



**The First Amendment,  
Defamation, and Privacy in  
Social Media**

Friday, April 7, 2017

8:45 am–3:15 pm

Widener University   
Delaware Law School

***Widener Law Review*, Widener University Delaware Law School, presents**

**THE FIRST AMENDMENT, DEFAMATION, AND PRIVACY  
IN THE SOCIAL MEDIA AGE**

**Friday, April 7, 2017**

**8:45 am – 3:15 pm**

**Delaware Law School  
Ruby R. Vale Moot Courtroom  
Main Law Building  
Wilmington, Delaware**

FIVE (5) CLE credits in DE & PA (including one ethics credit).  
NJ attorneys can self-report with Delaware Law's Certificate of Attendance.

**Symposium Agenda**

**8:15 a.m. Registration Check-In**

**8:45 a.m. – 9:00 a.m. Welcome & Introduction**

**Rodney A. Smolla**, Dean and Professor of Law, Widener University  
Delaware Law School

**Andrew P. Stafford**, Editor-in-Chief, *Widener Law Review*; J.D.  
Candidate, May 2017

**9:00 a.m. – 10:30 a.m.**

**First Panel: Defamation, Privacy, and the Current State of Discourse**

Are defamation and invasion of privacy modern “growth industries?” The internet and social media have made our public discourse more robust than ever. Everyone with a connection has a voice. No longer are mainstream media outlets the gatekeepers or the setters of discussion agendas. This is an epoch of democratization, few barriers to entry, virtually universal access, and (for those who choose it), anonymity. Yet this explosion of communication and discourse arguably has a dark side. The quality of public discourse may not increase with the quantity of public discourse. There may be less thoughtfulness, less reflection, less attention to factual accuracy. There may be a channeling tendency, through which like-minded people communicate with like-minded people, with less exposure or authentic dialogue across lines of affinity. Personal attacks, of the sort that tort law had traditionally addressed through actions for defamation or invasion of privacy, may also be on the rise. The first panel will explore these issues, in a wide-open, robust, yet civilized conversation.

**10:30 a.m. – 10:45 a.m. Break**

**10:45 a.m. – 12:15 p.m.**

**Second Panel: The Legal Doctrines that Matter and Whether They Should be Changed**

Defamation is an ancient tort. Invasion of privacy is of newer origins, but has also been part of our legal fabric for nearly a century. There are multiple privacy torts, not all recognized in all jurisdictions: false light, publication of private facts, intrusion, and appropriation / right of publicity. The First Amendment has been interpreted to alter the elements and defenses applicable to many of these causes of action. The stress points in defamation and privacy litigation are familiar. They include such doctrines as defamatory meaning, the distinction between fact and opinion, burdens of proving falsity, the distinction between public and private figures, fault standards, newsworthiness defenses, statutes of limitations, the single publication rule, liability for republication, the fair reports privilege, neutral reportage, and the immunities provided by § 230 of the Communications Decency Act, anti-SLAPP laws, and unmasking rules, as exemplars. What stresses do the internet and social media place on the complex matrix of substantive and procedural doctrines germane to defamation and privacy? In light of those stresses, what doctrines, if any, ought to be adjusted? Should they be adjusted to make recovery easier, or more difficult? This panel, the most “hard law” segment of the symposium, will explore these issues.

**12:15 p.m. – 12:50 p.m. Lunch – Barristers’ Club**

**1:00 p.m. – 2:00 p.m. Distinguished Speaker**

**Speech and Liability in the Global Arena—A Cautionary Tale**

Professor Xiaoxing Xi, Laura H. Carnell Professor of Physics at Temple University, will discuss his experience as a person accused of espionage by the Department of Justice.

**2:00 p.m. – 2:15 p.m. Break**

**2:15 p.m. – 3:15 p.m.**

**Concluding Forum: All the News that is Fit and All the News that Fits**

What insights, observations, or new perspectives and discoveries were revealed in the morning and luncheon sessions? This forum will reflect on the subjects discussed earlier in the day, and invite additional comments on issues that exert enormous influence on the quality of discourse and redress for injury. Among other matters, this panel will explore the role of major social media and search engine providers, such as Facebook, Twitter, or Google; the role of private arrangements to curtail expression, such as settlements that limit discourse or future suits; and any and all other observations on the subject of the symposium, from all the news that’s fit to print to all the news that fits.

**Moderator:**

- **Rodney A. Smolla**, Dean and Professor of Law, Widener University Delaware Law School

**Panel Speakers:**

- **Clay Calvert**, Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project, University of Florida College of Journalism and Communications
- **Erin Daly**, Professor of Law, Widener University Delaware Law School
- **Alan E. Garfield**, Professor of Law, Widener University Delaware Law School
- **Henry R. Kaufman**, Principal, Henry R. Kaufman P.C., New York, New York
- **Ashley Messenger**, In-house Counsel, NPR; Adjunct Professor, American University School of Communication
- **John J. Walsh**, Senior Counsel, Carter Ledyard & Milburn LLP, New York, New York
- **Stephen Wermiel**, Professor of Practice in Constitutional Law, American University Washington College of Law
- **Xiaoxing Xi**, Laura H. Carnell Professor of Physics, Temple University

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# **BIOGRAPHIES**

## **Clay Calvert**



Clay Calvert is Professor and Brechner Eminent Scholar in Mass Communication at the University of Florida in Gainesville, where he also directs the Marion B. Brechner First Amendment Project. He teaches both undergraduate and graduate-level courses on communications and media law issues, and he coordinates the joint JD/MA program for the College of Journalism and Communications. Professor Calvert has authored or co-authored more than 130 published law journal articles on freedom of expression-related topics. He is co-author, along with Don R. Pember, of the market-leading undergraduate media law textbook, *Mass Media Law, 19th Edition* (McGraw-Hill), and is author of *Voyeur Nation: Media, Privacy, and Peering in Modern Culture* (Westview Press). Professor Calvert received his J.D. Order of the Coif from the University of the Pacific's McGeorge School of Law and later earned a Ph.D. in Communication from Stanford University, where he also completed his undergraduate work in Communication, earning a B.A. with Distinction. He is a member of the

State Bar of California and the Bar of the Supreme Court of the United States.

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## **Erin Daly**



Erin Daly is Professor of Law at Delaