficient evidence from which the trier of fact reasonably could have found the defendant guilty.

[13] Extortion and Threats 165 32

165 Extortion and Threats
165II Threats
165k32 k. Evidence. Most Cited Cases

Evidence was sufficient from which jury could reasonably find that defendant, in email to alderwoman, used coarse language offensive to one of average sensibility and that alderwoman's fear of harm or physical contact was reasonable, so as to support defendant's conviction for harassment; in email, defendant called the alderwoman a "bitch," made reference to making a mess of everything with his sawed-off shotgun, and discussed assassinated president getting his "cherry popped," and defendant also discussed the assassination of politicians, referred to himself as a domestic terrorist, and stated he would make a mess of things with his shotgun, and there was no way for the alderwoman to know defendant's subjective intent simply by reading the email. V.A.M.S. § 565.090(1)(2).

[14] Extortion and Threats 165 25.1

165 Extortion and Threats
165II Threats
165k25 Nature and Elements of Offenses
165k25.1 k. In general. Most Cited Cases

Statute, providing that person commits the crime of harassment if he, when communicating with another person, knowingly uses coarse language offensive to one of average sensibility and thereby puts such person in reasonable apprehension of offensive physical contact or harm, does not require specific threats against a person, only a reasonable apprehension of harm; nothing in plain meaning of the statute indicates that the only way a person can be put in reasonable apprehension of harm is through specific threats. V.A.M.S. § 565.090(1)(2).

[15] Criminal Law 110 1186.1

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1185 Reversal
110k1186.1 k. Grounds in general. Most Cited Cases

Extortion and Threats 165 25.1

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165 Extortion and Threats
165II Threats
165k25 Nature and Elements of Offenses
165k25.1 k. In general. Most Cited Cases

Given that provision of harassment statute, criminalizing repeated unwanted communication to another person, was unconstitutionally overbroad, defendant's conviction under this provision would be overturned because allowing his conviction to stand would constitute a manifest injustice. V.A.M.S. § 565.090(1)(5).

West Codenotes
Recognized as UnconstitutionalV.A.M.S. § 565.090(1)(5) Amanda P. Faerber, Public Defender's Office, St. Louis, for Wooden.

Jerome McDonald, Circuit Attorney's Office, St. Louis, for the State.

PER CURIAM.

A jury found Mark Wooden guilty of two counts of harassment, one under § 565.090.1(2) [FN1] and one under § 565.090.1(5), and one count of possession of marijuana. Wooden's harassment convictions stem from emails he sent to various St. Louis area public officials. On appeal, Wooden argues that his harassment conviction under § 565.090.1(2) is unconstitutional because it punishes him for exercising his right to free speech guaranteed under the First Amendment and Mo. Const. art. I, sec. 8. In the alternative, Wooden argues that there is insufficient evidence to support his conviction under that provision. Wooden argues that his harassment conviction under § 565.090.1(5) constitutes plain error because this Court overturned that provision in *State v. Vaughn*, 366 S.W.3d 513 (Mo. banc 2012).

Wooden's emails contained personally offensive language and references to sawed-off shotguns, assassinations, and domestic terrorism and did not constitute protected speech. This Court concludes that § 565.090.1(2) is constitutional as applied to Wooden and that there was sufficient evidence to support his conviction. Because *State v. Vaughn* invalidated § 565.090.1(5) and the State concedes that manifest injustice will result if the conviction under that statute is not reversed, the judgment as to count II, as conceded, is set aside. The remainder of the judgment is affirmed.

Factual and Procedural History

Between February 19, 2011, and February 24, 2011, Mark Wooden, a resident of the city of St. Louis, sent a number of emails to various St. Louis area public officials. The emails contained text, audio attachments, or both. An alderwoman for the Sixth Ward of St. Louis was one of the recipients of these emails. Wooden did not send any email to the alderwoman exclusively, and each email included as many as 40 recipients. The alderwoman received the emails at an address displayed on her official website.

On February 19, 2011, the alderwoman received an email from Wooden with a 19 minute long audio attachment. The attachment specifically referenced the alderwoman and compared her to the biblical character Jezebel who, Wooden stated, abused her weaker subjects. Wooden asserted that, like Jezebel, the alderwoman spent too much time caring for the powerful and rich in her community and did not visit or care for the poorer neighborhoods in the Sixth Ward. Wooden repeatedly used the word “bitch” and referred to the alderwoman as a “bitch in the Sixth Ward.” In the audio attach-

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ment, Wooden made reference to dusting off a sawed-off shotgun and indicated that, at one point in life, he had personally sawed off the barrel of a shotgun and sanded down the edges. Wooden stated he was going to make "a mess of everything with his sawed-off." Additionally, Wooden referred to himself as a domestic terrorist and referred to the John F. Kennedy assassination, the murder of a federal judge, and the shooting of a congresswoman, presumably the shooting of Congresswoman Gabrielle Giffords and murder of United States District Court Judge John Roll. Wooden's tone throughout a majority of the recording was menacing and, at times, maniacal.

The alderwoman received four emails between February 19 and February 21. On February 21, after receiving the fourth email, she emailed Wooden and asked him to stop emailing her. Between February 21 and February 24, Wooden sent three additional emails. At some point, the alderwoman contacted the police because she felt threatened by the emails. She also sought a restraining order because, as she testified at trial, she feared for her safety due to the threatening nature of the emails and the references to the sawed-off shotgun.

Wooden was arrested February 24, 2011. The State charged Wooden with one count of harassment under § 565.090.1(2) (count I), one count of harassment under § 565.090.1(5) (count II), and one count of possession of marijuana (count III). Wooden moved for dismissal of the harassment charges arguing that they violated his constitutional rights to freedom of speech and to petition the government for redress of grievances. The circuit court overruled the motion. The case proceeded to a jury trial, and Wooden was found guilty of all three charges. Wooden was sentenced to one day in jail for each count, to be served concurrently. This case involves the validity of a state statute; therefore, this Court has jurisdiction. Mo. Const. art. V, sec. 3.

Constitutionality of § 565.090.1(2)

Standard of Review

[1][2] This Court reviews the circuit court's determination of the constitutional validity of a state statute *de novo*. *Vaughn*, 366 S.W.3d at 517. "Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision." *Id.*

Analysis

[3] Wooden asserts that § 565.090.1(2) is unconstitutional as applied to him because his speech was protected under the First Amendment to the United States Constitution and Mo. Const. art. I, sec. 8.[FN2] Section 565.090.1(2) states:

1. A person commits the crime of harassment if he or she:

3

(2) When communicating with another person, knowingly uses coarse language offensive to one of average sensibility and thereby puts such person in reasonable apprehension of offensive physical contact or harm[.]

Wooden asserts that his communications were meant as a commentary about the performance of his elected governmental representative and, therefore, constituted protected political speech.

[4][5][6] "[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*,

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408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). The ability to criticize the government and public officials are undeniably privileges that are afforded to all citizens under the First Amendment and Missouri's correlative provision, article I, section 8. *See* *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Significantly, "[t]he constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within narrowly limited classes of speech." *Vaughn*, 366 S.W.3d at 518 (quoting *Hess v. Indiana*, 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973)).

[7][8][9] But the right to free speech "is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Id.* at 571–72, 62 S.Ct. 766. Unprotected speech includes "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572, 62 S.Ct. 766. "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.; see also* *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (Kennedy, J., concurring) (indicating that the constitution does not protect obscenity, defamation, words tantamount to an act otherwise criminal, words that impair some other constitutional right, speech that incites lawless action, and speech calculated or likely to bring about imminent harm the State has the substantive power to prevent). "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell v. Connecticut*, 310 U.S. 296, 309–10, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

While Wooden's communications with the alderwoman involved criticism of her work as alderwoman, Wooden has not carried his burden of demonstrating that § 565.090.1(2), as applied to him, clearly contravenes a constitutional provision. In addition to the criticism of the alderwoman and other St. Louis area public officials, Wooden discussed using a sawed-off shotgun, domestic terrorism, and the assassination or murder of politicians. He did so while likening the alderwoman to the biblical character, Jezebel, who was eaten by dogs as punishment for her abuse of power, and referring to the alderwoman as a "bitch in the Sixth Ward." These communications are words that, taken together, "through their very utterance inflict injury or tend to incite an immediate breach of the peace" and are not protected by the First Amendment or the Missouri Constitution. *Chaplinsky*, 315 U.S. at 571–72, 62 S.Ct. 766.

Wooden urges this Court to follow the United States Supreme Court case of *Cohen v. California.* Cohen was convicted of disturbing the peace for wearing a jacket bearing the words "F—— the Draft." 403 U.S. at 16, 91 S.Ct. 1780. Cohen was convicted under a statute that prohibited "maliciously and willfully disturb(ing) the peace or quiet of any neighborhood or person ... by ... offensive conduct...." *Id.* The Supreme Court found the conviction was unconstitutional because it clearly rested on the offensiveness of the word used. *Id.* at 18, 91 S.Ct. 1780. Wooden argues that his conviction, similar to *Cohen,* rests solely on the offensiveness of the word "bitch" used in his communications.

[10] *Cohen* is distinguishable from Wooden's case. Wooden's argument that his conviction rests solely on the offensiveness of the language he used completely ignores his references to dusting off his shotgun, domestic terrorism, and the assassination of a number of politicians. Unlike in *Cohen,* where the statute criminalized only "offensive conduct," here § 565.090.1(2) required the jury to find

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Wooden used "coarse language offensive to one of average sensibilities" *and* that such communication "put[ ] [the alderwoman] in reasonable apprehension of offensive physical contact or harm." Speech that causes a fear of physical harm is not speech protected by either the United States or Missouri constitutions. Rather, it falls into the category of words "[that] by their very utterance inflict injury or tend to incite an immediate breach of the peace" and do not receive constitutional protection. *Chaplinsky*, 315 U.S. at 572, 62 S.Ct. 766. The constitutions do not afford the luxury of allowing an individual to send threatening communications to politicians, pepper them with political speech, and then hide behind the individual rights he or she has maliciously abused. While portions of Wooden's messages constituted actual criticism of the alderwoman, there is nothing unconstitutional about punishing Wooden for those unprotected portions that placed the alderwoman in "reasonable apprehension of offensive physical contact or harm." Because § 565.090.1(2) punished Wooden for his unprotected communications, it is not unconstitutional as applied.

Sufficiency of the Evidence for the Conviction under § 565.090.1(2)

Standard of Review

[11][12] When judging the sufficiency of the evidence to support a conviction, appellate courts do not weigh the evidence but accept as true all evidence tending to prove guilt together with all reasonable inferences that support the verdict and ignore all contrary evidence and inferences. *State v. Latall*, 271 S.W.3d 561, 566 (Mo. banc 2008). "In determining whether the evidence was sufficient to support a conviction, this Court asks only whether there was sufficient evidence from which the trier of fact reasonably could have found the defendant guilty." *Id.*

Analysis

[13] Section § 565.090.1(2) has three elements: l)the defendant makes a communication with another person, 2) during that communication the defendant uses "coarse language offensive to one of average sensibility," and 3) "thereby puts such person in reasonable apprehension of offensive physical contact or harm." Wooden admits that he made a communication, but he asserts that there was insufficient evidence for a juror to reasonably find the final two elements of the crime.

Wooden argues that there was insufficient evidence to support a finding that he used coarse language offensive to one of average sensibility in his communications. This Court in *State v. Koetting*, 691 S.W.2d 328, 331 (Mo.App. E.D.1985), held that "[c]oarse language directed specifically to an average person is likely to be offensive." Wooden claims that he never directed any coarse language at the alderwoman. This contention is undercut by the audio attachment in which Wooden called the alderwoman the "bitch in the Sixth Ward," made reference to making a mess of everything with his sawed-off shotgun, and discussed John F. Kennedy getting his "cherry popped." Moreover, Wooden directed these remarks at the alderwoman merely by sending her the email containing the attachment. Taken together, there was sufficient evidence from which a juror could reasonably find that Wooden used "coarse language offensive to one of average sensibility."

[14] Wooden also argues that there was insufficient evidence to find that the alderwoman's fear of harm or physical contact was reasonable. Wooden argues that the fear was unwarranted because he did not make any specific threats of harm and his statements were "metaphoric." As has been noted repeatedly, Wooden singled out the alderwoman in his audio attachment, he discussed the assassination of politicians, referred to himself as a domestic terrorist, and stated he would make a mess of things with his shotgun. Wooden's claims that the statements were metaphoric is irrelevant. There was no way for the alderwoman, or a reasonable juror, to know Wooden's subjective intent simply by listening to the audio attachments or reading the email. The lack of specific threats is also unpersuasive. Section 565.090.1(2) does not require specific threats against a person, only a reason-

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able apprehension of harm. Nothing in this Court's precedent or the plain meaning of the statute indicates that the only way a person can be put in reasonable apprehension of harm is through specific threats. Reviewing all the evidence on the record, there was sufficient evidence from which a juror could reasonably find that the alderwoman was placed in reasonable apprehension of offensive physical contact or harm by the coarse language used by Wooden.

Conviction Under § 565.090.1(5)

[15] Wooden also challenges his conviction under count II for violation of § 565.090.1(5). Wooden argues that he has suffered a manifest injustice because this Court in *State v. Vaughn* ruled that § 565.090.1(5) was unconstitutionally overbroad. The State concedes that allowing Wooden's conviction for count II to stand would constitute a manifest injustice. The judgment as to count II is reversed.

Conclusion

For the foregoing reasons, the judgment as to count II is reversed. In all other respects, the judgment is affirmed.

TEITELMAN, C.J., RUSSELL, BRECKENRIDGE, FISCHER, STITH and DRAPER, JJ., concur. WILSON, J., not participating.

FN1. All statutory references are to RSMo Supp.2011, unless otherwise noted.

FN2. Mo. Const. art. I, sec. 8 provides:

> That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty; and that in all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and in suits and prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts.

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C.A.9 (Cal.),2014.
SmithKline Beecham Corp. v. Abbott Laboratories
740 F.3d 471, 14 Cal. Daily Op. Serv. 563, 2014 Daily Journal D.A.R. 717

United States Court of Appeals,
Ninth Circuit.

SMITHKLINE BEECHAM CORPORATION, dba GlaxoSmithKline, Plaintiff–Appellee,
v.
ABBOTT LABORATORIES, Defendant–Appellant.

SmithKline Beecham Corporation, dba GlaxoSmithKline, Plaintiff–Appellant,
v.
Abbott Laboratories, Defendant–Appellee.

Nos. 11–17357, 11–17373.
Argued and Submitted Sept. 18, 2013.
Filed Jan. 21, 2014.

Background: Licensee brought action alleging that manufacturer of drug to treat human immunodeficiency virus (HIV) had violated implied covenant of good faith and fair dealing, antitrust laws, and North Carolina Unfair Trade Practices Act. The United States District Court for the Northern District of California, Claudia Wilken, Chief District Judge, granted judgment for licensee after jury verdict in its favor in part. Licensee appealed.

Holdings: The Court of Appeals, Reinhardt, Circuit Judge, held that:
(1) manufacturer struck juror on basis of his sexual orientation;
(2) heightened scrutiny applies to classifications based on sexual orientation;
(3) equal protection forbids striking juror on basis of sexual orientation; and
(4) *Batson* violation was not subject to harmless error review.

Reversed and remanded.

West Headnotes

[1] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Batson analysis requires the party challenging the peremptory strike to establish a prima facie case of intentional discrimination, the striking party then must give a nondiscriminatory reason for the strike, and, finally, the court

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determines, on the basis of the record, whether the party raising the challenge has shown purposeful discrimination.

[2] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

To establish a prima facie case under *Batson*, the party challenging the peremptory strike must produce evidence that (1) the prospective juror is a member of a cognizable group; (2) counsel used a peremptory strike against the individual; and (3) the totality of the circumstances raises an inference that the strike was motivated by the characteristic in question.

[3] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

The party challenging the peremptory strike satisfies the requirements of *Batson*'s first step that the prospective juror is a member of a cognizable group by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

[4] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Under *Batson*, the burden on the challenging party at the prima facie stage to show that the prospective juror is a member of a cognizable group is a burden of production, not a burden of persuasion, and it is not an onerous one.

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[5] Constitutional Law 92 3446

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3446 k. Juries. Most Cited Cases

Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Prima facie case was established, under *Batson*, that drug manufacturer intentionally discriminated against juror based on his sexual orientation, in violation of equal protection, by peremptorily striking him, in action alleging that manufacturer had unlawfully increased price of its HIV drug; juror was only self-identified gay member of venire, litigation presented issue of consequence to gay community, and there was reason to infer that manufacturer struck juror on basis of his sexual orientation because of its fear that he would be influenced by concern in gay community over manufacturer's decision to increase price of its HIV drug. U.S.C.A. Const.Amend. 5.

[6] Constitutional Law 92 3832

92 Constitutional Law
92XXVI Equal Protection
92XXVI(G) Juries
92k3832 k. Peremptory challenges. Most Cited Cases

Equal protection forbids striking even a single prospective juror for discriminatory purpose. U.S.C.A. Const.Amend. 5.

[7] Constitutional Law 92 3446

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3446 k. Juries. Most Cited Cases

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Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Drug manufacturer failed to offer non-sexual orientation-based reasons for its peremptory strike of only self-identified gay member of venire, and therefore did not rebut prima facie case of equal protection violation under *Batson*, in action alleging that manufacturer had unlawfully increased price of its HIV drug; record did not support manufacturer's claim that juror had lost friends to AIDS, despite manufacturer's claim that juror was acquainted with many people in legal field, other jurors who were lawyers or had close relatives who were lawyers were not stricken, manufacturer's claim that other jurors "might have given extra weight" to juror's opinions because he was computer technician with Ninth Circuit was "highly speculative," and even though juror was only one who testified that he had heard of any of three drugs at issue, when asked what he knew about the drug, juror replied, "not much." U.S.C.A. Const.Amend. 5.

[8] Constitutional Law 92 3430

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3430 k. In general. Most Cited Cases

Heightened scrutiny applies to equal protection claims involving sexual orientation. U.S.C.A. Const.Amend. 5.

[9] Constitutional Law 92 3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and other written regulations and rules. Most Cited Cases

A law must be upheld under rational basis equal protection review if any state of facts reasonably may be conceived to justify the classifications imposed by the law; this lowest level of review does not look to the actual pur-

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poses of the law, but, instead, it considers whether there is some conceivable rational purpose that Congress could have had in mind when it enacted the law. U.S.C.A. Const.Amend. 5.

[10] Constitutional Law 92 3053

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3053 k. In general. Most Cited Cases

Rational basis review under Equal Protection Clause ordinarily is unconcerned with the inequality that results from the challenged state action. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 92 3430

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3430 k. In general. Most Cited Cases

When state action discriminates on the basis of sexual orientation, a court must apply heightened scrutiny under the equal protection clause and examine its actual purposes and carefully consider the resulting inequality to ensure that the most fundamental institutions neither send nor reinforce messages of stigma or second-class status. U.S.C.A. Const.Amend. 14.

[12] Constitutional Law 92 3446

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3446 k. Juries. Most Cited Cases

Equal protection forbids striking a juror on basis of sexual orientation. U.S.C.A. Const.Amend. 5.

[13] Constitutional Law 92 3832

92 Constitutional Law

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92XXVI Equal Protection
92XXVI(G) Juries
92k3832 k. Peremptory challenges. Most Cited Cases

Federal Courts 170B 3698(2)

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)4 Harmless and Reversible Error
170Bk3686 Particular Errors as Harmless or Prejudicial
170Bk3698 Jury
170Bk3698(2) k. Selection and impaneling of jurors. Most Cited Cases
(Formerly 170Bk893)

Because effect of peremptory strike of juror in violation of equal protection is so pervasive, it is not subject to harmless error review. U.S.C.A. Const.Amend. 5.

[14] Federal Courts 170B 3698(2)

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)4 Harmless and Reversible Error
170Bk3686 Particular Errors as Harmless or Prejudicial
170Bk3698 Jury
170Bk3698(2) k. Selection and impaneling of jurors. Most Cited Cases
(Formerly 170Bk893)

Even if drug manufacturer's *Batson* violation was subject to harmless error review, peremptory strike of juror based on his sexual orientation, in violation of equal protection, was not harmless, with respect to contract claim on which jury held against manufacturer, since there was sufficient evidence for that claim to go jury. U.S.C.A. Const.Amend. 5.

Daniel B. Levin (argued), Jeffrey I. Weinberger, Stuart N. Senator, Keith R.D. Hamilton, Kathryn A. Eidman, Munger, Tolles, & Olson LLP, Los Angeles, CA; Krista Enns, San Francisco, CA, Winston & Strawn LLP; James F. Hurst, Samuel S. Park, Chicago, IL, Winston & Strawn LLP; Charles B. Klein, Steffen N. Johnson, Matthew A. Campbell, Jacob R. Loshin, Winston & Strawn LLP, Washington, D.C., for Defendant–Appellant/Cross–Appellee.

Lisa S. Blatt (argued), Arnold & Porter LLP, Washington, D.C.; Brian J. Hennigan (argued), Alexander F. Wiles, Carlos R. Moreno, Trevor V. Stockinger, Lillie A. Werner, Christopher Beatty, Andrew Ow, Irell & Manella LLP, Los Angeles, CA; Sarah M. Harris, Arnold & Porter LLP, Washington, D.C., for Plaintiff–Appellee/Cross–

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Appellant.

Shelbi D. Day, Tara L. Borelli, Jon W. Davidson, Lambda Legal Defense and Education Fund, Inc., Los Angeles, CA, for Amicus Curiae.

Appeal from the United States District Court for the Northern District of California, Claudia Wilken, Chief District Judge, Presiding. D.C. No. 4:07–cv–05702–CW.

Before: SCHROEDER, REINHARDT, and BERZON, Circuit Judges.

OPINION

REINHARDT, Circuit Judge:

The central question in this appeal arises out of a lawsuit brought by SmithKline Beecham (GSK) against Abbott Laboratories (Abbott) that contains antitrust, contract, and unfair trade practice (UTPA) claims. The dispute relates to a licensing agreement and the pricing of HIV medications, the latter being a subject of considerable controversy in the gay community. GSK's claims center on the contention that Abbott violated the implied covenant of good faith and fair dealing, the antitrust laws, and North Carolina's Unfair Trade Practices Act by first licensing to GSK the authority to market an Abbott HIV drug in conjunction with one of its own and then increasing the price of the Abbott drug fourfold, so as to drive business to Abbott's own, combination drug.

During jury selection, Abbott used its first peremptory strike against the only self-identified gay member of the venire. GSK challenged the strike under *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), arguing that it was impermissibly made on the basis of sexual orientation. The district judge denied the challenge.

This appeal's central question is whether equal protection prohibits discrimination based on sexual orientation in jury selection. We must first decide whether classifications based on sexual orientation are subject to a standard higher than rational basis review. We hold that such classifications are subject to heightened scrutiny. We also hold that equal protection prohibits peremptory strikes based on sexual orientation and remand for a new trial.

I.

During jury selection, the district judge began by asking questions of the potential jurors based on their questionnaires, and then each party's counsel had an opportunity to ask additional questions. When the judge turned her attention to Juror B, a male, she inquired first about his employment, as she had done with each of the previous members of the venire. Juror B stated that he worked as a computer technician for the Ninth Circuit Court of Appeals in San Francisco. During the course of the judge's colloquy with Juror B, the juror revealed that his "partner" studied economics and investments. When the district judge followed up with additional questions, the prospective juror referred to his partner three times by using the masculine pronoun, "he," and the judge subsequently referred to Juror B's partner as "he" in a follow-up question regarding his employment status. Responding to additional questions from the judge, Juror B stated that he took an Abbott or a GSK medication and that he had friends with HIV. When the time arrived for Abbott's counsel, Weinberger, to question Juror B, the questioning was brief and limited. Counsel's first question concerned Juror B's knowledge of the medications that were the focal point of the litigation: "You indicated that you know some people who have been diagnosed with HIV.... Do you know anything about the

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medications that any of them are on?" Juror B responded, "Not really." Abbott's counsel then continued: "Do you know whether any of them are taking any of the medications that we are going to be talking about here [,] ... Norvir or Kaletra or Lexiva, any of those?" Juror B responded that he did not know whether his friends took those medications, but that he had heard of Kaletra. He added that he didn't know much about the drug and that he had no personal experiences with it. In sum, Abbott's counsel asked Juror B five questions, all regarding his knowledge of the drugs at issue in the litigation. Abbott's counsel did not ask Juror B when he had taken either an Abbott or GSK medication, how long ago, which medication it was, or the purpose of the medication. He also failed to ask any questions as to whether Juror B could decide the case fairly and impartially.

When the time came for peremptory challenges, Abbott exercised its first strike against Juror B. GSK's counsel, Saveri, immediately raised a *Batson* challenge, and the following discussion ensued:

Mr. Saveri: Okay. So, you know, the first challenge, your honor, is a peremptory challenge of someone who is—who I think is or appears to be, could be homosexual.

That's use of the peremptory challenge in a discriminatory way.

The problem here, of course, your honor, is the litigation involves AIDS medication. The incidents [sic] of AIDS in the homosexual community is well-known, particularly gay men.

So with that challenge, Abbott wants to exclude from—it looks like Abbott wants to exclude from the pool anybody who is gay. So I am concerned about that. I wanted to raise it.

The Court: Well, I don't know that, number one, whether *Batson* applies in civil, and number two, whether *Batson* ever applies to sexual orientation. Number three, how we would know—I mean, the evil of *Batson* is not that one person of a given group is excluded, but that everyone is. And there is no way for us to know who is gay and who isn't here, unless somebody happens to say something.

There would be no real way to analyze it. And number four, one turns to the other side and asks for the basis for their challenge other than the category that they are in, and if you have one, it might be the better part of valor to tell us what it is.

Mr. Weinberger: Well, he—

The Court: Or if you don't want to, you can stand on my first three reasons.

Mr. Weinberger: I will stand on the first three, at this point, your honor. I don't think any of the challenge applies. I have no idea whether he is gay or not.

Mr. Saveri: Your honor, in fact, he said on voir dire that he had a male partner. So—

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Mr. Weinberger: This is my first challenge. It's not like we are sitting here after three challenges and you can make a case that we are excluding anybody.

The district judge then stated that she would allow Abbott's strike and would reconsider her ruling if Abbott struck other gay men.

At the conclusion of the four-week trial, the jury returned with a mixed verdict. It held for Abbott on the antitrust and UTPA claims, and for GSK on the contract claim. It awarded $3,486,240 in damages to GSK.

Abbott appealed the jury verdict on the contract claim, and GSK cross-appealed. On cross-appeal, GSK contends that a new trial is warranted on all counts, including the contract claim, because Abbott unconstitutionally used a peremptory strike to exclude a juror on the basis of his sexual orientation. We hold that the exclusion of the juror because of his sexual orientation violated *Batson* and we remand for a new trial.

II.

[1] The *Batson* analysis involves a three-part inquiry. First, the party challenging the peremptory strike must establish a prima facie case of intentional discrimination. *Kesser v. Cambra,* 465 F.3d 351, 359 (9th Cir.2006). Second, the striking party must give a nondiscriminatory reason for the strike. *See id.* Finally, the court determines, on the basis of the record, whether the party raising the challenge has shown purposeful discrimination. *Id.* Because the district judge applied the wrong legal standard in evaluating the *Batson* claim, we review the *Batson* challenge de novo. *United States v. Collins,* 551 F.3d 914, 919 (9th Cir.2009).

[2][3][4] To establish a prima facie case under *Batson,* GSK must produce evidence that 1) the prospective juror is a member of a cognizable group; 2) counsel used a peremptory strike against the individual; and 3) "the totality of the circumstances raises an inference that the strike was motivated" by the characteristic in question. *Collins,* 551 F.3d at 919. "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California,* 545 U.S. 162, 170, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005). The burden on the challenging party at the prima facie stage is "not an onerous one." *Boyd v. Newland,* 467 F.3d 1139, 1151 (9th Cir.2004). It is a burden of production, not a burden of persuasion. *Crittenden v. Ayers,* 624 F.3d 943, 954 (9th Cir.2010).

[5] GSK has established a prima facie case of intentional discrimination. Juror B was the only juror to have identified himself as gay on the record, and the subject matter of the litigation presented an issue of consequence to the gay community. When jury pools contain little racial or ethnic diversity, we have held that a strike of the lone member of the minority group is a "relevant consideration" in determining whether a prima facie case has been established. *Id.* at 955. We have further cautioned against failing to "look closely" at instances in which the sole minority is struck from the venire; this is because failure to do so would innoculate peremptory strikes against *Batson* challenges in jury pools with scant diversity. *Collins,* 551 F.3d at 921; *see also United States v. Chinchilla,* 874 F.2d 695, 698 n. 5 (9th Cir.1989) ("[A]lthough the striking of one or two members of the same racial group may not always constitute a prima facie case, it is preferable for the court to err on the side of the defendant's rights to a fair and impartial jury.").

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There is also reason to infer that Abbott struck Juror B on the basis of his sexual orientation because of its fear that he would be influenced by concern in the gay community over Abbott's decision to increase the price of its HIV drug. When we analyzed whether the appellant had made out a prima facie case in *Johnson v. Campbell,* 92 F.3d 951 (9th Cir.1996), for instance, we found it significant that the struck juror's sexual orientation had no relevance to the subject matter of the litigation. *Id.* at 953 & n. 1. The converse is true as well. In *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), the Supreme Court stated that when the gender of the juror coincided with the subject matter of the case, the potential for an impermissible strike based on sex increases substantially. *Id.* at 140, 114 S.Ct. 1419. Here, the increase in the price of the HIV drug had led to considerable discussion in the gay community. Upon raising the *Batson* challenge, GSK's counsel argued that the subject matter of the litigation raised suspicions regarding the purpose of the strike: "The problem here ... is the litigation involves AIDS medications. The incidents [sic] of AIDS in the homosexual community is well-known, particularly gay men." The potential for relying on impermissible stereotypes in the process of selecting jurors was "particularly acute" in this case. *Id.; see also Powers v. Ohio,* 499 U.S. 400, 416, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).[FN1] Viewing the totality of the circumstances, we have no difficulty in concluding that GSK has raised an inference of discrimination and established a prima facie case.

FN1. In evaluating an ineffective assistance of counsel claim for failure to raise a *Wheeler* claim, the California analog of a *Batson* claim, we stated that asking Hispanic-surnamed venire members whether they would be biased in evaluating a case involving a Hispanic defendant did not pose any constitutional problem because "asking questions about potential bias is the purpose of voir dire." *Carrera v. Ayers,* 699 F.3d 1104, 1111 (9th Cir.2012) (en banc). *Carrera* suggests that if Abbott's counsel was concerned that gay members of the jury pool might be biased because the price increase had gained some notoriety in the gay community, he could have questioned Juror B about this potential bias. Instead of pursuing this line of questioning about Juror B's ability to assess the case fairly, Abbott's counsel struck him without any indication that he was biased, thereby raising the inference that he had relied on an impermissible assumption about Juror B's ability to be impartial.

[6] Also, Abbott declined to provide any justification for its strike when offered the opportunity to do so by the district court. After the judge stated that she might reject the *Batson* challenge on legal grounds that were in fact erroneous,[FN2] she told Abbott's counsel that he could adopt those grounds, although she advised him that "it might be the better part of valor" to reveal the basis for his strike. Abbott's counsel replied that he would rely on the grounds given by the judge and further explained, "I don't think any of the challenge applies. I have no idea whether he is gay or not." He later added that he could not have engaged in intentional discrimination because this was only his first strike.

FN2. The district judge offered her view that *Batson* did not apply in civil cases or when only a single member of a protected group is struck. The first statement—that *Batson* does not apply to civil cases—is clearly incorrect. The Supreme Court held over twenty years ago that *Batson* applies in the civil context. *See Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 631, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). Her statement that *Batson* does not apply when only a single member of the given group is excluded is also a legal error because "[t]he [C]onstitution forbids striking even a single prospective juror for a discriminatory purpose." *United States v. Vasquez–Lopez,* 22 F.3d 900, 902 (9th Cir.1994); *see also Snyder v. Louisiana,* 552 U.S. 472, 474, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (citing and quoting *Vasquez–Lopez*). Her final

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statement expressing uncertainty about whether *Batson* applies to sexual orientation is the subject of this appeal.

Counsel's statement that he did not know that Juror B was gay is neither consistent with the record nor an explanation for his strike. First, Juror B and the judge referred to Juror B's male partner several times during the course of voir dire and repeatedly used masculine pronouns when referring to him. Given the information regarding Juror B's sexual orientation that was adduced during the course of voir dire, counsel's statement was far from credible. *See Snyder,* 552 U.S. at 482–83, 128 S.Ct. 1203 (comparing counsel's proffered reasons with the plausible facts on the record). Second, the false statement was non-responsive; it was simply a denial of a discriminatory intent and it in no way provided a reason, colorable or otherwise, for striking Juror B. Counsel's denial of a discriminatory motive had the opposite effect of that intended. Because the denial was demonstrably untrue, it undermines counsel's argument that his challenge was not based on intentional discrimination. Taking all these factors together, including the absence of any proffered reason for the challenge, a strong inference arises that counsel engaged in intentional discrimination when he exercised the strike.[FN3] *Paulino v. Harrison* (*Paulino II*), 542 F.3d 692, 702–03 (9th Cir.2008); *see also Johnson,* 545 U.S. at 171 n. 6, 125 S.Ct. 2410 ("In the unlikely hypothetical in which [counsel] declines to respond to a trial judge's inquiry regarding his justification for making a strike, the evidence before the judge would consist not only of the original facts from which the prima facie case was established, but also [counsel's] refusal to justify his strike in light of the court's request.").

FN3. Abbott's adoption of the court's erroneous legal reasons why *Batson* might be inapplicable to the type of trial before her does not, of course, provide or even suggest any explanation as to why counsel struck Juror B.

Abbott's counsel asked Juror B only five questions and failed to question him meaningfully about his impartiality or potential biases. *See Collins,* 551 F.3d at 921. Combined with Abbott's counsel's statement, in the face of clear evidence in the record to the contrary, that he did not know that Juror B was gay, the voir dire reveals that Abbott's strike was based not on a concern for Juror B's actual bias, but on a discriminatory assumption that Juror B could not impartially evaluate the case because of his sexual orientation. *See Kesser,* 465 F.3d at 360–62.

[7] Finally, Abbott attempts to offer several neutral reasons for the strike in its brief on appeal to our Court, but these reasons are also belied by the record. *See id.* at 360 ("[I]f a review of the record undermines ... many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination."). Ordinarily, it does not matter what reasons the striking party *might* have offered because "[w]hat matters is the *real* reason [the juror was] stricken," *Paulino v. Castro* (*Paulino I*), 371 F.3d 1083, 1090 (9th Cir.2004) (emphasis in original): that is, the reason offered at the time of the strike, if true. Here, Abbott offered no reasons for the strike at the voir dire, but we know from the reasons offered on appeal after full deliberation by highly respected and able counsel that even the best explanations that counsel could have offered are pretextual.[FN4] *See Kesser,* 465 F.3d at 360.

FN4. One reason advanced by Abbott on appeal is that Juror B was the only juror who had lost friends to AIDS. We reject this reason because it is not supported by the record. Nowhere does the record show that Juror B had friends who died of complications due to HIV or AIDS.

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A second reason advanced by Abbott on appeal is that Juror B was acquainted with many people in the legal field. Other jurors, however, who were lawyers, and other jurors with close relatives who were lawyers were not stricken but served on the jury.

Third, Abbott speculates on appeal that because Juror B was a computer technician at the Court, other jurors "might have given extra weight" to his opinions. We have more respect for jurors than to credit the idea that Juror B would have more influence on his fellow jurors than would the other jurors, including the two lawyers who remained on the panel. This is the kind of "highly speculative" rationale that the Supreme Court rejected in *Snyder,* 552 U.S. at 482, 128 S.Ct. 1203.

Finally, Abbott points out that Juror B was the only potential juror who testified that he had heard of any of the three drugs at issue. When asked what he knew about the drug, however, Juror B replied, "not much," and stated that he had no personal experience with it.

Here, three of the four reasons offered by Abbott are pretextual and the record casts strong doubt on the fourth. In such a circumstance, we follow the rule of our en banc decision in *Kesser,* and conclude that none of those reasons can withstand judicial scrutiny. *See id.,* 465 F.3d at 360 ("A court need not find all nonracial reasons pretextual in order to find racial discrimination."); *see also id.* (" 'Thus the court is left with only two acceptable bases for the challenges.... Although these criteria would normally be adequate 'neutral' explanations taken at face value, the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against their sufficiency.' " (quoting *Chinchilla,* 874 F.2d at 699)).

The record reflects that had the district judge applied the law correctly, she would necessarily have concluded that Abbott's strike of Juror B was impermissibly made on the basis of his sexual orientation. *See United States v. Alanis,* 335 F.3d 965, 969 (9th Cir.2003). Because GSK has established a prima facie case, Abbott offered no nondiscriminatory reason for its strike of Juror B at trial, and Abbott does not now offer in its brief on appeal any colorable neutral explanation for the strike, only one result is possible here. The prima facie evidence that the strike was based on a discriminatory motive is unrefuted, and on appeal it is clear that Abbott has no further credible reasons to advance nor evidence to offer. Accordingly, we need not remand the question whether a *Batson* violation occurred. *See id.* at 969–70. The record persuasively demonstrates that Juror B was struck because of his sexual orientation. This Court may therefore perform the third step of the *Batson* analysis and conclude "even based on a 'cold record,' that [Abbott's] stated reasons for striking [Juror B] was a pretext for purposeful discrimination." *Id.* at 969 n. 5.

III.

We must now decide the fundamental legal question before us: whether *Batson* prohibits strikes based on sexual orientation.[FN5] In *Batson,* the Supreme Court held that the privilege of peremptory strikes in selecting a jury is subject to the guarantees of the Equal Protection Clause. 476 U.S. at 89, 106 S.Ct. 1712. *Batson,* of course, considered peremptory strikes based on race. At stake, the Court explained, were not only the rights of the criminal defendant, but also of the individual who is excluded from participating in jury service on the basis of his race. *Id.* at 87, 106 S.Ct. 1712. Allowing peremptory strikes based on race would "touch the entire community" because it would "undermine public confidence in the fairness of our system of justice." *Id.* Thus, the Court held, the exclusion of prospective jurors because of their race would require reversal upon a finding of intentional discrimination. *Id.* at 100.

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Eight years later, in *J.E.B.,* the Court extended *Batson* to peremptory strikes made on the basis of gender. While expanding *Batson*'s ambit, *J.E.B.* explained the scope of its expansion. The Court stated that "[p]arties may ... exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." 511 U.S. at 143, 114 S.Ct. 1419; *accord United States v. Santiago–Martinez,* 58 F.3d 422, 423 (9th Cir.1995). Thus, if sexual orientation is subject to rational basis review, Abbott's strike does not require reversal.

> FN5. Citing *Johnson v. Campbell,* Abbott urges us to avoid deciding whether *Batson* applies to sexual orientation by holding that a prima facie showing cannot be demonstrated because " 'an obvious neutral reason for the challenge' appears in the record." As we have explained, there are no "obvious neutral" reasons for Abbott's strike in the record or even in Abbott's brief on appeal. In *Campbell,* we rejected a *Batson* challenge based on sexual-orientation where (1) counsel "made no attempt to show discriminatory motivation on the part of the opposing attorney," (2) there was no showing that opposing counsel was aware of the juror's sexual orientation, (3) there was an obvious neutral reason for the strike, and (4) the juror's sexual orientation had no bearing on the subject matter of the case. *Campbell,* 92 F.3d at 953. All of the factors that were absent in *Campbell* are present here. Because the record shows that there was purposeful discrimination here, the path we took in *Campbell* is not available to us.

We have in the past applied rational basis review to classifications based on sexual orientation. In *High Tech Gays v. Defense Industrial Security Clearance Office,* 895 F.2d 563, 574 (9th Cir.1990), and *Philips v. Perry,* 106 F.3d 1420, 1425 (9th Cir.1997), we applied rational basis review when upholding Department of Defense and military policies that classified individuals on the basis of sexual orientation. More recently, in *Witt v. Department of the Air Force,* 527 F.3d 806 (9th Cir.2008), an Air Force reservist brought due process and equal protection challenges to her suspension from duty on account of her sexual relationship with a woman. *Id.* at 809. We considered the meaning of the Supreme Court's decision in *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), and concluded that because *Lawrence* relied only on substantive due process and not on equal protection, it affected our prior *substantive due process* cases, but not our *equal protection* rules. *Witt,* 527 F.3d at 821. As a result, although we applied heightened scrutiny to the substantive due process challenge in *Witt,* we did not change our level of scrutiny for the equal protection challenge. *Id.* We stated that *Lawrence* "declined to address equal protection," and relying on *Philips,* our pre- *Lawrence* decision, we continued to apply rational basis review to equal protection challenges. *Id.* at 821. Thus, we are bound here to apply rational basis review to the equal protection claim in the absence of a post- *Witt* change in the law by the Supreme Court or an en banc court. *See Miller v. Gammie,* 335 F.3d 889, 892–93 (9th Cir.2003) (en banc). Here, we turn to the Supreme Court's most recent case on the relationship between equal protection and classifications based on sexual orientation: *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). That landmark case was decided just last term and is dispositive of the question of the appropriate level of scrutiny in this case.

Windsor, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary. *Lawrence* presented us with a nearly identical quandary when we confronted the due process claim in *Witt.* Just as *Lawrence* omitted any explicit declaration of its level of scrutiny with respect to due process claims regarding sexual orientation, so does *Windsor* fail to declare what level of scrutiny it applies with respect to such equal protection claims. Nevertheless, we have been told how to resolve the question. *Witt,* 527 F.3d at 816. When the Supreme Court has refrained from identifying its method of

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analysis, we have analyzed the Supreme Court precedent "by considering what the Court actually did, rather than by dissecting isolated pieces of text." *Id.*

[8] In *Witt,* we looked to three factors in determining that *Lawrence* applied a heightened level of scrutiny rather than a rational basis analysis. We stated that *Lawrence* did not consider the possible post-hoc rationalizations for the law, required under rational basis review. *Witt,* 527 F.3d at 817. We further explained that *Lawrence* required a "legitimate state interest" to "justify" the harm that the Texas law inflicted as is traditionally the case in heightened scrutiny. *Witt,* 527 F.3d at 817 (quoting *Lawrence,* 539 U.S. at 578, 123 S.Ct. 2472) (internal quotation marks omitted). Finally, we looked to the cases on which *Lawrence* relied and found that those cases applied heightened scrutiny. *Witt,* 527 F.3d at 817. Applying the *Witt* test here, we conclude that *Windsor* compels the same result with respect to equal protection that *Lawrence* compelled with respect to substantive due process: *Windsor* review is not rational basis review. In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.

[9] Examining *Witt*'s first factor, *Windsor,* like *Lawrence,* did not consider the possible rational bases for the law in question as is required for rational basis review. The Supreme Court has long held that a law must be upheld under rational basis review "if any state of facts reasonably may be conceived to justify" the classifications imposed by the law. *McGowan v. Maryland,* 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). This lowest level of review does not look to the actual purposes of the law. Instead, it considers whether there is some conceivable rational purpose that Congress could have had in mind when it enacted the law.

This rule has been repeated throughout the history of modern constitutional law. In *Williamson v. Lee Optical,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), the Court repeatedly looked to what the legislature "might have concluded" in enacting the law in question and evaluated these hypothetical reasons. *Id.* at 487, 75 S.Ct. 461. In *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980), the Court emphasized that deference to post-hoc explanations was central to rational basis review:

> Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," ... because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing. The "task of classifying persons for ... benefits ... inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line," ... and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

Id. at 179, 101 S.Ct. 453 (internal citations omitted). More recently, the Supreme Court has again stated that under rational basis review, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Fed. Commc'n Comm'n v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

In *Windsor,* instead of conceiving of hypothetical justifications for the law, the Court evaluated the "essence" of

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the law. *Windsor,* 133 S.Ct. at 2693. *Windsor* looked to DOMA's "design, purpose, and effect." *Id.* at 2689. This inquiry included a review of the legislative history of DOMA. *Windsor* quoted extensively from the House Report and restated the House's conclusion that marriage should be protected from the immorality of homosexuality. *Id.* at 2693. Unlike in rational basis review, hypothetical reasons for DOMA's enactment were not a basis of the Court's inquiry. In its brief to the Supreme Court, the Bipartisan Legal Advisory Group offered five distinct rational bases for the law. *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 28–48, *Windsor,* 133 S.Ct. 2675 (2013) (No. 12–307), 2013 WL 267026. *Windsor,* however, looked behind these justifications to consider Congress's "avowed purpose:" "The principal purpose," it declared, "is to impose inequality, not for other reasons like governmental efficiency." *Windsor,* 133 S.Ct. at 2693, 2694. The result of this more fundamental inquiry was the Supreme Court's conclusion that DOMA's "*demonstrated* purpose" "raise[d] a most serious question under the Constitution's Fifth Amendment." *Id.* at 2693–94 (emphasis added). *Windsor* thus requires not that we conceive of hypothetical purposes, but that we scrutinize Congress's actual purposes. Windsor's "careful consideration" of DOMA's actual purpose and its failure to consider other unsupported bases is antithetical to the very concept of rational basis review. *Id.* at 2693.

Witt's next factor also requires that we conclude that *Windsor* applied heightened scrutiny. Just as *Lawrence* required that a legitimate state interest justify the harm imposed by the Texas law, the critical part of *Windsor* begins by demanding that Congress's purpose "*justify* disparate treatment of the group." *Windsor,* 133 S.Ct. at 2693 (emphasis added). *Windsor* requires a "legitimate purpose" to "overcome[ ]" the "disability" on a "class" of individuals. *Id.* at 2696. As we explained in *Witt,* "[w]ere the Court applying rational basis review, it would not identify a legitimate state interest to 'justify'...." the disparate treatment of the group. *Witt,* 527 F.3d at 817.

[10] Rational basis is ordinarily unconcerned with the inequality that results from the challenged state action. *See McGowan,* 366 U.S. at 425–26, 81 S.Ct. 1101 (applying the presumption that state legislatures "have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality"). Due to this distinctive feature of rational basis review, words like *harm* or *injury* rarely appear in the Court's decisions applying rational basis review. *Windsor,* however, uses these words repeatedly. The majority opinion considers DOMA's "effect" on eight separate occasions. *Windsor* concerns the "resulting injury and indignity" and the "disadvantage" inflicted on gays and lesbians. 133 S.Ct. at 2692, 2693.

Moreover, *Windsor* refuses to tolerate the imposition of a second-class status on gays and lesbians. Section 3 of DOMA violates the equal protection component of the due process clause because "it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition." *Id.* at 2694. *Windsor* was thus concerned with the public message sent by DOMA about the status occupied by gays and lesbians in our society. This government-sponsored message was in itself a harm of great constitutional significance: "Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways." *Id. Windsor*'s concern with DOMA's message follows our constitutional tradition in forbidding state action from "denoting the inferiority" of a class of people. *Brown v. Bd. of Educ.,* 347 U.S. 483, 494, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (internal quotations omitted) (citation omitted). It is the identification of such a class by the law for a separate and lesser public status that "make[s] them unequal." *Windsor,* 133 S.Ct. at 2694. DOMA was "practically a brand upon them, affixed by the law, an assertion of their inferiority." *Strauder v. West Virginia,* 100 U.S. 303, 308, 25 L.Ed. 664 (1879). *Windsor* requires that classifications based on sexual orientation that impose inequality on gays and lesbians and send a message of second-class status be justified by some legitimate purpose.

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Notably absent from *Windsor*'s review of DOMA are the "strong presumption" in favor of the constitutionality of laws and the "extremely deferential" posture toward government action that are the marks of rational basis review. Erwin Chemerinsky, *Constitutional Law* 695 (4th ed.2013). After all, under rational basis review, "it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." *Lee Optical,* 348 U.S. at 487, 75 S.Ct. 461. *Windsor*'s failure to afford this presumption of validity, however, is unmistakable. In its parting sentences, *Windsor* explicitly announces its balancing of the government's interest against the harm or injury to gays and lesbians: "The federal statute is invalid, for no legitimate purpose *overcomes* the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." 133 S.Ct. at 2696 (emphasis added). *Windsor*'s balancing is not the work of rational basis review.

In analyzing its final and least important factor, *Witt* stated that *Lawrence* must have applied heightened scrutiny because it cited and relied on heightened scrutiny cases. *Witt,* 527 F.3d at 817. Part IV, the central portion of *Windsor*'s reasoning, cites few cases, instead scrutinizing Congress's actual purposes and examining in detail the inequality imposed by the law. Among the cases that the Court cites are *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), *Department of Agriculture v. Moreno,* 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973), and *Lawrence.* In *Witt,* we thought it noteworthy that *Lawrence* did not cite *Romer,* a rational basis case. *Witt,* 527 F.3d at 817. The citation to *Moreno,* however, is significant because the Court recognized in *Lawrence* that *Moreno* applied "a more searching form of rational basis review," despite purporting to apply simple rational basis review. *Lawrence,* 539 U.S. at 580, 123 S.Ct. 2472. Our Court has similarly acknowledged that *Moreno* applied " 'heightened' scrutiny." *See Mountain Water Co. v. Montana Dep't of Pub. Serv. Regulation,* 919 F.2d 593, 599 (9th Cir.1990). Further, the Court cited *Lawrence,* which we have since held applied heightened scrutiny. *Witt,* 527 F.3d at 816. As we stated in *Witt, Lawrence* did not resolve whether to apply heightened scrutiny in equal protection cases, but, nevertheless, *Lawrence* is a heightened scrutiny case. Because *Windsor* relies on one case applying rational basis and two cases applying heightened scrutiny, *Witt*'s final factor does not decisively support one side or the other but leans in favor of applying heightened scrutiny.

[11] At a minimum, applying the *Witt* factors, *Windsor* scrutiny "requires something more than traditional rational basis review." *Witt,* 527 F.3d at 813. *Windsor* requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status. In short, *Windsor* requires heightened scrutiny. Our earlier cases applying rational basis review to classifications based on sexual orientation cannot be reconciled with *Windsor. See Miller,* 335 F.3d at 892–93. Because we are bound by controlling, higher authority, we now hold that *Windsor*'s heightened scrutiny applies to classifications based on sexual orientation. *See Miller,* 335 F.3d at 892–93; *see also Witt,* 527 F.3d at 816–17, 821.

In sum, *Windsor* requires that we reexamine our prior precedents, and *Witt* tells us how to interpret *Windsor.* Under that analysis, we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection. *Lawrence* previously reached that same conclusion for purposes of due process. *Witt,* 527 F.3d at 816, 821. Thus, there can no longer be any question that gays and lesbians are no longer a "group or class of individuals normally subject to 'rational basis' review." *J.E.B.,* 511 U.S. at 143, 114 S.Ct. 1419.

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IV.

A.

[12] Having established that heightened scrutiny applies to classifications based on sexual orientation, we must now determine whether *Batson* is applicable to that classification or group of individuals. In *J.E.B.,* the Court did not state definitively whether heightened scrutiny is sufficient to warrant *Batson*'s protection or merely necessary. *See J.E.B.,* 511 U.S. at 136 & n. 6, 143, 114 S.Ct. 1419. The Court explained that striking potential jurors on the basis of their gender harms "the litigants, the community, and the individual jurors" because it reinforces stereotypes and creates an appearance that the judicial system condones the exclusion of an entire class of individuals. *Id.* at 140, 114 S.Ct. 1419. It added that, when viewed against the long history of women's exclusion from jury service, gender-based strikes send a message "that certain individuals ... are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree." *Id.* at 142, 114 S.Ct. 1419. With *J.E.B.*'s concerns in mind and given that classifications on the basis of sexual orientation are subject to heightened scrutiny, we must answer whether equal protection forbids striking a juror on the basis of his sexual orientation. We conclude that it does.

J.E.B. took *Batson,* a case about the use of race in jury selection, and applied its principles to discrimination against women. As the Supreme Court acknowledged, women's experiences differed significantly from the experiences of African Americans. *J.E.B.,* 511 U.S. at 135–36, 114 S.Ct. 1419. The Court did not require that, to warrant the protections of *Batson,* women's experiences had to be identical to those of African Americans. *Id.* Instead, what remained constant in the Court's analysis was its willingness to reason from the actual experiences of the group. For women, a history of exclusion from jury service and the prevalence of "invidious group stereotypes" led the Court to conclude that *Batson* should extend to strikes on the basis of gender. *Id.* at 131–34, 140, 114 S.Ct. 1419. Here also we must reason from the unique circumstances of gays and lesbians in our society.

Gays and lesbians have been systematically excluded from the most important institutions of self-governance. Even our prior cases that rejected applying heightened scrutiny to classifications on the basis of sexual orientation have acknowledged that gay and lesbian individuals have experienced significant discrimination. *See High Tech Gays,* 895 F.2d at 573; *Witt,* 527 F.3d at 824–25 (Canby, J., dissenting in part). In the first half of the twentieth century, public attention was preoccupied with homosexual "infiltration" of the federal government. Gays and lesbians were dismissed from civilian employment in the federal government at a rate of sixty per month. Michael J. Klarman, *From the Closet to the Altar* 5 (2013). Discrimination in employment was not limited to the federal government; local and state governments also excluded homosexuals, and professional licensing boards often revoked licenses on account of homosexuality. *Id.* In 1985, the Supreme Court denied certiorari in a case in which a woman had been fired from her job as a guidance counselor in a public school because of her sexuality. *Rowland v. Mad River Local Sch. Dist.,* 470 U.S. 1009, 105 S.Ct. 1373, 84 L.Ed.2d 392 (1985) (Brennan, J., dissenting from denial of certiorari). Indeed, gays and lesbians were thought to be so contrary to our conception of citizenship that they were made inadmissible under a provision of our immigration laws that required the Immigration and Naturalization Service (INS) to exclude individuals "afflicted with psychopathic personality." *See Boutilier v. INS,* 387 U.S. 118, 120, 87 S.Ct. 1563, 18 L.Ed.2d 661 (1967). It was not until 1990 that the INS ceased to interpret that category as including gays and lesbians. William N. Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* 133–34 (1999). It is only recently that gay men and women gained the right to be open about their sexuality in the course of their military service. As one scholar put it, throughout the twentieth century, gays and lesbians were the "anticitizen." Margot Canaday, *The Straight State* 9 (2009).

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Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals. They tell the individual who has been struck, the litigants, other members of the venire, and the public that our judicial system treats gays and lesbians differently. They deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve.

Windsor's reasoning reinforces the constitutional urgency of ensuring that individuals are not excluded from our most fundamental institutions because of their sexual orientation. "Responsibilities, as well as rights, enhance the dignity and integrity of the person." *Windsor,* 133 S.Ct. at 2694. Jury service is one of the most important responsibilities of an American citizen. "[F]or most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers,* 499 U.S. at 407, 111 S.Ct. 1364. It gives gay and lesbian individuals a means of articulating their values and a voice in resolving controversies that affect their lives as well as the lives of all others. To allow peremptory strikes because of assumptions based on sexual orientation is to revoke this civic responsibility, demeaning the dignity of the individual and threatening the impartiality of the judicial system.

Gays and lesbians may not have been excluded from juries in the same open manner as women and African Americans, but our translation of the principles that lie behind *Batson* and *J.E.B.* requires that we apply the same principles to the unique experiences of gays and lesbians. Gays and lesbians did not identify themselves as such because, for most of the history of this country, being openly gay resulted in significant discrimination. *See* Kenji Yoshino, *Covering,* 111 Yale L.J. 769, 814–36 (2002). The machineries of discrimination against gay individuals were such that explicit exclusion of gay individuals was unnecessary—homosexuality was "unspeakable." *Id.* at 814. In *J.E.B.,* the Court noted that strikes based on gender were a recent phenomenon because women's participation on juries was relatively recent. *J.E.B.,* 511 U.S. at 131, 114 S.Ct. 1419. Being "out" about one's sexuality is also a relatively recent phenomenon. To illustrate how recently the change occurred, in 1985, only one quarter of Americans reported knowing someone who was gay. By 2000, this number increased to 75 percent of Americans. Klarman, *From the Closet,* at 197. As we have indicated, gays and lesbians who were "out" were punished for their openness, sometimes through imprisonment or exclusion from civil society.

Batson must also protect potential jurors, litigants, and the community from the serious dignitary harm of strikes based on sexual orientation because, as in the case of gender, to allow such strikes risks perpetuating the very stereotypes that the law forbids. "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Miller–El v. Dretke* (*Miller–El II*), 545 U.S. 231, 237, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (quoting *Strauder,* 100 U.S. at 309 (internal quotation marks omitted)). These stereotypes and their pernicious effects are not always known to us. "Prejudice ... rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Alabama v. Garrett,* 531 U.S. 356, 374, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (Kennedy, J., concurring). Stereotypes of gays and lesbians depict them as wealthy and promiscuous, and as "disease vectors" or child molesters. *Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 982–83 (N.D.Cal.2010). Empirical

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research has begun to show that discriminatory attitudes toward gays and lesbians persist and play a significant role in courtroom dynamics. *See* Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A Double Standard,* 39:2 J. of Homosexuality 93 (2000).

As illustrated by this case, permitting a strike based on sexual orientation would send the false message that gays and lesbians could not be trusted to reason fairly on issues of great import to the community or the nation. Strikes based on preconceived notions of the identities, preferences, and biases of gays and lesbians reinforce and perpetuate these stereotypes. [FN6] The Constitution cannot countenance "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *J.E.B.,* 511 U.S. at 128, 114 S.Ct. 1419.

> FN6. True, attitudes toward gays and lesbians are rapidly changing, just as attitudes toward women's role in civic life had changed by the time the Supreme Court decided *J.E.B.* in 1994. The central premise of *J.E.B.,* however, was that the courtroom should not be a site for "ratify [ing] and reinforc[ing] prejudicial views," even if such prejudicial views are on the decline. *J.E.B.,* 511 U.S. at 140, 114 S.Ct. 1419.

The history of exclusion of gays and lesbians from democratic institutions and the pervasiveness of stereotypes about the group leads us to conclude that *Batson* applies to peremptory strikes based on sexual orientation.

B.

Abbott urges us to proceed with caution in light of the significant sensitivities and privacy interests at stake in applying *Batson* to strikes based on sexual orientation. We agree that, as the California Court of Appeal put it when it extended *Wheeler* protection, the state equivalent of *Batson,* to gays and lesbians, "No one should be 'outed' in order to take part in the civic enterprise which is jury duty." *People v. Garcia,* 77 Cal.App.4th 1269, 92 Cal.Rptr.2d 339, 347 (2000). For gays and lesbians, keeping one's sexual orientation private has long been a strategy for avoiding the ramifications—job loss, being disowned by friends and family, or even potential physical danger—that accompanied open acknowledgment of one's sexual orientation for most of the twentieth century and sometimes even today. For some individuals, being forced to announce their sexuality risks intruding into the intimate process of self-discovery that is "coming out," a process that can be at once affirming and emotionally fraught. Equally important, coming out for many gays and lesbians is a life-defining moment of celebrating one's dignity and identity. Deciding when, and how, and to whom one comes out is a vital part of this process, and it should not be co-opted in the name of affording a group that has long been discriminated against the constitutional rights to which it is entitled.

These concerns merit careful consideration, but they do not warrant the conclusion that the Constitution necessitates permitting peremptory strikes based on sexual orientation. Concerns that applying *Batson* to sexual orientation will jeopardize the privacy of gay and lesbian prospective jurors can be allayed by prudent courtroom procedure. Courts can and already do employ procedures to protect the privacy of prospective jurors when they are asked sensitive questions on any number of topics. Further, applying *Batson* to strikes based on sexual orientation creates no requirement that prospective jurors reveal their sexual orientation. A *Batson* challenge would be cognizable only once a prospective juror's sexual orientation was established, voluntarily and on the record. California's successful application of *Wheeler* protections to sexual orientation for the past thirteen years illustrates that problems with administration can be overcome, even in a large judicial system that comes in contact with a diverse population of

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court users. *See Garcia,* 92 Cal.Rptr.2d at 348.

V.

Abbott contends that any exclusion of a juror in violation of *Batson* would have been harmless because none of GSK's claims should have been submitted to the jury. It asserts that there was not sufficient evidence to support any of those claims.

We have held that "[t]here is no harmless error analysis with respect to *Batson* claims," *Turner v. Marshall,* 121 F.3d 1248, 1254 n. 3 (9th Cir.1997); *see also Gray v. Mississippi,* 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (holding that the "right to an impartial adjudicator, be it judge or jury" is among those constitutional rights so basic "that their infraction can never be treated as harmless error"). There are two reasons for this.

First, it is impossible to determine whether a jury verdict would have been different had the jury been constitutionally selected. *See Vasquez v. Hillery,* 474 U.S. 254, 263, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) ("[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained."). Second, even if it were possible to find that a jury verdict had been unaffected by the error, this would not render the error harmless, as the harm from excluding a juror in violation of *Batson* is far greater than simply the effect upon the verdict.

[13] In *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), the Supreme Court held that a defendant may object to the race-based exclusion of jurors even if the defendant and the excluded jurors are not of the same race. *Id.* at 415, 111 S.Ct. 1364. In so holding, the Court explained that a *Batson* violation injures the unconstitutionally stricken juror as well as the parties: "[a] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character." *Powers,* 499 U.S. at 413–14, 111 S.Ct. 1364. Moreover, a *Batson* violation undermines the integrity of the entire trial:

> [The] wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The *voir dire* phase of the trial represents the jurors' first introduction to the substantive factual and legal issues in a case. The influence of the *voir dire* process may persist through the whole course of the trial proceedings.

Powers, 499 U.S. at 412, 111 S.Ct. 1364 (internal quotation omitted). In *Powers,* the Court further stated that "discrimination in the selection of jurors casts doubt on the integrity of the judicial process" and "may pervade all the proceedings that follow." *Id.* at 411, 413, 111 S.Ct. 1364; *see also J.E.B.,* 511 U.S. at 140, 114 S.Ct. 1419 ("Discrimination in jury selection ... causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.... The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."). Because the effect of excluding a juror in violation of *Batson* is so pervasive, it cannot be deemed harmless, and therefore we do not subject such violations to harmless error review.

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[14] Abbott urges an exception to this rule, citing an unpublished disposition, *United States v. Gonzalez–Largo,* 436 Fed.Appx. 819, 821 (9th Cir.2011), that relies on *Nevius v. Sumner,* 852 F.2d 463, 468 (9th Cir.1988). In *Nevius,* which was decided before *Powers* and *J.E.B.,* we stated that a *Batson* violation is harmless where the challenged juror would have been an alternate who would not have been called to serve as a juror in any event. *Nevius,* 852 F.2d at 468. Here, Abbott argues that the *Batson* error is harmless because none of the claims should have been allowed to go to the jury for various reasons, including insufficiency of evidence. Even were we to accept Abbott's harmlessness exception, it would not apply here.

As agreed by the parties, the contract claim is governed by New York law. Abbott argues, first, that its conduct did not violate any implied covenant in its contract with GSK because that contract contained no agreement as to price. There was evidence, however, from which a jury could find that Abbott's conduct had "injur[ed]" GSK's right to "receive the fruits of the contract," and was meant to have that impact. Such proof is sufficient under New York law to find a breach of an implied covenant. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 746 N.Y.S.2d 131, 773 N.E.2d 496, 500 (2002). Abbott's second argument, that the contract's limitation-of-liability clause bars any damages award, is premised on the "jury['s] reject[ion of] GSK's theories involving tortious gross negligence and intent to harm...." As the jury findings were tainted by the *Batson* violation, we cannot rely on them to support enforcement of the limitation-of-liability clause.[FN7]

FN7. We have considered and rejected Abbott's other arguments with regard to the contract claim.

In conclusion, the district court properly found that GSK's contract claim does not fail as a matter of law.[FN8] Thus, even if *Batson* violations were subject to harmless error analysis where the losing party should have prevailed as a matter of law and no jury verdict should have been rendered, the exclusion of a juror in violation of *Batson* was not harmless here, as a jury was necessary to resolve the case. Therefore, we remand for a new trial.[FN9]

FN8. Abbott has argued only that structural error does not apply because *no* claim should have gone to the jury. As we hold to the contrary with regard to the implied covenant claim, we need not consider whether the district court erred in submitting the UTPA and antitrust claims to the jury.

FN9. Our holding that the contract claim does not fail as a matter of law resolves Abbott's sole contention on direct appeal, that the district court should have granted its 50(b) motion for judgment as a matter of law on this claim. We need not address GSK's remaining claim on cross-appeal—that the UTPA verdict was inconsistent with the jury's findings—as we remand for a new trial and new findings.

VI.

We hold that heightened scrutiny applies to classifications based on sexual orientation and that *Batson* applies to strikes on that basis. Because a *Batson* violation occurred here, this case must be remanded for a new trial.

REVERSED AND REMANDED.

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C.A.10 (Kan.),2015.
Brown v. University of Kansas
--- Fed.Appx. ----, 2015 WL 150271 (C.A.10 (Kan.))
Only the Westlaw citation is currently available.This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.

United States Court of Appeals,
Tenth Circuit.
Robert M. BROWN, Plaintiff–Appellant,
v.
UNIVERSITY OF KANSAS; Stephen W. Mazza, individually and in his official capacity as Interim Dean of the University of Kansas School of Law; Joyce A. McCray–Pearson; Gail B. Agrawal; Wendy Rohleder–Sook; Andy Tompkins, in his official capacity as President of the Kansas Board of Regents; Gary Sherrer, in his official capacity as Chair of the Kansas Board of Regents; Ed McKechnie, in his official capacity as Vice Chair of the Kansas Board of Regents; Jarold Boettcher, in his official capacity as a member of the Kansas Board of Regents; Christine Downey–Schmidt, in her official capacity as a member of the Kansas Board of Regents; Mildred Edwardsin, in her official capacity as a member of the Kansas Board of Regents; Tim Emert, Chairman, in his official capacity as a member of the Kansas Board of Regents; Richard Hedges, in his official capacity as a member of the Kansas Board of Regents; Dan Lykins, in his official capacity as a member of the Kansas Board of Regents; Janie Perkins, in her official capacity as a member of the Kansas Board of Regents; Bernadette Gray–Little, in her official capacity as Chancellor of the University of Kansas, Defendants–Appellees.

No. 14–3102.
Jan. 13, 2015.

Robert M. Brown, Overland Park, KS, pro se.

Sara L. Trower, University of Kansas Office of General Counsel, Lawrence, KS, for Defendants–Appellees.

Before HOLMES, BACHARACH, and McHUGH, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* The Court has determined that oral argument would not materially help in deciding the appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). Thus, we have declined to order oral argument.

This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed.

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R.App. P. 32.1(a) and 10th Cir. R. 32.1(A).

ROBERT E. BACHARACH, Circuit Judge.

Mr. Robert M. Brown was enrolled as a student at the University of Kansas School of Law until school officials learned of his criminal history. When they discovered this history, they expelled Mr. Brown from the school. He reacted by suing the school, some faculty members, and all of the state regents, alleging state torts and denial of due process. The district court granted summary judgment to the defendants, and we affirm.

I. Mr. Brown's Criminal History and Expulsion

When Mr. Brown applied for law school, his application contained a section entitled "Character & Fitness." In this section, applicants were to disclose any criminal history:

> Have you ever been arrested for, charged with, or convicted of a felony, misdemeanor or infraction other than a traffic violation? (include diversions, sealed or expunged records, and juvenile offenses)
>
> Have you ever been arrested for, charged with, or convicted of a traffic violation involving alcohol or a controlled substance? (include diversions, sealed or expunged records, and juvenile offenses)
>
> If you answered "yes" to any of these questions, please explain on a separate sheet or electronic attachment submitted with your application and provide the date, nature of the offense or proceeding, name and location of the court or tribunal, and disposition of the matter.

Appellees' App., vol. I at 224. Mr. Brown answered "no" to these questions.

He then certified the truth of his answers, acknowledging that a false answer constituted "sufficient cause for denial of [the] application or dismissal from the School of Law." *Id.* at 224–25, 227.

With certification of the answers, the law school accepted Mr. Brown and he began classes.

Mr. Brown then amended his application to disclose criminal convictions for domestic battery and driving under the influence. The law school's admissions committee investigated and determined that Mr. Brown's application would have been rejected if his criminal history had been known. With this determination, an associate dean filed an academic misconduct complaint. Mr. Brown objected, and a hearing panel dismissed the complaint on the ground that it did not allege violation of a particular rule. Nonetheless, the panel observed that Mr. Brown's application and certification letter acknowledged that he could be expelled for falsifying, misrepresenting, or failing to supply required information.

The law school's dean, Ms. Gail Agrawal, sent Mr. Brown a letter, stating her intent to dismiss him for "falsification, misrepresentation, and failure to supply complete, accurate and truthful answers to [his] application for admission to the School of Law." *Id.* at 211. She detailed the facts warranting dismissal and stated: "If you believe that this action is inappropriate or that there are mitigating factors that I should consider before dismissing you, then you

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must provide me with a written response to this letter by 2:00 p.m. on June 3, 2010." *Id.* Mr. Brown challenged the dismissal, demanding a hearing and notice of the charges and requesting a hearing with the University Judicial Board and a personal meeting with Dean Agrawal. Dean Agrawal declined a meeting and the Judicial Board's chairperson declined to provide a hearing, stating that faculty rules authorized each college to establish its own admission standards. The Dean then notified Mr. Brown that he was dismissed from the law school "based on falsification, misrepresentation and failure to supply the required information to support [his] admission to the School of Law." *Id.* at 144–45.

Mr. Brown sued, and the district court granted summary judgment to the defendants, ruling that the members of the Board of Regents had no personal involvement in Mr. Brown's dismissal, and that the defendants provided due process.[FN1]

FN1. The district court also held that the state-law claims failed as a matter of law.

II. Standard of Review

We engage in de novo review of the award of summary judgment, applying the standard under Fed.R.Civ.P. 56(a). *Cillo v. City of Greenwood Vill.,* 739 F.3d 451, 461 (10th Cir.2013). In applying this standard, we view the facts in the light most favorable to Mr. Brown, resolving all factual disputes and reasonable inferences in his favor. *Id.* Because Mr. Brown is proceeding pro se, we afford his materials a liberal construction, but do not act as his advocate. *See Yang v. Archuleta,* 525 F.3d 925, 927 n. 1 (10th Cir.2008).

III. Application of the Standard of Review

Applying this standard, we conclude that the award of summary judgment was proper.

A. Members of the Board of Regents

Members of the Board of Regents were entitled to summary judgment.

As the district court recognized, "government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior.*" *Pahls v.. Thomas,* 718 F.3d 1210, 1225 (10th Cir.2013) (brackets and internal quotation marks omitted). Mr. Brown testified that his claim against the regents was based purely on their oversight function. Appellees' App., vol. I at 172. Based on this testimony, Mr. Brown conceded that he had no evidence that the regents knew about his application or expulsion. *Id.* at 175–76. Under these circumstances, the members of the Board of Regents were entitled to summary judgment.

B. The Due Process Arguments

We also reject Mr. Brown's due process arguments.

"The Fourteenth Amendment provides that a state shall not 'deprive any person of life, liberty, or property, without due process of law.' " *Lauck v. Campbell Cnty.,* 627 F.3d 805, 811 (10th Cir.2010) (quoting U.S. Const. amend. XIV, § 1). Under this amendment, we address two questions. The first is whether a liberty or property interest exists. The second is whether the State provided sufficient procedures. *Id.* In this case, we will assume Mr. Brown had liberty or property interests implicated by his dismissal from the law school. *See Bd. of Curators of Univ.*

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of Mo. v. Horowitz, 435 U.S. 78, 84–85 (1978) (assuming without deciding the existence of a liberty or property interest); *Trotter v. Regents of Univ. of N.M.,* 219 F.3d 1179, 1184 (10th Cir.2000) (same).

The question then becomes the adequacy of the procedures. The district court properly required greater procedural safeguards because the university was considering an action that was disciplinary rather than academic. *See Harris v. Blake,* 798 F.2d 419, 423 (10th Cir.1986). The procedures satisfied the stringent requirements for disciplinary action.

When a university considers expulsion, it must use procedures accounting for the conflicting interests. *Watson ex rel. Watson v.. Beckel,* 242 F.3d 1237, 1240 (10th Cir.2001). To consider those interests, we weigh "(1) the private interest that will be affected by the official action, (2) the probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest, including the fiscal and administrative burden, that the additional or substitute procedural requirements would entail." *Id.* The objective is to ensure balancing of "[t]he students' interest in unfair or mistaken exclusion from the educational process" and "the school's interest in discipline and order." *Id.* (internal quotation marks omitted).

The risk of unfair expulsion is minimal because Mr. Brown knew what he had done, knew it constituted ground for expulsion, and took various opportunities to urge mitigation.

Mr. Brown argues that the procedures should have had greater formality, citing *Goss v. Lopez,* 419 U.S. 565 (1975). But *Goss* simply noted that severe disciplinary action could require "more formal procedures," not necessarily the equivalent of a trial. *Goss,* 419 U.S. at 584. For our purposes, the issue is whether greater protections would have proved beneficial. Any benefits would have been minimal in light of the undisputed facts.

These facts include Mr. Brown's acknowledgement that he could be expelled for falsifying his application and his notification to the school that he had given false information. The dean relied on this fact, but gave Mr. Brown an opportunity to respond.

Mr. Brown did so, raising procedural objections and requesting a hearing, but failed to address the fact that he had knowingly provided false information. Accordingly, Dean Agrawal ordered expulsion.

In light of these undisputed facts, further procedural safeguards would have added little. *See Watson,* 242 F.3d at 1241 ("All that is necessary to satisfy due process is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to insure that they are given a meaningful opportunity to present their case." (internal quotation marks omitted)).

Elsewhere, Mr. Brown contends that Dean Agrawal was biased. But, there is no evidence of a link between the dean's alleged bias and the decision to expel Mr. Brown. The connection is particularly attenuated because a separate body (the admissions committee) concluded that the school would not have allowed admission into the school if the criminal history had been disclosed.

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Mr. Brown also relies on the university's failure to follow its own rules and regulations. The district court rejected this argument, holding that the university's "failure to follow its own regulations does not, by itself, give rise to a constitutional violation." Appellees' App., vol. IV at 579 (citing *Horowitz,* 435 U.S. at 92 n. 8; *Trotter,* 219 F.3d at 1185; *Schuler v. Univ. of Minn.,* 788 F.2d 510, 515 (8th Cir.1986) (per curiam)). Mr. Brown argues that the district court erroneously relied on cases involving academic dismissals rather than disciplinary actions. But, even in the disciplinary context, a school's failure to comply with its own rules "does not, in itself, constitute a violation of the Fourteenth Amendment." *Hill v. Trs. of Ind. Univ.,* 537 F.2d 248, 252 (7th Cir.1976). Indeed, "[t]he Due Process Clause ... does not require the University to follow any specific set of detailed procedures as long as the procedures the University actually follows are basically fair ones...." *Newman v. Burgin,* 930 F.2d 955, 960 (1st Cir.1991). The procedures afforded to Mr. Brown were fair as a matter of law.

C. Mr. Brown's Proffered Factual Disputes

Mr. Brown asserts the district court erred in resolving alleged factual disputes. He first says it was "clear error" for the district court to limit its decision to undisputed facts. Appellant's Br. at 54. This argument is meritless because summary judgment is appropriate only if " 'there is *no* genuine dispute as to any material fact.' " *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.,* 762 F.3d 1114, 1118 (10th Cir.2014) (citing Fed.R.Civ.P. 56(a)) (emphasis added). Of course, the defendants "must identify portions of the record that demonstrate the absence of a genuine issue of material fact," and Mr. Brown was entitled to have the evidence viewed in the light most favorable to him. *Adler v. Wal–Mart Stores, Inc.,* 144 F.3d 664, 679 (10th Cir.1998).

Mr. Brown cites 321 factual statements, saying they show material disputes disregarded by the district court. For example, he says that a factual dispute existed regarding his reasons for not disclosing the criminal cases. But, Mr. Brown's motivation is irrelevant. The key consideration is whether Mr. Brown disputes that he knowingly gave false answers in his application. He does not dispute that fact.

In a related argument, Mr. Brown contends that despite evidence showing material disputes, the district court erred in making the following dispositive factual findings:

- that he lied on his law school application;
- that the defendants' conduct was not "wanton" for purposes of his state-law negligence claim;
- that he had no reasonable expectation of practicing law and could not show intentional misconduct or malice to support his state-law tortious interference claim; and
- that there was no evidence of unlawful overt acts or meeting of the minds to support his state-law civil conspiracy claim.

The first finding involves an uncontested fact, for Mr. Brown does not deny that he intentionally gave false information about his criminal history.

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We need not address the other three findings, because Mr. Brown does not challenge the district court's grant of summary judgment on his state-law claims. Indeed, the state-law claims are not listed in Mr. Brown's statement of the issues in his opening brief. *See* Aplt. Br. at 3–4. And apart from an isolated reference in his statement of the case, his opening brief refers to the state-law claims only in the context of this factual discussion. These scattered references are insufficient to preserve appellate review. *See Murrell v. Shalala,* 43 F.3d 1388, 1389 n. 2 (10th Cir.1994).

IV. Sealed Record Volume

We also have an issue involving the sealing of Volume V of the defendants' appendix. The clerk's office directed the parties to file written responses stating whether Volume V should remain under seal and, if so, for how long. We have held:

> A party seeking to file court records under seal must overcome a presumption, long supported by courts, that the public has a common-law right of access to judicial records. To do so, the parties must articulate a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making process.

Eugene S. v. Horizon Blue Cross & Blue Shield of New Jersey, 663 F.3d 1124, 1135–36 (10th Cir.2011) (citations and internal quotation marks omitted).

The defendants have requested that Volume V remain under seal because it contains redacted information obtained through discovery of other students who amended their law school applications to disclose criminal or disciplinary records. The defendants claim these students have a strong interest in preventing the disclosure of their personally identifiable information. *See generally* Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(b)(1). We agree and conclude that the defendants have shown a substantial interest justifying the continued sealing of Volume V. Accordingly, Volume V shall remain under seal.

V. Disposition

We affirm and direct the Clerk to continue sealing Volume V of the defendants' appendix.

C.A.10 (Kan.),2015.
Brown v. University of Kansas
--- Fed.Appx. ----, 2015 WL 150271 (C.A.10 (Kan.))

END OF DOCUMENT

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Cal.,2007.
Balboa Island Village Inn, Inc. v. Lemen
40 Cal.4th 1141, 156 P.3d 339, 57 Cal.Rptr.3d 320, 07 Cal. Daily Op. Serv. 4553, 2007 Daily Journal D.A.R. 5805
Supreme Court of California
BALBOA ISLAND VILLAGE INN, INC., Plaintiff and Respondent,
v.
Anne LEMEN, Defendant and Appellant.
No. S127904.

April 26, 2007.

Background: Owner of bar and restaurant sought injunctive relief against resident who lived near the business, alleging nuisance, defamation, interference with business. The Superior Court, Orange County, No. 01CC13243, Gerald G. Johnston, found in favor of owner on all three causes of action and issued permanent injunction prohibiting resident from initiating contact with employees of the business, making defamatory statements about it, and filming within 25 feet of it. Resident appealed. The Court of Appeal affirmed in part and reversed in part. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Moreno, J., held that:
(1) injunction prohibiting repeating of speech trial court found defamatory was not invalid prior restraint, but
(2) injunction was overbroad.

Judgment of the Court of Appeal affirmed and matter remanded.

Baxter, J., filed a concurring opinion in which George, C.J., and Chin, J., joined.

Kennard and Werdegar, JJ., filed concurring and dissenting opinions.

Opinion, 17 Cal.Rptr.3d 352, superseded.

West Headnotes

[1] Constitutional Law 92 3851

92 Constitutional Law
92XXVII Due Process
92XXVII(A) In General
92k3848 Relationship to Other Constitutional Provisions; Incorporation
92k3851 k. First Amendment. Most Cited Cases
(Formerly 92k274.1(1))
The fundamental right to free speech in the First Amendment is among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. U.S.C.A. Const.Amends. 1, 14.

[2] Constitutional Law 92 1498

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

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92XVIII(A) In General
92XVIII(A)1 In General
92k1498 k. Absolute Nature of Right. Most Cited Cases
(Formerly 92k90(3))
The First Amendment right to free speech, although stated in broad terms, is not absolute, and the State may punish its abuse. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 2161

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(X) Defamation
92k2160 In General
92k2161 k. In General. Most Cited Cases
(Formerly 92k90.1(5))
Libelous speech is not protected by the First Amendment. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 2174

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(X) Defamation
92k2172 Remedies for Defamation
92k2174 k. Injunctions. Most Cited Cases
(Formerly 92k90.1(5))

Injunction 212 98(2)

212 Injunction
212II Subjects of Protection and Relief
212II(G) Personal Rights and Duties
212k98 Libel and Slander
212k98(2) k. Injury to Business. Most Cited Cases
Injunction prohibiting resident who lived near restaurant from repeating statements about restaurant that had been determined to be defamatory in trial of restaurant's suit against resident was not unconstitutional prior restraint of speech. U.S.C.A. Const.Amend. 1.
See 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 359 et seq.; Cal. Jur. 3d, Constitutional Law, §§ 246, 247; Cal. Civil Practice (Thomson/West 2003) Civil Rights Litigation, § 4:6 et seq.; Annot., Injunction as Remedy Against Defamation of Person (1956) 47 A.L.R.2d 715.
[5] Injunction 212 98(1)

212 Injunction
212II Subjects of Protection and Relief
212II(G) Personal Rights and Duties
212k98 Libel and Slander
212k98(1) k. In General. Most Cited Cases
The general rule that a defamation may not be enjoined does not apply in a circumstance in which an injunction is issued to prevent a defendant from repeating statements that have been judicially determined to be defamatory.

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[6] Injunction 212 98(1)

212 Injunction
212II Subjects of Protection and Relief
212II(G) Personal Rights and Duties
212k98 Libel and Slander
212k98(1) k. In General. Most Cited Cases

Injunction 212 138.75

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)3 Subjects of Relief
212k138.75 k. Personal Rights and Duties. Most Cited Cases
In determining whether an injunction restraining defamation may be issued, it is crucial to distinguish requests for preventive relief prior to trial and post-trial remedies to prevent repetition of statements judicially determined to be defamatory.

[7] Constitutional Law 92 1554

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1554 k. Injunctions and Restraining Orders. Most Cited Cases
(Formerly 92k90.1(1))
Despite the broad language in the state constitutional protection of speech, a court may enjoin further distribution of a publication that was found at trial to be unlawful. West's Ann.Cal. Const. Art. 1, § 2(a).

[8] Constitutional Law 92 2174

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(X) Defamation
92k2172 Remedies for Defamation
92k2174 k. Injunctions. Most Cited Cases
(Formerly 92k90.1(5))

Injunction 212 189

212 Injunction
212V Permanent Injunction and Other Relief
212k189 k. Nature and Scope of Relief. Most Cited Cases
Injunction prohibiting resident who lived near restaurant from repeating statements about restaurant that had been determined to be defamatory in trial of restaurant's suit against resident was overbroad to extent it applied to resi-

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dent's “agents, all persons acting on her behalf or purporting to act on her behalf and all other persons in active concert and participation with her,” rather than limiting prohibition to resident personally. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 1435

92 Constitutional Law
92XV Right to Petition for Redress of Grievances
92k1435 k. In General. Most Cited Cases
(Formerly 92k91)

Injunction 212 189

212 Injunction
212V Permanent Injunction and Other Relief
212k189 k. Nature and Scope of Relief. Most Cited Cases
Injunction prohibiting resident who lived near restaurant from repeating statements about restaurant that had been determined to be defamatory in trial of restaurant's suit against resident was overbroad to extent it prohibited resident from presenting her grievances to government officials. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 1435

92 Constitutional Law
92XV Right to Petition for Redress of Grievances
92k1435 k. In General. Most Cited Cases
(Formerly 92k91)
The right to petition the government for redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 1554

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1554 k. Injunctions and Restraining Orders. Most Cited Cases
(Formerly 92k90.1(1))

Constitutional Law 92 1780

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)4 Private Property
92k1780 k. In General. Most Cited Cases
(Formerly 92k90.1(1))

Constitutional Law 92 2174

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92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(X) Defamation
92k2172 Remedies for Defamation
92k2174 k. Injunctions. Most Cited Cases
(Formerly 92k90.1(5))

Injunction 212 189

212 Injunction
212V Permanent Injunction and Other Relief
212k189 k. Nature and Scope of Relief. Most Cited Cases
Injunction issued in restaurant's suit against nearby resident for nuisance, defamation, and interference with business, prohibiting resident from initiating contact with individuals known to resident to be employees of restaurant was overbroad as it included no time, place, and manner restrictions.

[12] Injunction 212 98(2)

212 Injunction
212II Subjects of Protection and Relief
212II(G) Personal Rights and Duties
212k98 Libel and Slander
212k98(2) k. Injury to Business. Most Cited Cases

Injunction 212 210

212 Injunction
212VI Writ, Order, or Decree
212k207 Final Judgment or Decree
212k210 k. Opening and Vacating or Modifying. Most Cited Cases
Injunction prohibiting resident who lived near restaurant from repeating statements about restaurant that had been determined to be defamatory in trial of restaurant's suit against resident was not invalid even though defamatory statements could become truthful in future, since resident was entitled to move to modify or dissolve injunction, and court could retain jurisdiction to monitor enforcement of injunction. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Civ.Code § 3424(a).

[13] Judgment 228 855(1)

228 Judgment
228XIX Suspension, Enforcement, and Revival
228k854 Proceedings to Enforce Judgment
228k855 In General
228k855(1) k. In General. Most Cited Cases
The jurisdiction of a court of equity to enforce its decrees is coextensive with its jurisdiction to determine the rights of the parties, and it has power to enforce its decrees as a necessary incident to its jurisdiction.
***321** D. Michael Bush, Los Angeles; Erwin Chemerinsky, Durham, N.C.; Sheppard Mullin Richter & Hampton, Gary L. Bostwick and Jean-Paul Jassy, for Defendant and Appellant.

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Dubia, Erickson, Tenerelli & Russo, Law Offices of J. Scott Russo and J. Scott Russo, Irvine, for Plaintiff and Respondent.

***322 MORENO, J.

*1144 **341 Following a court trial in which defendant Anne Lemen was found to have repeatedly defamed plaintiff Balboa Island Village Inn, Inc., the superior court issued a permanent injunction prohibiting defendant from, among other things, repeating certain defamatory statements about plaintiff. For the reasons that follow, we hold that the injunction is overly broad, but that defendant's right to free speech would not be infringed by a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory.

FACTS

Aric Toll owns and manages the Balboa Island Village Inn, a restaurant and bar located on Balboa Island in Newport Beach. He bought it on November 30, 2000, but the Village Inn has been operating at that location for more than half a century.

In 1989, defendant Anne Lemen purchased the "Island Cottage," which lies across an alley from the Village Inn. She lives there part of the time and rents the cottage as a vacation home part of the time. Lemen is a vocal critic of the Village Inn and has contacted the authorities numerous times to complain of *1145 excessive noise and the behavior of inebriated customers leaving the bar. In an effort to document these abuses, Lemen videotaped the Inn approximately 50 times. According to Lemen, she made these videotapes while on her own property, although she acknowledged that, on one occasion, she parked her Volkswagen bus across from the Inn and videotaped from there.

The Village Inn introduced evidence that Lemen's actions were far more intrusive. For more than two years, Lemen parked across from the Inn at least one day each weekend and made videotapes for hours at a time. Customers often asked Lemen not to videotape them as they entered or left the building. Numerous times, she followed customers to or from their cars while videotaping them. She took many flash photographs through the windows of the Inn a couple of days each week for a year, upsetting the customers. She called customers "drunks" and "whores." She told customers entering the Inn, "I don't know why you would be going in there. The food is shitty." She approached potential customers outside the Inn more than 100 times, causing many to turn away. One time, she stopped her vehicle in front of the Village Inn and sounded her horn for five seconds.

Lemen had several encounters with employees of the Village Inn. She told bartender Ewa Cook that Cook "worked for Satan," was "Satan's wife," and was "going to have Satan's children." She asked musician Arturo Perez if he had a "green card" and asked whether he knew there were illegal aliens working at the Inn. Lemen referred to Theresa Toll, the owner's wife, as "Madam Whore" and said, in the presence of her tenant, Larry Wilson: "Everyone on the island knows you're a whore." Three times, Lemen took photographs of cook Felipe Anaya**342 and other employees while they were changing clothes in the kitchen.

Lemen collected 100 signatures on a petition opposing the Village Inn. As she did so, she told neighbors that there was child pornography and prostitution going on in the Inn, and that the Village Inn was selling drugs and was selling alcohol to minors. She said that sex videos were being filmed inside the Village Inn, that it was involved with the Mafia, that it encouraged lesbian activity, and that the Inn stayed open until 6:00 a.m. When defendant began collecting signatures door to door and making these statements, the ***323 Village Inn's sales dropped more than 20 percent.

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On October 16, 2001, the Village Inn filed a civil complaint that, as amended, alleged causes of action for nuisance, defamation, and interference with business and sought injunctive relief against defendant. Following a court trial, the superior court entered judgment for plaintiff on October 11, 2002 granting a permanent injunction. Paragraph 4 of the injunction states:

***1146** "[T]he court orders that Lemen, her agents, all persons acting on her behalf or purporting to act on her behalf and all other persons in active concert and participation with her, be and hereby are, permanently enjoined from engaging in or performing directly or indirectly, any of the following acts:

"A. Defendant is prohibited from initiating contact with individuals known to Defendant to be employees of Plaintiff. Any complaints Defendant has regarding Plaintiff or Plaintiff's business must be communicated to a member or members of Plaintiff's management, who will be identified by Plaintiff for Defendant and for which Plaintiff will provide Defendant a phone number by which Defendant can timely and easily communicate any problems related to Plaintiff's operation.

"B. Defendant is prohibited from making the following defamatory statements about Plaintiff to third persons: Plaintiff sells alcohol to minors; Plaintiff stays open until 6:00 a.m.; Plaintiff makes sex videos; Plaintiff is involved in child pornography; Plaintiff distributes illegal drugs; Plaintiff has Mafia connections; Plaintiff encourages lesbian activities; Plaintiff participates in prostitution and acts as a whorehouse; Plaintiff serves tainted food.

"C. Defendant is prohibited from filming (whether by video camera or still photography) within 25 feet of the premises of the Balboa Island Village Inn *unless* Defendant engages in such filming while on Defendant's own property. An exception to this prohibition occurs when Defendant is documenting the circumstances surrounding an immediate disturbance or damage to her property. An example of this exception might involve Defendant's attempt to gather evidence regarding the mechanism and identity of any person who breaks the window of Defendant's house."

The Court of Appeal upheld paragraph 4C of the judgment, which granted an injunction prohibiting defendant from filming within 25 feet of the Village Inn, but invalidated paragraphs 4A and 4B of the judgment enjoining defendant from initiating contact with employees of the Village Inn and repeating the identified defamatory statements about the Village Inn, ruling that those portions of the judgment violated defendant's right to free speech under the federal and California Constitutions. We granted review.

We agree with the result reached by the Court of Appeal, but disagree in part with its reasoning. Paragraph 4A, which prohibits defendant from initiating contact with employees of the Village Inn at any time or place, is impermissibly broad. Paragraph 4B, which prohibits defendant from repeating certain defamatory statements, also is overly broad, but a properly limited injunction prohibiting defendant from repeating to third persons statements about the Village Inn that were determined at trial to be defamatory would not violate defendant's right to free speech.

***1147 DISCUSSION**

[1] The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech...." This fundamental right to free speech is "among the fundamental personal rights and liberties which *****324** are protected ****343** by the Fourteenth Amendment from invasion by state action." (*Lovell v. Griffin* (1938) 303 U.S. 444, 450, 58 S.Ct. 666, 82 L.Ed. 949; *Gitlow v. New York* (1925) 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138.) Numerous decisions have recognized our " profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686.)

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[2][3] But the right to free speech, "[a]lthough stated in broad terms, ... is not absolute." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 134, 87 Cal.Rptr.2d 132, 980 P.2d 846 (plur. opn. of George, C.J.).) "Liberty of speech ... is ... not an absolute right, and the State may punish its abuse." (*Near v. Minnesota* (1931) 283 U.S. 697, 708, 51 S.Ct. 625, 75 L.Ed. 1357.) "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty-and thus a good unto itself-but also is essential to the common quest for truth and the vitality of society as a whole. Under our Constitution, 'there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas.' [Citation.] Nevertheless, there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend, because they 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' [Citation.] [¶] Libelous speech has been held to constitute one such category, [citation]...." (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 503-504, 104 S.Ct. 1949, 80 L.Ed.2d 502; *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 245-246, 122 S.Ct. 1389, 152 L.Ed.2d 403 ["The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation...."]; *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 382-383, 112 S.Ct. 2538, 120 L.Ed.2d 305; *Beauharnais v. Illinois* (1952) 343 U.S. 250, 255-257, 266, 72 S.Ct. 725, 96 L.Ed. 919 ["Libelous utterances not being within the area of constitutionally protected speech...."] *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 571-572, 62 S.Ct. 766, 86 L.Ed. 1031.) [FN1]

> FN1. The limitations upon actions for defamation brought by public figures do not apply here. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 344-346, 94 S.Ct. 2997, 41 L.Ed.2d 789.)

[4] ***1148** Defendant in the present case objects to the imposition of an injunction prohibiting her from repeating statements the trial court determined were slanderous, asserting the injunction constitutes an impermissible prior restraint. We disagree. As explained below, an injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment.

The prohibition against prior restraints on freedom of expression is rooted in the English common law, but originally applied only to freedom of the press. In 1769, Blackstone explained in his Commentaries on the Laws of England that when printing first was invented in 1476, the press was entirely controlled by the government [FN2], at first through the granting of *****325** licenses and later by the decrees of the star chamber: "The art of printing, soon after its introduction, was looked upon (as well in England as in other countries) as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of starchamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers." (4 Blackstone's Commentaries 152, fn. a.) Blackstone observed that subjecting****344** "the press to the restrictive power of a licenser" restricted freedom of expression. (*Id.* at p. 152.) It was only in 1694, Blackstone explained, after the end of the star chamber, that "the press became properly free ... and has ever since so continued." (*Id.* at p. 152, fn. a.)

> FN2. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and Separation of Powers* (2001) 34 Ind. L.Rev. 295, 298-305 (providing a history of prior restraints on the press in England).

But the freedom granted to the press to print what it pleased without first having to obtain permission did not mean that government could not punish the press if it abused that privilege. Blackstone observed that in imposing criminal

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penalties for libel, "the *liberty of the press,* properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity." (4 Blackstone's Commentaries 151-152.)

***1149** It was this former practice of the English government of licensing the press that inspired the First Amendment's prohibition against prior restraints: "When the first amendment was approved by the First Congress, it was undoubtedly intended to prevent government's imposition of any system of prior restraints similar to the English licensing system under which nothing could be printed without the approval of the state or church authorities." (Tribe, American Constitutional Law (2d ed.1988) § 12-34, p. 1039.) As another noted commentator has explained: "The First Amendment undoubtedly was a reaction against the suppression of speech and of the press that existed in English society. Until 1694, there was an elaborate system of licensing in England, and no publication was allowed without a government granted license.... It is widely accepted that the First Amendment was meant, at the very least, to abolish such prior restraints on publication." (Chemerinsky, Constitutional Law Principles and Policies (2d ed.2002) § 11.1.1, p. 892, fn. omitted.)

This prohibition against prior restraints of the press led to the rule that the publication of a writing could not be prevented on the grounds that it allegedly would be libelous. In 1839, the New York Court of Chancery refused to prevent the publication of a pamphlet that allegedly would have defamed the plaintiff, holding that the publication of a libel could not be enjoined "without infringing upon the liberty of the press, and attempting to exercise a power of *preventative* justice which ... cannot safely be entrusted to any tribunal consistently with the principles of a free government." (*Brandreth v. Lance* (1839) 4 N.Y. Ch. Ann. 330, 8 Paige Ch. 24, 26, 1839 WL 3231, italics added.) The court noted that the "court of star chamber*****326** in England [[[FN3] ... was undoubtedly in the habit of restraining the publication of such libels by injunction. Since that court was abolished, however, I believe there is but one case upon record in which any court, either in this country or in England, has attempted, by an injunction or order of the court, to prohibit or restrain the publication of a libel, as such, in anticipation." (*Brandreth v. Lance, supra,* 8 Paige Ch. at p. 26.) The court refused, therefore, to prevent the defendants from publishing the pamphlet, but left them with this warning: "And if the defendants persist in their intention of giving this libelous production to the public, [the plaintiff] must have his remedy by a civil suit in a court of law; or by instituting a criminal prosecution, to the end that the libelers, upon conviction, may receive their appropriate punishment, in the penitentiary or otherwise." (*Id.* at p. 28.)

> FN3. Which, the court noted in colorful language, "once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of libellers of important personages." (*Brandreth v. Lance, supra,* 8 Paige Ch. 24, 26.)

But preventing a person from speaking or publishing something that, allegedly, would constitute a libel if spoken or published is far different from ***1150** issuing a posttrial injunction *after* a statement that already has been uttered has been found to constitute defamation. Prohibiting a person from making a statement or publishing a writing *before* that ****345** statement is spoken or the writing is published is far different from prohibiting a defendant from *repeating* a statement or *republishing* a writing that has been determined at trial to be defamatory and, thus, unlawful. This distinction is hardly novel.

In 1878, the English Court of Common Pleas upheld a posttrial injunction prohibiting the repetition of a libel. The plaintiffs in *Saxby v. Easterbrook* (1878) 3 C.P.D. 339 were a firm of engineers that had applied for a patent for a railway device. The defendants printed a statement claiming they had invented the device and the plaintiffs had stolen it from them. The plaintiffs sued and were awarded damages and an injunction restraining the defendants from

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"repetitions of acts of the like nature." (*Id.* at p. 341.) The English Court of Common Pleas affirmed the judgment. Lord Coleridge wrote: "I can well understand a court of Equity declining to interfere to restrain the publication of that which has not been found by a jury to be libelous. Here, however, the jury have found the matter complained of to be libelous...." (*Id.* at p. 342.) Judge Lindley agreed, stating that "when a jury have *found* the matter complained of to be libelous ..., I see no principle by which the court ought to be precluded from saying that the repetition of the libel shall be restrained." (*Id.* at p. 343.)

An early case in Missouri reached the same conclusion, stating: "After verdict in favor of the plaintiffs, they can have an injunction to restrain any further publication of that which the jury has found to be an actionable libel or slander." (*Flint v. Smoke Burner Co.* (1892) 110 Mo. 492, 19 S.W. 804, 806.) And in 1916, Roscoe Pound noted in an article in the Harvard Law Review that English courts would allow "an injunction in case the libel was repeated or publication was continued after a jury had found the matter libelous." (Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1916) 29 Harv. L.Rev. 640, 665, fn. omitted.)

The Court of Appeal in the present case based its contrary conclusion that the injunction was an invalid prior restraint of speech on language in ***327*Near v. Minnesota, supra,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357. Only when taken out of context, however, does the language in *Near* support the Court of Appeal's conclusion.

In *Near v. Minnesota, supra,* 283 U.S. 697, 702, 51 S.Ct. 625, 75 L.Ed. 1357, the high court considered a statute that permitted a court to enjoin as a nuisance the publication of a "malicious, scandalous and defamatory newspaper" or other periodical. The district court had found that several editions of a newspaper, The Saturday Press, "were 'chiefly devoted to malicious, scandalous and defamatory articles' " concerning the Mayor and the Chief of Police of Minneapolis, as ***1151** well as the county attorney and other officials. (*Id.* at p. 706, 51 S.Ct. 625.) The court " 'abated' " The Saturday Press as a public nuisance and defendant was "perpetually enjoined" from publishing " 'any publication whatsoever which is a malicious, scandalous or defamatory newspaper.' " (*Ibid.*)

The high court in *Near* recognized that prohibiting the future publication of a newspaper or other periodical "is of the essence of censorship." (*Near v. Minnesota, supra,* 283 U.S. 697, 713, 51 S.Ct. 625, 75 L.Ed. 1357.) The court stated that the "chief purpose" of the guarantee of liberty of the press is "to prevent previous restraints upon publication." (*Id.* at p. 713, 51 S.Ct. 625.) The high court was careful to point out, however, that the statute being considered was "not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected." (*Id.* at p. 709, 51 S.Ct. 625.) The court also observed that "the common law rules that subject the libeler to responsibility ... are not abolished by the protection extended in our constitutions." (*Id.* at p. 715, 51 S.Ct. 625.) But most significant is that the court, after noting that "the protection even as to previous restraint is not absolutely unlimited," clarified that it was not addressing "questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity." (*Id.* at p. 716, 51 S.Ct. 625, fn. omitted.) In a footnote, the court cited the above-quoted article by Roscoe Pound that observed that English courts permit***346** "an injunction in case the libel was repeated or publication was continued after a jury had found the matter libelous." (Pound, *Equitable Relief Against Defamation and Injuries to Personality, supra,* 29 Harv. L.Rev. at p. 665.) Therefore, *Near* expressly did not address the issue posed in the present case.[FN4]

> FN4. A law review article from half a century ago recognized that the injunction in *Near* "was directed against the total silencing of the newspaper. An entirely different problem is presented when, for example, a plaintiff asks merely that a defendant be enjoined from distributing particular defamatory statements already in print. An injunction of the latter type would be no more objectionable as a restriction of free speech than punishment of defamation by punitive damage awards and criminal libel prosecutions. In neither case is the inhibition one upon speech in general, but only upon a specific group of words which have been adjudged to be beyond the range of constitutional protection." (Note, *Developments in the Law of Defamation* (1956) 69 Harv. L.Rev. 874, 944 fns. omitted.)

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The United States Supreme Court has never addressed the precise question before us-whether an injunction prohibiting the repetition of statements found at trial to be defamatory violates the First Amendment. But several high court decisions have addressed related questions, and each is consistent with our holding that a court may enjoin the repetition of a statement that was determined at trial to be defamatory.

The decision in *Kingsley Books, Inc. v. Brown* (1957) 354 U.S. 436, 437, 77 S.Ct. 1325, 1 L.Ed.2d 1469, upheld a state law ***328** authorizing a " 'limited *1152 injunctive remedy' " prohibiting "the sale and distribution of written and printed matter found after due trial to be obscene." The high court rejected the defendant's argument that issuance of an injunction "amounts to a prior censorship" in violation of the First Amendment (*id.* at p. 440, 77 S.Ct. 1325), quoting *Near v. Minnesota, supra,* 283 U.S. 697, 716, 51 S.Ct. 625, 75 L.Ed. 1357 for the proposition that " 'the protection even as to previous restraint is not absolutely unlimited.' " (*Kingsley Books, supra,* 354 U.S. at p. 441, 77 S.Ct. 1325.) The high court recognized that the term "prior restraint" cannot be applied unthinkingly: "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." (*Ibid.*) The court pointed out that the defendants in *Kingsley Books* "were enjoined from displaying for sale or distributing only the particular booklets theretofore published and adjudged to be obscene." (*Id.* at p. 444, 77 S.Ct. 1325.) This fact distinguished *Kingsley Books* from the decision in *Near v. Minnesota, supra,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357, which had ruled that the abatement as a public nuisance of a newspaper was an invalid prior restraint, noting that the abatement in *Near* "enjoin [ed] the dissemination of future issues of a publication because its past issues had been found offensive," which is " 'the essence of censorship.' " (*Kingsley Books, supra,* 354 U.S. at p. 445, 77 S.Ct. 1325.) The high court in *Kingsley Books* observed that the injunction was "glaringly different" from the prior restraint in *Near,* because it "studiously withholds restraint upon matters not already published and not yet found to be offensive." (354 U.S. at p. 445, 77 S.Ct. 1325.)

Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49, 55, 93 S.Ct. 2628, 37 L.Ed.2d 446 upheld a Georgia statute authorizing an injunction prohibiting the exhibition of obscene materials because the statute "imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected."

Pittsburgh Press Co. v. Human Rel. Comm'n (1973) 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 held that an order forbidding a newspaper from publishing "help wanted" advertisements in gender-designated columns was not a prohibited prior restraint on expression. A city ordinance had been interpreted to forbid such segregation of advertisements as unlawful sexual discrimination in employment. The high court held that the First Amendment did not protect such illegal conduct, stating: "We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." (413 U.S. at p. 388, 93 S.Ct. 2553.) The court held that the order was not a prohibited prior restraint **347 on expression, noting that it never had held that all injunctions against newspapers were impermissible: "The special vice of a prior restraint is that communication will be suppressed ... before an adequate determination that it is unprotected by the First Amendment. [¶] The present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive *1153 conduct, this is not a case in which the Court is asked to speculate as to the effect of publication. [Citation.]" (413 U.S. at p. 390, 93 S.Ct. 2553; see also *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 764, 114 S.Ct. 2516, 129 L.Ed.2d 593, fn. 2 ["Not all injunctions that may incidentally affect expression, however, are 'prior restraints' in the sense that the term was used in ***329** *New York Times Co. [v. United States* (1971) 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822] or *Vance [v. Universal Amusement Co.* (1980) 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413]"].)

In each of these cases, the high court held an injunctive order prohibiting the repetition of expression that had been judicially determined to be unlawful did not constitute a prohibited prior restraint of speech. (See *Kramer v. Thompson* (3d Cir.1991) 947 F.2d 666, 675 ["The United States Supreme Court has held repeatedly that an injunction

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against speech generally will not be considered an unconstitutional prior restraint if it is issued after a jury has determined that the speech is not constitutionally protected."]; see *DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 891-892, 4 Cal.Rptr.3d 69, 75 P.3d 1 (conc. opn. of Moreno, J.) ["a preliminary injunction poses a danger that permanent injunctive relief does not; that potentially protected speech will be enjoined prior to an adjudication on the merits of the speaker's or publisher's First Amendment claims"].)

Decisions of two federal courts echo this conclusion. *Auburn Police Union v. Carpenter* (1st Cir.1993) 8 F.3d 886, upheld an injunction under a Maine statute that prohibited solicitations for the benefit of a law enforcement officer, agency, or association, rejecting the argument that an injunction against such solicitation necessarily would constitute an invalid prior restraint on expression: "The Supreme Court ... 'has never held that all injunctions are impermissible.' [Citation.] 'The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.' [Citation.] An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint." (*Id.* at p. 903; *Haseotes v. Cumberland Farms, Inc.* (Bankr.D.Mass.1997) 216 B.R. 690, 695.)

In *Lothschuetz v. Carpenter* (6th Cir.1990) 898 F.2d 1200, the district court awarded nominal damages after finding that the defendant had repeatedly libeled the plaintiffs but denied the plaintiffs' request for an injunction, ruling that it would constitute "an unwarranted prior restraint on freedom of speech." (*Id.* at p. 1206.) The Court of Appeals reversed, stating that "in view of [the defendant]'s frequent and continuing defamatory statements, an injunction is necessary to prevent future injury to [the plaintiff]'s personal ***1154** reputation and business relations. [Citations.]" (*Id.* at pp. 1208-1209 (conc. & dis. opn. of Wellford, J.).) [FN5] The Court of Appeals majority made clear that it "would limit the application of such injunction to the statements which have been found in this and prior proceedings to be false and libelous." (*Ibid.*)

> FN5. Judge Wellford's concurring and dissenting opinion was joined by Judge Hull and, thus, is "the opinion of the court on this issue." (*Lothschuetz v. Carpenter, supra,* 898 F.2d 1200, 1206.)

The highest courts of several of our sister states have reached the same conclusion. The Ohio Supreme Court upheld a complaint that sought injunctive relief to prohibit the defendant from repeating statements after those statements were proven at trial to be defamatory. The court held: "Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that *same* speech may be proper. ****348** The judicial determination that specific speech is defamatory must be made prior to any *****330** restraint. [Citation.]" (*O'Brien v. University Community Tenants Union, Inc.* (1975) 42 Ohio St.2d 242, 245, 327 N.E.2d 753, 755.)

The Georgia Supreme Court upheld an injunction issued following a jury trial in a libel case that prohibited the repetition of the statements found to be defamatory. The plaintiff in *Retail Credit Company v. Russell* (1975) 234 Ga. 765, 218 S.E.2d 54 discovered that the defendant credit reporting company had published a report erroneously stating the plaintiff had been fired from a previous job for stealing from his former employer. The plaintiff provided to the defendant a letter from his former employer completely refuting this libel. The jury found that the defendant promised to retract the statement, but failed to do so and, in fact, distributed further reports that repeated the libel. The jury awarded $15,000 in damages to the plaintiff, and the trial court "entered a narrowly-drawn order enjoining Retail Credit from the further publication of the adjudicated libel." (*Id.*, 218 S.E.2d at p. 56.) The Georgia Supreme Court rejected Retail Credit's claim that the injunction constituted an unconstitutional prior restraint on expression, stating: "The jury verdict necessarily found the statements of Retail Credit to have been false and defamatory, and the evidence authorized a conclusion that the libel had been repetitive.... Thus, prior to the issuance of the injunction 'an adequate determination [was made] that it is unprotected by the First Amendment'; the 'order is based on a con-

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tinuing course of repetitive conduct'; and 'the order is clear and sweeps no more broadly than necessary.' [Citation.] The protections recognized in *Pittsburgh Press* have been accorded Retail Credit and this injunction is not subject to the complaints made of it." (*Id.* at pp. 62-63.) The court added: " 'The present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the court is asked to speculate as to the effect of publication.' " (*Id.* at p. 62.)

***1155** The Supreme Court of Minnesota upheld an injunction issued following a jury trial that prohibited further publication of a book and a document that had been determined at trial to contain defamatory statements. "[C]ourts have ... upheld the suppression of libel, so long as the suppression is limited to the precise statements found libelous *after* a full and fair adversary proceeding. [Citations.] We therefore hold that the injunction below, limited as it is to material found either libelous or disparaging after a full jury trial, is not unconstitutional and may stand." (*Advanced Training Systems, Inc. v. Caswell Equipment Co., Inc.* (Minn.1984) 352 N.W.2d 1, 11.)

In *Sid Dillon Chevrolet v. Sullivan* (1997) 251 Neb. 722, 559 N.W.2d 740, the Nebraska Supreme Court overturned an injunction issued *prior* to trial that prohibited speech, quoting the "general rule" that "equity will not enjoin a libel or slander." (*Id.*, 559 N.W.2d at p. 746.) Among the reasons for this general rule, is that "the defendant would be deprived of the right to a jury trial concerning the truth of his or her allegedly defamatory publication." (*Ibid.*) The court recognized, however, that this general rule does not necessarily apply to an injunction prohibiting speech that is issued following a trial at which the statements have been found to be unlawful: "Some jurisdictions have concluded that an order enjoining further publication of libelous or slanderous material does not constitute a prior restraint on speech where there has been a full and fair adversarial proceeding in which the complained of publications were found to be false or misleading representations of fact *****331** prior to the issuance of injunctive relief. [Citations.]" (*Ibid.*) Accordingly, the court carefully limited its holding to injunctions issued prior to trial: "We adopt the view of those jurisdictions that have considered the issue and hold that *absent a prior adversarial determination that the complained of publication is false or a misleading representation of fact,* equity will not issue to enjoin a libel or slander...." (*Id.* at p. 747, italics added; *Nolan v. Campbell* (2004) 13 Neb.App. 212, 226 [690 N.W.2d 638, 652] ["Here, the restraint via the injunction is permissible because the speech had been adjudicated to be ****349** libelous and therefore not to be protected under the First Amendment. Therefore, the trial court did not err in issuing an injunction."]; see also Annot., Injunction as Remedy Against Defamation of Person (1956) 47 A.L.R.2d 715, 728 ["It may be argued that the constitutionally guaranteed rights of free speech and trial by jury are not infringed by equitable interference with the right of publication where the defamatory nature of the publications complained of has once been established by a trial at law, and the plaintiff seeks to restrain further similar statements."]; 42 Am-Jur.2d (2000) Injunctions § 96, p. 691 ["Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper."].)

Accordingly, we hold that, following a trial at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction ***1156** prohibiting the defendant from repeating the statements determined to be defamatory. (*Aguilar v. Avis Rent A Car System, Inc., supra,* 21 Cal.4th 121, 140, 87 Cal.Rptr.2d 132, 980 P.2d 846 (plur. opn. of George, C.J.) ["[O]nce a court has found that a specific pattern of speech is unlawful, an injunctive order prohibiting the repetition, perpetuation, or continuation of that practice is not a prohibited 'prior restraint' of speech. [Citation.]"].) Such an injunction, issued only following a determination at trial that the enjoined statements are defamatory, does not constitute a prohibited prior restraint of expression. "Once specific expressional acts are properly determined to be unprotected by the first amendment, there can be no objection to their subsequent suppression or prosecution." (Tribe, American Constitutional Law, *supra,* § 12-37, pp. 1054-1055; Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory* (1984) 70 Va. L.Rev. 53, 55 ["in certain instances prior restraints are appropriately disfavored ... because of the coincidental harm to fully protected expression that results from the *preliminary* restraint imposed prior to a decision on the merits of a *final* restraint.... Such interim restraints present a threat to first amendment rights ... that expression will be abridged ... prior to a full and fair hearing before an independent judicial forum to determine the scope of the speaker's constitutional right."].)

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Lemen argues that damages are the sole remedy available for defamation, stating: "The traditional rule of Anglo-American law is that equity has no jurisdiction to enjoin defamation." [FN6] But, as Lemen acknowledges, this general rule "was established in eighteenth-century England." At that time, the courts of law and the courts ***332** of equity were separate.[FN7] This long-since-abandoned separation of the courts of law and equity accounts for the general rule that equity will not enjoin defamation. As one commentator has explained: "By the end of the Fifteenth Century, complaints against defamation were heard in two different courts, the Star Chamber and the common-law courts.... [¶] ... [¶] When the Star Chamber was abolished in 1641, the common-law courts assumed its former jurisdiction over defamation.... [¶] The courts of equity, accordingly, were denied authority to hear claims for defamation. As early as 1742, it was ruled in the *St. James's Evening Post **1157 Case,* that the courts of equity had no jurisdiction over claims of libel and slander: 'For whether it is a libel against the publick or private persons, the only method is to proceed at law.' Since the ***350** common-law courts then had no power at all to grant injunctions, the resultant ruling meant that, in England, defamation could not be enjoined; the only permissible remedy was money damages at law.... [¶] Thus, an extraordinarily important rule was created more as an offshoot of a jurisdictional dispute than as a calculated understanding of the needs of a free press. In fact, the creation of the rule that equity will not enjoin a libel parallels the almost anti-climatic ending of licensing of the press. These were both 'historical accidents'...." (Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and Separation of Powers* (2001) 34 Ind. L.Rev. 295, 309-311, fns. omitted.) [FN8]

FN6. The general rule upon which Lemen relies is not universally accepted. As one commentator has observed: "Upon the question of relief by injunction against the publication of defamatory statements affecting the character or business of persons, the authorities both in England and America present a noticeable want of uniformity, and are indeed wholly irreconcilable." (Newell, Libel and Slander (2d ed. 1898) p. 246a.)

FN7. "English equity as a system administered by a tribunal apart from the established courts made its first appearance in the reign of Edward I...." (30A C.J.S. (1992) Equity, § 3, p. 162.) "For centuries law and equity were administered in England by two separate and distinct sets of courts, each applying exclusively its own system of jurisprudence, and following its own system of procedure, but, by statute and constitutional provision, this dual system of administration was abolished and provision was made for the administration of equity in a consolidated court." (*Id.,* § 4, p. 163.) Separate courts of equity were abolished in England in 1873. (27A Am.Jur.2d (1996) Equity, § 3, p. 521.)

FN8. " 'Prior to the Common-Law Procedure Act 1854, no court could grant any injunction in a case of libel. The Court of Chancery could grant no injunction in such a case, because it could not try a libel. Neither could courts of common law until the Common-Law Procedure Act of 1854, because they had no power to grant injunctions.' " (*American Malting Co. v. Keitel* (2d Cir.1913) 209 F. 351, 354.)

[5] Further, as some of the authorities cited by Lemen acknowledge, the general rule that a defamation may not be enjoined does not apply in a circumstance such as that in the present case in which an injunction is issued to prevent a defendant from repeating statements that have been judicially determined to be defamatory. For example, after stating that "[a]s a general rule, an injunction will not lie to restrain a libel or slander" (43A C.J.S. (2004) Injunctions, § 255, p. 283), Corpus Juris Secundum clarifies that this general rule does not apply in circumstances like those in the present case: "After an action at law in which there is a verdict finding the statements published to be false, the plaintiff on a proper showing may have an injunction restraining any further publication of the matter which the jury has found to be acts of libel or slander...." (*Id.* at § 255, p. 284.) To the same effect, the annotation written by W.E. Shipley and cited by Lemen states as a general rule "that equity will not grant an injunction against publication of a personal libel or slander" (Annot., Injunction as Remedy Against Defamation of Person, *supra,* 47 A.L.R. 715, 716) but also acknowledges: "It may be argued that the constitutionally ***333** guaranteed rights of

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free speech and trial by jury are not infringed by equitable interference with the right of publication where the defamatory nature of the publications complained of has once been established by a trial at law, and the plaintiff seeks to restrain further similar statements." (*Id.* at p. 728.) [FN9]

> FN9. Consistently, American Jurisprudence Second observes that "while it is true that equity will not normally restrain a libel, the rule is not without exception ... and an injunction properly issued to prohibit a defendant from reiterating statements which had been found in current and prior proceedings to be false and libelous...." (42 Am.Jur.2d (2000) Injunctions, § 98, p. 693.)

[6] ***1158** In determining whether an injunction restraining defamation may be issued, therefore, it is crucial to distinguish requests for preventive relief prior to trial and post-trial remedies to prevent repetition of statements judicially determined to be defamatory. As one commentator aptly recognized: "There are two stages at which it would be in the plaintiff's interest to enjoin publication of a defamation firstly to preclude the initial public distribution, and secondly to bar continued distributions after a matter has been adjudged defamatory. [¶] The attempt to enjoin the initial distribution of a defamatory matter meets several barriers, the most impervious being the constitutional prohibitions against prior restraints on free speech and press.... [¶] In addition, such an injunction may be denied on the ground that equitable jurisdiction extends only to property rights and not personalty.... [¶] In a few states the requirement that criminal libels be tried by a jury has been applied to civil cases as well, thus providing a third objection to the granting of an injunction against the initial distribution of defamatory matter. [¶] *In contrast, an injunction against continued distribution of a publication which a jury has determined to be defamatory may be more readily granted.* The simplest procedure is to add a prayer for injunctive relief to the action for damages.... Since the constitutional problems of a prior restraint are not present in this situation, and the defendant ****351** has not been deprived of a jury determination, injunctions should be available as ancillary relief for ... personal and political defamations." (1 Hanson, Libel and Related Torts (1969) § 170, pp. 139-140, italics added.)

Accepting Lemen's argument that the only remedy for defamation is an action for damages would mean that a defendant harmed by a continuing pattern of defamation would be required to bring a succession of lawsuits if an award of damages was insufficient to deter the defendant from continuing the tortuous behavior. This could occur if the defendant either was so impecunious as to be "judgment proof," or so wealthy as to be willing to pay any resulting judgments. Thus, a judgment for money damages will not always give the plaintiff effective relief from a continuing pattern of defamation. The present case provides an apt example. The Village Inn did not seek money damages in its amended complaint. The Inn did not want money from Lemen; it just wanted her to stop.[FN10]

> FN10. Justice Kennard's concurring and dissenting opinion states that the majority holds that "future speech may be enjoined irrespective of whether monetary damages would have been an adequate remedy." (Conc. & dis. opn. of Kennard, J., *post,* 57 Cal.Rptr.3d at pp. 338, 341-342, 156 P.3d at pp. 354-355, 358.) We do not so hold. We hold that an injunction prohibiting the defendant from repeating a statement determined to be defamatory does not constitute a prohibited prior restraint of speech. We also hold that an award of damages is not the sole remedy available for defamation. We express no view on whether, in an individual case, an injunction prohibiting the defendant from repeating defamatory statements could, or should, be denied because an award of damages would be an adequate remedy.

*****334 *1159** We recognize, of course, that a court must tread lightly and carefully when issuing an order that prohibits speech. In *Carroll v. Princess Anne* (1968) 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325, the high court invalidated a restraining order prohibiting the continuation of a public rally conducted by a "white supremacist" organization that had been issued ex parte without notice to the enjoined parties. In explaining the importance of giving the enjoined parties an opportunity to be heard, the high court in *Princess Anne* stressed the importance of limiting any order restraining speech: "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of

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the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' [Citation.] In other words, the order must be tailored as precisely as possible to the exact needs of the case." (*Carroll v. Princess Anne, supra,* 393 U.S. at pp. 183-184, 89 S.Ct. 347; *Pittsburgh Press Co. v. Human Rel. Comm'n, supra,* 413 U.S. 376, 390, 93 S.Ct. 2553 [upholding an order that is "clear and sweeps no more broadly than necessary"]; *Aguilar v. Avis Rent A Car System, Inc., supra,* 21 Cal.4th 121, 140-141, 87 Cal.Rptr.2d 132, 980 P.2d 846 (plur. opn. of George, C. J.).)

The court in *Madsen v. Women's Health Center, Inc., supra,* 512 U.S. at page 765, 114 S.Ct. 2516, held that review of an injunction, as opposed to an ordinance, that restricted the time, place, and manner of protected expression "require[s] a somewhat more stringent application of general First Amendment principles." The high court explained: "In past cases evaluating injunctions restricting speech, [citations], we have relied upon such general principles while also seeking to ensure that the injunction was no broader than necessary to achieve its desired goals. [Citations.] Our close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech is consistent with the general rule, quite apart from First Amendment considerations, 'that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.' [Citations.]" (*Ibid.*)

The same result obtains under the California Constitution. Article I, section 2, subdivision (a) of the California Constitution states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." In *Dailey v. Superior Court* (1896) 112 Cal. 94, 44 P. 458, this court ****352** overturned an order issued prior to a play's opening performance that prohibited the performance or advertising of the play because it was based upon the facts of a pending criminal trial. Concluding that the order constituted a prohibited prior restraint of expression, this court observed that the wording of the above-quoted constitution provision "is terse and vigorous, and its meaning so plain that construction is not needed.... It is patent that this right to speak, write, and publish, cannot ***1160** be abused until it is exercised, and before it is exercised there can be no responsibility." (*Id.* at p. 97, 44 P. 458.) In *Wilson v. Superior Court* (1975) 13 Cal.3d 652, 658, 119 Cal.Rptr. 468, 532 P.2d 116, we held that a preliminary injunction issued prior to trial that prohibited the distribution of a political campaign leaflet was unconstitutional because it *****335** "constituted a prior restraint on publication."

[7] Despite the broad language in the California Constitution protecting speech, we have recognized that a court may enjoin further distribution of a publication that was found at trial to be unlawful, stating: "[I]f the trial court finds the subject matter obscene under prevailing law an injunctive order may be fashioned.... It is entirely permissible from a constitutional standpoint to enjoin further exhibition of specific magazines or films which have been finally adjudged to be obscene following a full adversary hearing. [Citations.]" (*People ex rel. Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 57, 130 Cal.Rptr. 328, 550 P.2d 600; see *Aguilar v. Avis Rent A Car System, Inc., supra,* 21 Cal.4th 121, 144-145, 87 Cal.Rptr.2d 132, 980 P.2d 846 (plur. opn. of George, C.J.) ["Under the California Constitution, as under its federal counterpart, the injunction in the present case thus does not constitute a prohibited prior restraint of speech, because defendants simply were enjoined from continuing a course of repetitive speech that had been judicially determined to constitute unlawful harassment in violation of the FEHA."].)

[8] The injunction in the present case is broader than necessary to provide relief to plaintiff while minimizing the restriction of expression. (*Madsen v. Women's Health Center, Inc., supra,* 512 U.S. 753, 765, 114 S.Ct. 2516, 129 L.Ed.2d 593.) The injunction applies not just to Lemen but to "her agents, all persons acting on her behalf or purporting to act on her behalf and all other persons in active concert and participation with her." There is no evidence in the record, however, to support a finding that anyone other than Lemen herself defamed defendant, or that it is likely that Lemen will induce others to do so in the future. Therefore, the injunction, to be valid, must be limited to prohibiting Lemen personally from repeating her defamatory statements. [FN11]

> FN11. We express no view regarding whether the scope of the injunction properly could be broader if people other than Lemen purported to act on her behalf.

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[9][10] Further, the injunction must not prevent Lemen from presenting her grievances to government officials. The right to petition the government for redress of grievances is "among the most precious of the liberties safeguarded by the Bill of Rights." (*Mine Workers v. Illinois Bar Assn.* (1967) 389 U.S. 217, 222, 88 S.Ct. 353, 19 L.Ed.2d 426.) Accordingly, paragraph 4B, which prohibits Lemen "from making the following defamatory statements about Plaintiff to third persons" must be modified to prohibit Lemen "from making ***1161** the following defamatory statements about Plaintiff to third persons other than governmental officials with relevant enforcement responsibilities."

[11] The injunction prohibits Lemen from "initiating contact with individuals known to Defendant to be employees of Plaintiff." We agree with the Court of Appeal that this restriction "sweeps more broadly than necessary" because it "includes no time, place, and manner restrictions but prohibits Lemen from initiating any type of contact with a known Village Inn employee anywhere, at any time, regarding any subject." FN12

> FN12. The Court of Appeal upheld the final paragraph of the injunction, which prohibits Lemen "from filming ... within 25 feet of the premises" of the Village Inn, except on Lemen's own property. Lemen did not seek review of this portion of the Court of Appeal's decision and does not challenge it in this court.

*****336 **353** [12] Lemen argues that she cannot be enjoined from repeating the same statements found to be defamatory, because a change in circumstances might render permissible a statement that was defamatory, stating: "A statement that was once false may become true later in time." If such a change in circumstances occurs, defendant may move the court to modify or dissolve the injunction. Civil Code section 3424, subdivision (a) states: "Upon notice and motion, the court may modify or dissolve a final injunction upon a showing that there has been a material change in the facts upon which the injunction was granted...." "This statute codifies a long-settled judicial recognition of the inherent power of the court to amend an injunction in the interest of justice when '... there has been a change in the controlling facts upon which the injunction rested....' [Citations.]" (*Swan Magnetics, Inc. v. Superior Court* (1997) 56 Cal.App.4th 1504, 1509, 66 Cal.Rptr.2d 541.) By the same token, the Village Inn could move to modify the injunction if Lemen repeated her defamatory statements in a manner not expressly covered by the injunction.FN13

> FN13. Justice Kennard's concurring and dissenting opinion states that the majority holds that "a defendant's truthful future speech may be subjected to judicial censorship." (Conc. & dis. opn. of Kennard, J., *post,* 57 Cal.Rptr.3d at p. 338, 156 P.3d at pp. 354-355.) We do not so hold. We hold only that the possibility that a change in circumstances could alter the nature of a statement found to be defamatory does not prohibit a court from issuing an injunction prohibiting the defendant from repeating that statement.

[13] If it chose to, the trial court could retain jurisdiction to monitor the enforcement of the injunction. "The jurisdiction of a court of equity to enforce its decrees is coextensive with its jurisdiction to determine the rights of the parties, and it has power to enforce its decrees as a necessary incident to its jurisdiction. Except where the decree is self-executing, jurisdiction of the cause continues for this purpose, or leave may be expressly reserved to reinstate the cause for the purpose of enforcing the decree, or to make such further orders as may be necessary. [Citations.]" (*Klinker v. Klinker* (1955) 132 Cal.App.2d 687, 694, 283 P.2d 83.)

***1162** Accordingly, we agree with the Court of Appeal that the injunction issued by the trial court must be reversed in part, but we reach that conclusion based on different reasoning than that relied upon by the Court of Appeal. As explained above, the injunction must be reversed in part because it is overly broad, but a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory would not violate defendant's right to free speech.

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DISPOSITION

The judgment of the Court of Appeal is affirmed, and the matter remanded for proceedings consistent with the views expressed in this opinion.

GEORGE, C.J., and BAXTER, CHIN and CORRIGAN, JJ., concur.Concurring Opinion by BAXTER, J.
I join fully in the majority opinion. I write separately only to point out that if a defendant were to be enjoined from repeating statements already determined to be defamatory, such a defendant may not only move the court to modify or dissolve the injunction based on a change in circumstances or context, as the majority notes, but may also speak out, notwithstanding the injunction, and assert the present truth of those statements as a defense in any subsequent prosecution for violation of the injunction. ***337(*People v. Gonzalez* (1996) 12 Cal.4th 804, 818, 50 Cal.Rptr.2d 74, 910 P.2d 1366 ["this court has firmly established that a person subject to a court's injunction may elect whether to challenge the constitutional validity of the injunction when it is issued, or to reserve that claim until a violation of the injunction is charged as a contempt of court"]; *In re Berry* (1968) 68 Cal.2d 137, 149-150, 65 Cal.Rptr. 273, 436 P.2d 273.)

Our decision thus does *not* require a citizen to obtain government permission before speaking truthfully. In this respect, California law "is 'considerably more consistent with **354 the exercise of First Amendment freedoms' than that of other jurisdictions that have adopted the so-called collateral bar rule barring collateral attack on injunctive orders." (*People v. Gonzalez, supra,* 12 Cal.4th at p. 819, 50 Cal.Rptr.2d 74, 910 P.2d 1366, quoting *in rE berry, supra,* 68 cal.2d at p. 150, 65 caL.rptr. 273, 436 P.2d 273.)

GEORGE, C.J., and CHIN, J., concur.Concurring and Dissenting Opinion by KENNARD, J.
In this defamatory speech action, the Court of Appeal invalidated the trial court's permanent injunction against defendant. The majority here affirms the Court of Appeal's judgment. So would I.

Unlike the majority, however, I would not remand the matter for issuance of a narrower injunction. Rather, I agree with the Court of Appeal that an *1163 injunction permanently prohibiting defendant's future speech is an unconstitutional prior restraint. And, unlike the majority, I would hold that the remedy for defamation is to award monetary damages. To forever gag the speaker-the remedy approved by the majority-goes beyond chilling speech; it freezes speech.

The majority acknowledges that the statements the trial court has prohibited defendant from uttering may in the future become true. In that event, the majority concludes, defendant has an adequate remedy because she may apply to the trial court for modification of the injunction. I disagree. To require a judge's permission before defendant may speak truthfully is the essence of government censorship of speech and in my view is constitutionally impermissible.

I

Plaintiff Balboa Island Village Inn, Inc., owns the Balboa Island Village Inn (Village Inn), a bar and restaurant on Balboa Island in Newport Beach, Southern California. The Village Inn has live music, and on weekends it stays open until 2:00 a.m. Defendant Anne Lemen (Lemen) has since 1989 owned a cottage across an alley from the Village Inn. Lemen lives in the cottage part of the time and rents it out as a vacation home part of the time.

Like the previous owners of her home, Lemen became embroiled in a dispute with plaintiff about noise at the Village Inn. She also complained about the inebriation and boisterousness of departing customers. Lemen circulated a petition on Balboa Island, which has about 1100 residents, and obtained, as plaintiff's counsel acknowledged at oral argument, 400 signatures. While circulating the petition, and at other times, Lemen orally accused plaintiff of,

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among other things, having child pornography and prostitution at the Village Inn, selling drugs and alcohol to minors there, and being involved with the Mafia.

Plaintiff sued Lemen, alleging causes of action for nuisance, interference with business, and defamation. Although plaintiff claimed that the Village Inn experienced a 20 percent drop in business after Lemen circulated her petition and made her oral ***338** accusations (maj. opn., *ante,* 57 Cal.Rptr.3d at pp. 322-323, 156 P.3d at p. 342), it sought no monetary damages whatsoever. The sole remedy it sought, and obtained, was a permanent injunction ordering Lemen to stop making disparaging statements about the Village Inn. (Maj. opn., *ante,* 57 Cal.Rptr.3d at p. 333, 156 P.3d at p. 351.)

The trial court prohibited Lemen from contacting Village Inn employees, an order that the Court of Appeal invalidated as an overbroad restriction. The trial court also permanently enjoined Lemen from making the following *1164 statements about plaintiff to third persons: "Plaintiff sells alcohol to minors; Plaintiff stays open until 6:00 a.m.; Plaintiff makes sex videos; Plaintiff is involved in child pornography; Plaintiff distributes illegal drugs; Plaintiff has mafia connections; Plaintiff encourages lesbian activities; Plaintiff participates in prostitution and acts as a whorehouse; Plaintiff serves tainted food." The Court of Appeal held that these restrictions on Lemen's future speech are a constitutionally impermissible prior restraint of speech.

The majority agrees with the Court of Appeal that the trial court's permanent injunction is unconstitutional. But it does so **355 based only on the overbreadth of the injunction in applying to persons other than Lemen herself; in restricting Lemen's contacts with plaintiff's employees regardless of time, place, or manner; and in prohibiting Lemen from making the specified statements even to government officials. (Maj. opn., *ante,* 57 Cal.Rptr.3d at pp. 334-335, 156 P.3d at pp. 351-352.) The majority, however, rejects the Court of Appeal's holding that the injunction is an unconstitutional prior restraint. (*Id.,* 57 Cal.Rptr.3d at p. 331, 156 P.3d at p. 349.) It holds: (1) After a trial court has once found a defendant's statement to be defamatory, it may order the defendant never to repeat that statement (*ibid.*); (2) future speech may be enjoined irrespective of whether monetary damages would have been an adequate remedy (*id.,* 57 Cal.Rptr.3d at p. 333, 156 P.3d at p. 351); and (3) a defendant's truthful future speech may be subjected to judicial censorship (*id.,* 57 Cal.Rptr.3d at pp. 335-336, 156 P.3d at p. 352).

I do not and cannot join those majority holdings, which I view as restraints on the right of free speech that are impermissible under both the federal and the California Constitutions. The majority orders the matter remanded so that the trial court may prepare and file a new permanent injunction against Lemen that avoids the overbreadth problems that the majority has identified. I do not agree with the remand. Even as so limited, the injunction operates as an impermissible prior restraint of Lemen's future speech.

II

To speak openly and freely, one of our most cherished freedoms, is a right guaranteed by the First Amendment to the United States Constitution. (U.S. Const., 1st Amend. ["Congress shall make no law ... abridging the freedom of speech...."].) This fundamental right operates as a restriction on both state and federal governments (*Near v. Minnesota* (1931) 283 U.S. 697, 732, 51 S.Ct. 625, 75 L.Ed. 1357) including the judicial, legislative, and executive branches of those governments (*Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 764, 114 S.Ct. 2516, 129 L.Ed.2d 593).

Injunctions pose a greater threat to freedom of speech than do statutes, as injunctions carry a greater risk of censorship and discriminatory application *1165 than do general laws. ***339**(*Madsen v. Women's Health Center, Inc., supra,* 512 U.S. at pp. 764-765, 114 S.Ct. 2516.) An injunction is issued not by the collective action of a legislature but by an individual judge-a single man or woman controlling someone's future utterances of speech. Because the

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power to enjoin speech resides in an individual judge, injunctions deserve greater scrutiny than statutes. (See *id.* at p. 793, 114 S.Ct. 2516 (conc. & dis. opn. of Scalia, J.).) An injunction restricting future speech is a prior restraint (*id.* at p. 797, 114 S.Ct. 2516 (conc. & dis. opn. of Scalia, J.)) and thus, presumptively unconstitutional (*Southeastern Promotions, Ltd. v. Conrad* (1975) 420 U.S. 546, 558, 95 S.Ct. 1239, 43 L.Ed.2d 448).

The majority's insistence to the contrary notwithstanding (maj. opn., *ante,* 57 Cal.Rptr.3d at p. 324, 156 P.3d at p. 343), the injunction here is a prior restraint because it prohibits Lemen from making specified statements (*ante,* 57 Cal.Rptr.3d at p. 322, 156 P.3d at p. 341) anywhere and at any time in the future. A prohibition targeting speech that has not yet occurred is a prior restraint. (*Alexander v. United States* (1993) 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 [court orders that actually forbid speech activities are classic examples of prior restraints]; see *Tory v. Cochran* (2005) 544 U.S. 734, 736, 125 S.Ct. 2108, 2110, 161 L.Ed.2d 1042 [injunction against "orally uttering statements" is a prior restraint].)

The pertinent inquiry is whether the presumptively unconstitutional prior restraint (*Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at p. 558, 95 S.Ct. 1239; *Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584) on Lemen's future speech is legally proper. A heavy burden of justification rests on anyone seeking a prior restraint on the right of free speech. (*Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1.) Here, plaintiff has not carried that burden. Plaintiff's argument, adopted by the majority, consists in essence ****356** of this syllogism: (1) Defamation is not constitutionally protected speech; (2) it has been judicially determined that Lemen defamed plaintiff by making certain statements; therefore (3) defendant may be enjoined from ever again making those statements. (Maj. opn., *ante,* 57 Cal.Rptr.3d at p. 331, 156 P.3d at p. 349.) Like many a syllogism, the argument has superficial appeal. Like many a syllogism, it is flawed.

Its flaw is the failure to appreciate that whether a statement is defamatory cannot be determined by viewing the statement in isolation from the context in which it is made, the facts to which it refers, and the precise wording used. A statement previously adjudged to be defamatory, and thus not protected by the First Amendment, may, when spoken in the future at a particular time and in a particular context, not be defamatory for a number of reasons, and thus be entitled to constitutional protection.

The underlying facts to which the statement refers may change. Here, for example, the trial court enjoined Lemen from ever saying that plaintiff sells ***1166** alcohol to minors at the Village Inn. If in the future the Village Inn were ever to serve alcohol to minors, and Lemen accurately reported that fact to a neighbor, Lemen could be charged with contempt of court for violating the trial court's injunction, even though her statement was not defamatory (because true) and thus entitled to full constitutional protection.

And, the context in which the words are spoken may be different. For an audience member to falsely yell "fire" in a crowded theater is quite different than for an actor to yell the same word in the same crowded theater while reciting the lines of a dramatic*****340** production. Similarly, if a newspaper reporter were to ask Lemen what sorts of things the trial court's injunction prohibited her from saying, and if Lemen were to reply, "Plaintiff sells alcohol to minors," the statement would not be defamatory because a reasonable person hearing the conversation would understand that Lemen was describing the contents of the injunction and not the activities at the Village Inn. (See *Couch v. San Juan Unified School Dist.* (1995) 33 Cal.App.4th 1491, 1501, 39 Cal.Rptr.2d 848 [whether an oral statement is defamatory depends on how a reasonable hearer would understand it in the context in which it was spoken].) In other words, whether the First Amendment protects speech depends on the setting in which the speech occurs. (*Young v. American Mini Theatres, Inc.* (1976) 427 U.S. 50, 66, 96 S.Ct. 2440, 49 L.Ed.2d 310; *Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260, 228 Cal.Rptr. 206, 721 P.2d 87 [statement must be examined in light of the "totality of the circumstances"].) Because the injunction here makes no allowance for context, it muzzles nondefamatory speech entitled to full constitutional protection.

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Also, the words in which a statement is formulated may vary. Subtle differences in wording can make it exceptionally difficult to determine whether a particular utterance falls within an injunction's prohibition. As the United States Supreme Court has aptly observed: "It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." (*Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at p. 559, 95 S.Ct. 1239; accord, *Young v. American Mini Theatres, Inc., supra,* 427 U.S. at p. 66, 96 S.Ct. 2440.) For example, should in this case Lemen express in the future her opinion that bars such as the Village Inn contribute to the social problems arising from alcoholic consumption by minors, has Lemen violated the injunction? Does that assertion imply that the Village Inn sells alcohol to minors or only that the general availability of alcohol in all bars, including the Village Inn, contributes to the social problems caused by alcohol? If Lemen were to tell a friend that the food at the Village Inn is "bad," would that statement imply that the food is "tainted" (a statement that the injunction forbids) or only that it is unappetizing or ill-flavored (statements that the injunction does not forbid)?

1167** The United States Supreme Court's decisions recognize that an injunction may not be used to prohibit speech that, because its precise content is not yet known, might be constitutionally protected. Thus, in ****357Kingsley Books, Inc. v. Brown* (1957) 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469, the high court upheld an injunction of "written and printed matter found after due trial to be obscene" (*id.* at p. 437, 77 S.Ct. 1325) because the injunction "studiously withholds restraint upon matters *not already published* and not yet found to be offensive" (*id.* at p. 445, 77 S.Ct. 1325, italics added).

When, as here, an injunction based on *past* oral statements found to be defamatory, and therefore unprotected by the First Amendment, restrains *future* speech that, because it has not yet occurred, has not been judicially determined to be unprotected, the high court has held the injunction to be an unconstitutional prior restraint. (*Vance v. Universal Amusement Co., Inc.* (1980) 445 U.S. 308, 311, 316, 100 S.Ct. 1156, 63 L.Ed.2d 413; *Near v. Minnesota, supra,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; see *Alexander v. United States, supra,* 509 U.S. at p. 550, 113 S.Ct. 2766; *Kingsley Books, Inc. v. Brown, supra,* 354 U.S. at p. 445, 77 S.Ct. 1325.) The threat *****341** of contempt of court proceedings, which may result in fines and incarceration, necessarily discourages or chills the exercise of free speech and may deter a person from speaking at all. The First Amendment does not permit "banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." (*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 255, 122 S.Ct. 1389, 152 L.Ed.2d 403.) A prior restraint does more than chill the exercise of free speech: "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." (*Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 559, 96 S.Ct. 2791, 49 L.Ed.2d 683.)

In response to plaintiff's argument that changed circumstances may in the future render true a statement that was in the past false, the majority requires Lemen to seek the trial court's permission before she speaks by moving to modify the injunction. (Maj. opn., *ante,* 57 Cal.Rptr.3d at p. 336, 156 P.3d at p. 353.) Requiring a citizen to obtain government permission before speaking truthfully is "the essence of censorship" directly at odds with the "chief purpose" of the constitutional guarantee of free speech to prevent prior restraints. (*Near v. Minnesota, supra,* 283 U.S. at p. 713, 51 S.Ct. 625; *Kingsley Books, Inc. v. Brown, supra,* 354 U.S. at p. 445, 77 S.Ct. 1325.) [FN1]

> FN1. The concurring opinion asserts that, because California permits collateral attacks on the constitutionality of injunctions, the majority's decision does not require Lemen to obtain government permission before speaking truthfully. (Conc. opn. of Baxter, J., *ante,* 57 Cal.Rptr.3d at pp. 336-337, 156 P.3d at pp. 353-354.) This assertion implicitly recognizes that the injunction is unconstitutionally overbroad because it enjoins speech whether or not it is truthful. What it fails to recognize, however, is the powerfully chilling effect of an injunction restricting speech. To speak truthfully in violation of the injunction, Lemen must be willing to be cited for contempt, hauled into court, and face possible incarceration and fines. How many

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will be bold enough to run those risks? Realistically, the majority's decision does require persons like Lemen to obtain government permission before speaking truthfully.

***1168** Not only does the injunction against Lemen's future speech offend the basic principles of the First Amendment, it also violates the First Amendment because it is unnecessary, as discussed below.

III

The injunction here is not necessary to protect any compelling state interest or any important public policy. (See *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 165-166, 87 Cal.Rptr.2d 132, 980 P.2d 846 (conc. opn. of Werdegar, J.) [compelling state interest in eradicating racial discrimination in workplace], *id.,* at p. 180, 87 Cal.Rptr.2d 132, 980 P.2d 846 (dis. opn. of Kennard, J.) [compelling state interest in eradicating invidious employment discrimination].) The injunction in this case serves no significant public interest, such as eliminating invidious racial discrimination in employment, preventing incitement of immediate violence, or protecting national security. Obviously, there is no compelling public or state interest in stopping Lemen from circulating a petition among her neighbors and making disparaging statements about the Village Inn. The injunction only protects plaintiff's purely private business interests.

****358** Plaintiff has not shown that the injunction is necessary to serve even those private interests, because plaintiff has not demonstrated that monetary damages would be an inadequate remedy. Although plaintiff claimed it suffered a 20 percent loss in business revenue after Lemen*****342** circulated her petition among the residents of Balboa Island and orally disparaged the Village Inn, plaintiff did not seek any monetary damages from Lemen. The only relief plaintiff sought was a permanent injunction. Entitlement to such relief, however, requires a showing "that the defendant's wrongful acts threaten to cause *irreparable* injuries, ones that cannot be adequately compensated in damages." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352, 1 Cal.Rptr.3d 32, 71 P.3d 296.) Here, neither plaintiff nor the majority claims that such a showing has been made. The majority is wrong in asserting (maj. opn., *ante,* 57 Cal.Rptr.3d at p. 333, 156 P.3d at p. 351) that an injunction may issue without a showing of irreparable injury-that is, that damages are inadequate. The " 'extraordinary remedy of injunction' cannot be invoked without showing the likelihood of irreparable harm." (*Intel Corp. v. Hamidi, supra,* at p. 1352, 1 Cal.Rptr.3d 32, 71 P.3d 296.)

The majority relieves plaintiff of its obligation to establish that damages are not an adequate remedy, by asserting that a defendant harmed by defamation could be required to bring a series of lawsuits or that damages ***1169** would not deter a defendant who is too poor to pay damages or "so wealthy as to be willing to pay any resulting judgments." (Maj. opn., *ante,* 57 Cal.Rptr.3d at p. 333, 156 P.3d at p. 351.) I disagree.

The majority points to nothing in this record that would support the conclusion that, if damages had been awarded, Lemen would again have defamed plaintiff, requiring plaintiff to bring another lawsuit. In the absence of substantial evidence, or any evidence, relevant to this issue, it cannot be assumed that an award of actual damages would not deter Lemen. To the contrary, compensatory damages awards, when added to the high costs of defending lawsuits and the risk of future punitive damage awards, are powerful deterrents.

Nor is there any basis for concluding that Lemen is either too poor to pay damages or so rich that a damage award would not serve as a deterrent. From her ownership of Balboa Island property we may infer that Lemen is not too poor to pay a damage award, and nothing in the appellate record suggests she is so wealthy that a compensatory damage award would not deter her from making defamatory statements about the Village Inn. In addition, so far as I am aware neither this nor any other court has ever held that a defendant's wealth can justify a prior restraint on the constitutional right to free speech. (See *Willing v. Mazzocone* (1978) 482 Pa. 377, 393 A.2d 1155, 1158 ["In Pennsylvania the insolvency of a defendant does not create a situation where there is no adequate remedy at law"].)

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Thus, the injunction here violates the First Amendment to the United States Constitution's guarantee of free speech for a second reason-because it is unnecessary. Its invalidity is even clearer under the free speech provisions of the California Constitution, provisions that are more stringent than even those of the federal Constitution.

IV

The California Constitution's guarantee of the right to free speech and press is more protective and inclusive than that contained in the First Amendment to the federal Constitution. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 490-493, 101 Cal.Rptr.2d 470, 12 P.3d 720; *Wilson v. Superior Court* (1975) 13 Cal.3d 652, 658, 119 Cal.Rptr. 468, 532 P.2d 116.) Our constitutional guarantee states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of ***343** this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a).)

This court has long recognized that under our state Constitution's free speech guarantee (Cal. Const., art. I, § 2, subd. (a)) a person may be held ***1170** responsible in damages for what the person says, writes, or publishes but cannot be censored by a prior restraint. "The wording of this section is terse and ***359** vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose." (*Dailey v. Superior Court* (1896) 112 Cal. 94, 97, 44 P. 458.)

The majority errs in claiming that this court's interpretation of the state constitutional free speech guarantee in *Dailey v. Superior Court, supra,* 112 Cal. 94, 44 P. 458, is no longer controlling. (Maj. opn., *ante,* 57 Cal.Rptr.3d at pp. 334-335, 156 P.3d at pp. 351-352.) Misplaced is the majority's reliance on this court's decision in *People ex rel. Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600 (*Busch*) and on the plurality opinion in *Aguilar v. Avis Rent A Car System, Inc., supra,* 21 Cal.4th 121, 87 Cal.Rptr.2d 132, 980 P.2d 846 (plur. opn. of George, C.J.). *Busch* concerned an injunction to prohibit the exhibition of particular obscene magazines and films (*Busch, supra,* at pp. 48-49, 130 Cal.Rptr. 328, 550 P.2d 600), not an injunction prohibiting future speech that might or might not be defamatory. Moreover, the majority in *Busch* did not consider, apply, or even cite our state constitutional provision. With respect to the *Aguilar* plurality opinion, it made the same fundamental mistakes the majority repeats here. Because it was only a plurality opinion, it lacks authority as precedent.

The injunction at issue here (both as entered by the trial court and as it will be after the majority's required modifications are made) violates our state Constitution's free speech guarantee as authoritatively construed in *Dailey v. Superior Court, supra,* 112 Cal. 94, 44 P. 458. As I have explained, the injunction is a prior restraint on future speech; it is overbroad in prohibiting nondefamatory future speech; and it is unnecessary in the absence of proof that compensatory damages would not be an adequate remedy. Moreover, the majority does not cure, but only exacerbates, the injunction's unconstitutional features by requiring the trial court to act as a censor of Lemen's future speech. Because our state Constitution prohibits prior restraints and government censorship, the injunction also violates the California Constitution.

I would affirm the judgment of the Court of Appeal.

***1171** Concurring and Dissenting Opinion by WERDEGAR, J.

For reasons that will appear, I concur in the disposition. However, finding the majority's analysis flawed, I otherwise

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dissent.

A little more than seven years ago, a bare majority of this court "sail[ed] into uncharted First Amendment waters" ***344(*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 148, 87 Cal.Rptr.2d 132, 980 P.2d 846 (conc. opn. of Werdegar, J.) (*Aguilar*)) and held that despite the free speech guarantee in the First Amendment to the United States Constitution, an injunction prohibiting a person from uttering certain words or phrases in the future was permissible. In that case, the defendant had been found guilty of employment discrimination in violation of the Fair Employment and Housing Act (FEHA) (Gov.Code, § 12900 et seq.) for directing racially derogatory comments at his Latino employees at their workplace. A plurality of three justices found the injunction in *Aguilar* permissible under the First Amendment because the jury, having found a FEHA violation, necessarily found the defendant's racial comments were unprotected speech. The plurality reasoned: "[T]he injunction at issue is not an invalid prior restraint, because the order was issued only after the jury determined that defendant [ ] had engaged in employment discrimination, and the order simply precluded defendant[ ] from continuing [his] unlawful activity." (*Aguilar,* at p. 138, 87 Cal.Rptr.2d 132, 980 P.2d 846; see also **360*id.* at p. 140, 87 Cal.Rptr.2d 132, 980 P.2d 846 ["once a court has found that a specific pattern of speech is unlawful, an injunctive order ... is not a prohibited 'prior restraint' of speech"]; *id.* at p. 147, 87 Cal.Rptr.2d 132, 980 P.2d 846 [because the speech "had been judicially determined to violate the FEHA," the injunction " does not constitute an invalid prior restraint of speech"].)

Three justices of this court dissented, each writing separate opinions; all concluded that notwithstanding the jury's decision finding a FEHA violation, the trial court's injunction constituted an impermissible prior restraint on speech in violation of the defendant's First Amendment rights. The late Justice Mosk concluded "the injunction fail[ed] to overcome the heavy presumption against the constitutional validity of prior restraints on speech." (*Aguilar, supra,* 21 Cal.4th at p. 173, 87 Cal.Rptr.2d 132, 980 P.2d 846 (dis. opn. of Mosk, J.).) Justice Kennard opined that "the high court's decisions do not support the broad proposition that viewpoint-based remedial injunctions are exempt from strict First Amendment scrutiny simply because they are issued against a person who has once been found to have engaged in speech that produced or contributed to a hostile work environment." (*Id.* at p. 186, 87 Cal.Rptr.2d 132, 980 P.2d 846 (dis. opn. of Kennard, J.).) Justice Brown likewise rejected the plurality's rationale that an adjudication of a FEHA violation justified imposition of the injunction on future speech. (*Id.* at p. 193, 87 Cal.Rptr.2d 132, 980 P.2d 846 (dis. opn. of Brown, J.).)

***1172** I, too, wrote separately in *Aguilar,* but a concurrence, not a dissent. Although I found the injunction to be constitutionally permissible in the particular circumstances, I did not join the plurality's analysis elevating the jury's FEHA verdict into a constitutional license to enjoin the defendant's future speech. Instead, recognizing that the case posed two constitutionally protected interests in tension with each other-the defendant's right to free speech versus the plaintiffs' right to be free of racial discrimination-I concluded that "[g]iven the constellation of factors present in this case, no clear reason appears why [the defendant's] free speech rights should predominate over the state's and the individual plaintiffs' similarly weighty antidiscrimination interests. [¶] Balancing [the defendant's] First Amendment free speech rights with the equally weighty right of [the] plaintiffs to be let alone at their jobsite, free of racial discrimination, I find the several factors coalescing in this case-speech occurring in ***345** the workplace, an unwilling and captive audience, a compelling state interest in eradicating racial discrimination, and ample alternative speech venues for the speaker-support the conclusion that the injunction, if sufficiently narrowed on remand to apply to the workplace only, will pass constitutional muster." (*Aguilar, supra,* 21 Cal.4th at p. 166, 87 Cal.Rptr.2d 132, 980 P.2d 846 (conc. opn. of Werdegar, J.).)

Because I did not join the plurality opinion in *Aguilar,* only three justices of this court agreed with the proposition that a jury determination a person's speech was unlawful (in that case, that the defendant's speech created a hostile work environment in violation of FEHA), *by itself,* permitted a court to enjoin that person from engaging in similar speech in the future. Instead, a majority of this court-myself, along with the three *Aguilar* dissenters-expressly rejected that reasoning. Accordingly, the Court of Appeal below, reading the plurality opinion and my concurring

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opinion together, accurately characterized *Aguilar* as "support[ing] the principle that a content-based injunction restraining speech is constitutionally valid if the speech has been adjudicated to violate a specific statutory scheme expressing a compelling state interest justifying a prior restraint on speech, or when necessary to protect a right equal in stature to the right of free speech secured by the First Amendment to the United States Constitution."

Unlike in *Aguilar,* where we were called on to balance countervailing constitutional concerns with the demands of the First Amendment free speech guarantee, the present case involves a garden-variety defamation under state law. Defendant was shown in a court trial to have made false and defamatory statements to several people, including plaintiff's customers, regarding activities occurring****361** in plaintiff's restaurant. She also made false and injurious comments about the cleanliness and wholesomeness of the food served therein. While our Legislature reasonably has determined such utterances are ***1173** inimical to the social order and justify a civil remedy,[FN1] that state interest is not one of federal constitutional dimension and must surrender to the greater constitutional interest as expressed in the First Amendment. Unlike in *Aguilar,* where the plaintiffs plausibly could argue the Constitution protected their interests as well as the defendants', plaintiff in this case cannot wield the Constitution as its sword.

FN1. Thus, Civil Code sections 44 to 46 set forth the civil torts of defamation and libel under state law.

Nor are any of the other considerations that rendered *Aguilar* an unusual case present here. Thus, although the speech in *Aguilar* occurred at the workplace where "special considerations ... sometimes permit greater restrictions on First Amendment rights" (*Aguilar, supra,* 21 Cal.4th at p. 156, 87 Cal.Rptr.2d 132, 980 P.2d 846 (conc. opn. of Werdegar, J.)), defendant Anne Lemen's speech in this case occurred largely in and around the streets and sidewalks near the restaurant, places that are presumptively open to free speech. (*International Soc. for Krishna Consciousness, Inc. v. Lee* (1992) 505 U.S. 672, 679, 112 S.Ct. 2701, 120 L.Ed.2d 541.) Nor do plaintiff or its customers comprise a captive audience, a circumstance that might justify "greater restrictions on a speaker's freedom of expression." (*Aguilar,* at p. 159, 87 Cal.Rptr.2d 132, 980 P.2d 846 (conc. opn. of Werdegar, J.); *Frisby v. Schultz* (1988) 487 U.S. 474, 487, 108 S.Ct. 2495, 101 L.Ed.2d 420 ["The First Amendment permits the government to prohibit *****346** offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech"].) Plaintiff does not allege defendant uttered her defamatory statements while inside the restaurant, where diners could plausibly claim to be a captive audience. Finally, the injunction prohibiting Lemen from repeating her defamatory statements is not, as in *Aguilar,* akin to a time, place and manner restriction (*Aguilar,* at p. 162, 87 Cal.Rptr.2d 132, 980 P.2d 846 (conc. opn. of Werdegar, J.); *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593), but is more like a gag order, judicially enforced.

An injunction such as the one imposed in this case, of course, constitutes a prior restraint on speech. (*Alexander v. United States* (1993) 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 ["permanent injunctions ... are classic examples of prior restraints"].) In the absence of a compelling constitutional interest supporting plaintiff's interests as well as the unusual aggregation of other factors present in *Aguilar, supra,* 21 Cal.4th 121, 87 Cal.Rptr.2d 132, 980 P.2d 846, the traditional First Amendment protection against prior restraints on speech should apply in full. "Any system of prior restraint ... 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc. v. Sullivan,* 372 U.S. [58], at 70[, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)]; *New York Times Co. v. United States,* 403 U.S. [713], at 714[, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)]; [citations]. The presumption against prior restraints is heavier-and the degree of protection broader-than that against limits on expression ***1174** imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." (*Southeastern Promotions, Ltd. v. Conrad* (1975) 420 U.S. 546, 558-559, 95 S.Ct. 1239, 43 L.Ed.2d 448.)

It has long been the rule that "[a] court cannot enjoin the publication of a libel." (*People v. Superior Court (1973*

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Grand Jury) (1975) 13 Cal.3d 430, 446, 119 Cal.Rptr. 193, 531 P.2d 761.) As the high court explained more than a century ago: "If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a ****362** court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law." (*Francis v. Flinn* (1886) 118 U.S. 385, 389, 6 S.Ct. 1148, 30 L.Ed. 165; see also *Metropolitan Opera Ass'n, Inc. v. Local 100* (2d Cir.2001) 239 F.3d 172, 177 ["courts have long held that equity will not enjoin a libel"].) As the Court of Appeal below explained: "This rule rests 'in large part on the principle that injunctions are limited to rights that are without an adequate remedy at law, and because ordinarily libels may be remedied by damages, equity will not enjoin a libel absent extraordinary circumstances.' " This rule is set forth in this state's statutory law; Code of Civil Procedure section 526, subdivision (a)(4) provides: "An injunction may be granted in the following cases: [¶] ... [¶] (4) When pecuniary compensation would not afford adequate relief."

The majority provides an interesting historical explanation for the long-standing rule that equity will not enjoin defamation. (Maj. opn., *ante,* 57 Cal.Rptr.3d at pp. 331-332, 156 P.3d at pp. 349-350.) But though law and equity courts presided over separate*****347** domains hundreds of years ago in England, and our state's superior courts have more comprehensive jurisdiction today, I do not read the majority opinion as advocating, based on this historical analysis, the wholesale abandonment of the rule against enjoining defamation. More importantly, irrespective of whether modern courts have *jurisdiction* to enjoin a person's future statements, in exercising that jurisdiction they must factor in the person's First Amendment right to free speech, a concern not applicable in the 18th and 19th century English Court of Common Pleas or in our state courts before 1925. (See *Gitlow v. New York* (1925) 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 [applying the First Amendment to the states]; *Aguilar, supra,* 21 Cal.4th at p. 150, 87 Cal.Rptr.2d 132, 980 P.2d 846 (conc. opn. of Werdegar, J.).)

The majority concedes the issue we decide today is of first impression, noting that "[t]he United States Supreme Court has never addressed the ***1175** precise question before us-whether an injunction prohibiting the repetition of statements found at trial to be defamatory violates the First Amendment." (Maj. opn., *ante,* 57 Cal.Rptr.3d at pp. 327-328, 156 P.3d at p. 346.) [FN2] In this legal vacuum, the majority resorts to reasoning by analogy, citing situations in which the United States Supreme Court in resolving "related questions" has approved injunctions on a person's future speech. (Maj. opn., *ante,* 57 Cal.Rptr.3d at pp. 327-328, 156 P.3d at p. 346.) As I explain, the analogies are flawed and the legal authority cited by the majority does not authorize a court to impose an injunction against future defamation.

> FN2. The high court recently granted certiorari in a case to decide "[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment." (*Tory v. Cochran* (2005) 544 U.S. 734, 736, 125 S.Ct. 2108, 161 L.Ed.2d 1042.) The court vacated and remanded the case without resolving the First Amendment issue because the plaintiff passed away during the pendency of the appeal. (*Id.* at pp. 738-739, 125 S.Ct. 2108.)

The majority first analogizes to cases involving speech found to be obscene. (Maj. opn., *ante,* 57 Cal.Rptr.3d at pp. 327-328, 156 P.3d at p. 346.) Those familiar with this area of the law know the high court has traveled a twisting, rocky road during the last 50 years in its attempt to enunciate both a coherent explanation for, and the proper limits on, government suppression of obscene and sexually explicit speech. (See, e.g., *Roth v. United States* (1957) 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 [obscenity unprotected by First Amendment if "utterly without redeeming social importance"]; *Jacobellis v. State of Ohio* (1964) 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (conc. opn. of Stewart, J.) [conceding he "perhaps ... could never succeed in intelligibly" defining obscenity, but opining that "I know it when I see it"]; *Miller v. California* (1973) 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 [partially overruling *Roth* and establishing the modern test for obscenity]; *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 [invalidating portions of the Communications Decency Act of ****363** 1996, which attempted to regulate obscenity on the Internet].)

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The majority accurately observes the United States Supreme Court has permitted the issuance of injunctions prohibiting defendants from selling books, magazines and films adjudged obscene. (*Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446; *Kingsley Books, Inc. v. Brown* (1957) 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469.) The majority reads these precedents for all they could mean, reasoning that, as with obscenity,***348** once a trier of fact has decided that some particular speech falls within a category unprotected by the First Amendment (here, defendant's defamatory comments), an injunction is permissible to prohibit future utterances. But *Paris Adult Theatre I* and *Kingsley Books* have never been read to authorize such broad limits on speech outside the category of obscene speech. For example, in *Snepp v. United States* (1980) 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704, the high court considered an author's breach of an agreement ***1176** with the Central Intelligence Agency to submit his book to the agency for prepublication clearance. In approving equitable relief as a remedy for the breach (in that case a constructive trust on book sale profits rather than an injunction), the high court did not cite any obscenity case in support. The majority today cites no United States Supreme Court case in which *Paris Adult Theatre I* or *Kingsley Books* is cited as authority justifying an injunction on future speech outside the area of obscenity.

Moreover, the high court's approval of injunctive relief for obscenity must be viewed in the larger context, in which it has permitted other forms of government regulation of obscene and sexually explicit speech that would likely be found unconstitutional if applied to other forms of speech. For example, the high court has held it permissible for a state to require all films, subject to certain limitations, be submitted to a censor board before exhibition. (*Freedman v. Maryland* (1965) 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649; see also *Alexander v. United States, supra,* 509 U.S. 544, 113 S.Ct. 2766, 125 L.Ed.2d 441 [authorizing seizure and destruction of business assets, including nonobscene material, following conviction for selling obscene material]; *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 [upholding government zoning to regulate secondary effects of sexually explicit, though not necessarily obscene, speech]; *Heller v. New York* (1973) 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 [authorizing seizure of a copy of a film even before judicial determination the film is obscene].) We need not here decide whether the court's approval of these remedial measures aimed at curbing obscene speech is a function of the unique history of the regulation of obscene speech or the somewhat unique commercial and financial incentives [FN3] connected to such speech. It is enough to conclude that cases addressing the problem of obscene speech are not broadly applicable to all other forms of unprotected speech and thus provide no direct analogy to the question of the permissible remedies for defamation. Accordingly, the mere fact a court may enjoin the sale of a book or film found obscene does not, without more, provide persuasive authority for concluding a court may also enjoin a person from speaking, in the future, words or phrases found in the past to have been defamatory.

> FN3. See, e.g., *New York v. Ferber* (1982) 458 U.S. 747, 756, 761, 102 S.Ct. 3348, 73 L.Ed.2d 1113 ("States are entitled to greater leeway in the regulation of pornographic depictions of children" in part because the "advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation" (italics added)). (Cf. *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 574, 264 Cal.Rptr. 883 ["One of the important differences between trade libel on the one hand and defamation on the other, is said to be that 'because of the *economic interest involved,* the disparagement of quality may in a proper case be enjoined, whereas personal defamation can not [*sic*].' " (Italics added.)].)

***1177** The majority also cites *Pittsburgh Press Co. v. Human Rel. Comm'n* (1973) 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 in support. (Maj. opn., *ante,* 57 Cal.Rptr.3d at p. 328, 156 P.3d at pp. 346-347.) But that case posed a plaintiff asserting a ***349** counterbalancing constitutional claim (sex discrimination) against a defendant claiming the right to free speech. ****364** As the Court of Appeal below recognized, my concurring opinion in *Aguilar* is "consistent with *Pittsburgh Press,* which concluded the challenged advertising lost any First Amendment protection because it violated a municipal ordinance prohibiting sex-based discrimination." Because plaintiff here asserts no such constitutional claim in support, *Pittsburgh Press* is not at all analogous to the present case and provides no persua-

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sive support for the requested injunction here.

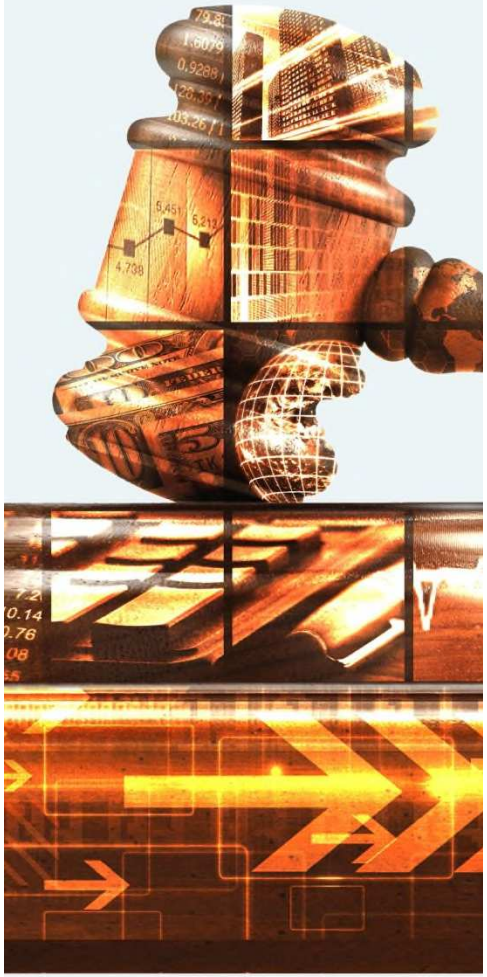
In the absence of any of the unusual factors present in *Aguilar, supra,* 21 Cal.4th 121, 87 Cal.Rptr.2d 132, 980 P.2d 846, or any compelling United States Supreme Court authority, it is inescapable that the injunction here is an impermissible prior restraint on defendant's speech. Although prior restraints on speech are not categorically prohibited in all cases (see, e.g., *DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 890, 4 Cal.Rptr.3d 69, 75 P.3d 1 (conc. opn. of Werdegar, J.) [First Amendment "does not necessarily preclude injunctive relief in trade secret cases"]), the party moving for such relief bears a heavy burden. (See *New York Times Co. v. United States, supra,* 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 [the Pentagon Papers case].) Plaintiff does not carry this burden here.

Although plaintiff, a business operating a restaurant, claims it lost money as a result of defendant's defamatory comments, it has not shown why it cannot be made whole by damages. (Code Civ. Proc., § 526, subd. (a)(4).) If plaintiff lost money, customers or goodwill due to defendant's defamatory comments, she can be made to pay damages. If, after paying damages, defendant continues to utter defamatory statements and it is proved she did so intentionally and maliciously, the law provides for punitive damages. Defendant has not been shown to be either so rich or so poor that the threat of monetary damages would be an insufficient incentive for her to stop repeating her illegal conduct. Under these circumstances, I am unpersuaded plaintiff has carried its heavy burden of demonstrating the courts may constitutionally enjoin defendant's future speech.

The Court of Appeal below found the injunction on defendant's future speech was an unconstitutional prior restraint, largely applying my concurring opinion in *Aguilar, supra,* 21 Cal.4th 121, 147, 87 Cal.Rptr.2d 132, 980 P.2d 846. The majority today finds the injunction permissible in theory but overbroad as written, and therefore affirms the Court of Appeal's judgment reversing the injunction in part.[FN4] ***1178** Because, like the Court of Appeal, I find the injunction to be an impermissible prior restraint, I concur in the majority's disposition. But because, for the reasons stated, I disagree with the majority's reasoning, I dissent.

> FN4. The portion of the injunction restraining defendant from videotaping plaintiff's business is not addressed by the majority. I therefore also express no opinion on it.

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Roger LeRoy Miller

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Constitutional Law

Chapter 2

Chapter Outline

- 2-1 The Constitutional Powers of Government
- 2-2 Business and the Bill of Rights
- 2-3 Due Process and Equal Protection
- 2-4 Privacy Rights

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Learning Objectives (slide 1 of 2)

1. What is the basic structure of the U.S. government?
2. What constitutional clause gives the federal government the power to regulate commercial activities among the various states?
3. What constitutional clause allows laws enacted by the federal government to take priority over conflicting state laws?

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Learning Objectives (slide 2 of 2)

4. What is the Bill of Rights? What freedoms does the First Amendment guarantee?
5. Where in the Constitution can the due process clause be found?

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2-1 The Constitutional Powers of Government

- 2-1a A Federal Form of Government
  - The federal constitution was a political compromise between advocates of state sovereignty and central government.

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2-1b The Separation of Powers

1. Legislative branch can enact a law but executive branch can veto
2. Executive branch is responsible for foreign affairs but treaties require consent from Senate
3. Congress determines jurisdiction of federal courts; president appoints federal judges (with advice/consent of Senate) but judicial branch has power to hold actions of other two branches unconstitutional

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2-1c The Commerce Clause

- U.S. Constitution gives Congress the power to: *"regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."* (Art. 1 § 8)
- Greatest impact on business than any other Constitutional provision

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Landmark in the Law

- *Gibbons v. Ogden* (1824)
- To Chief Justice Marshall, commerce meant all business dealings that *substantially affected* more than one state.
- The national government had the exclusive power to regulate interstate commerce.

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2-1c The Commerce Clause

- The Commerce Clause and the Expansion of National Powers
  - **Case Example 2.1** *Wickard v. Filburn* (1942)
  - Purely local production, sale and consumption of wheat was subject to federal regulation.

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Classic Case 2.1

- *Heart of Atlanta Motel v. United States* (1964)
- Owner of the HoA motel unconstitutionally refused to rent to blacks. The Civil Rights Act of 1964 did not violate the interstate commerce clause.

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2-1c The Commerce Clause (slide 1 of 3)

– The Commerce Clause Today

- Theoretically, the commerce clause applies to virtually all commercial transactions.
- **Case Example 2.2** *Gonzales v. Raich* (2005)

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2-1c The Commerce Clause (slide 2 of 3)

- The Regulatory Powers of the States
  - Tenth Amendment reserves all powers to the states that have not been expressly delegated to the national government.
  - States have inherent police powers including right to regulate health, safety, morals and general welfare, licensing, building codes, parking regulations, and zoning restrictions.
    - Police powers: powers possessed by the states as part of their inherent sovereignty. These powers may be exercised to protect or promote the public order, health, safety, morals, and general welfare.

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2-1c The Commerce Clause (slide 3 of 3)

– The "Dormant" Commerce Clause

- National government has *exclusive* power to regulate interstate commerce.
- States only have a "dormant" (negative) power to regulate interstate commerce.
- Courts balance state's interest vs. national interest.
- **Case Example 2.3** *Tri-M Group, LLC v. Sharp* (2011)

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2-1d The Supremacy Clause

- Article VI of the Constitution provides that Constitution, laws and treaties of the United States are the "supreme law of the land."
- Preemption: A doctrine under which certain federal laws preempt, or take precedence over, conflicting state or local laws.
- Congressional Intent
  - **Case Example 2.4** *Riegel v. Medtronic, Inc.* (2008)

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2-2 Business and the Bill of Rights

- Bill of Rights: The first ten amendments to the U.S. Constitution
  1. First Amendment – freedom of religion
  2. Second Amendment – right to keep and bear arms
  3. Third Amendment – prohibits lodging of soldiers in any house without owner's consent during peactime
  4. Fourth Amendment – unreasonable search and seizure
  5. Fifth Amendment – rights to indictment by grand jury
  6. Sixth Amendment – right to speedy and public trial
  7. Seventh Amendment – right to trial by jury in civil cases
  8. Eighth Amendment – prohibits excessive bail/fines and cruel/unusual punishment
  9. Ninth Amendment – establishes people have rights in addition to those specified in Constitution
  10. Tenth Amendment – establishes powers reserved for states

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2-2a Limits on Federal and State Governmental Actions

- Originally, Bill of Rights only applied to the federal government.
- Later, the Bill of Rights was "incorporated" and applied to the States as well.
- Some protections also apply to businesses.

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2-2b The First Amendment—Freedom of Speech (slide 1 of 3)

- Right to Free Speech is the basis for our democratic government.
- Free speech also includes symbolic speech, including gestures, movements, articles of clothing.
- Reasonable Restrictions
  - Content-Neutral Laws
    - **Case Example 2.6** *Commonwealth v. Ora* (2008)
  - Laws That Restrict the Content of Speech
    - **Case Example 2.7** *Morse v. Frederick* (2007)

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2-2b The First Amendment—Freedom of Speech (slide 2 of 3)

– Corporate Political Speech

- Political speech by corporations is protected by the First Amendment.
- **Case Example 2.8** *Citizens United v. Federal Election Commission* (2010)

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2-2b The First Amendment—Freedom of Speech (slide 3 of 3)

- Commercial Speech
  - **Case Example 2.9** *Café Erotica v. Florida Department of Transportation* (2002)
  - Courts give substantial protection to commercial speech (advertising).
    - Restrictions must: Implement substantial government interest; directly advance that interest; and go no further than necessary.

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Spotlight on Beer Labels: Case 2.2

- *Bad Frog Brewery, Inc. v. New York State Liquor Authority* (1998)
- Did the State unconstitutionally restrict commercial speech when it prohibited a certain gesture (illustration) on beer labels?

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2-2b The First Amendment—Freedom of Speech

- Unprotected Speech
  - Obscenity
    - It is a crime to disseminate and possess obscene materials, including child pornography.
    - Defining obscene speech has proved difficult.
    - It is difficult to prohibit the dissemination of obscenity and pornography online.
  - Virtual Child Pornography
    - It is a crime to intentionally distribute virtual child pornography—which uses computer-generated images, not actual people—without indicating that it is computer-generated.

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2-2c The First Amendment—Freedom of Religion (slide 1 of 2)

- The Establishment Clause: The provision in the First Amendment that prohibits the government from establishing any state-sponsored religion or enacting any law that promotes religion or favors one religion over another.
  - Applicable Standard
  - Religious Displays
    - **Case Example 2.10** *Trunk v. City of San Diego* (2011)

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2-2c The First Amendment—Freedom of Religion (slide 2 of 2)

- The Free Exercise Clause: The provision in the First Amendment that prohibits the government from interfering with people's religious practices or forms of worship.
  - Restrictions Must Be Necessary
    - **Case Example 2.11** *Mitchell County v. Zimmerman* (2012)
  - Public Welfare Exception
    - When religious practices work against public policy and the public welfare, the government can act.

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Case 2.3

- *Holt v. Hobbs* (2015)
- United States Supreme Court decision on the free exercise clause and how restrictions must be necessary

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2-3 Due Process and Equal Protection

- 2-3a Due Process
  - Procedural Due Process
    - Any government decision to take life, liberty, or property must be fair.
    - Requires: Notice and Fair Hearing
  - Substantive Due Process
    - Focuses on the content or the legislation (the right itself)

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2-3b Equal Protection

- Government must treat similarly situated individuals (or businesses) in the same manner. Courts apply different tests:
- Strict Scrutiny – fundamental rights
- Intermediate Scrutiny
  - Applied in cases involving discrimination based on gender or legitimacy
- The "Rational Basis" Test - economic rights
  - **Case Example 2.18** *Maxwell's Pic-Pac, Inc. v. Dehner* (2014)

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2-4 Privacy Rights

- Constitutional Protection of Privacy Rights
  - *Olmstead v. United States* (1928)
  - *Griswold v. Connecticut* (1965) found a right to personal privacy implied in constitution, expanded in *Roe v. Wade* (1973).

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2-4a Federal Privacy Legislation

- Freedom of Information Act (1966)
- Privacy Act (1974)
- Health Insurance Portability and Accountability Act (HIPAA) (1996)

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2-4b The USA Patriot Act

– Passed by Congress in the wake of the terrorist attacks of September 11, 2001, and then reauthorized twice (2006) and (2011)

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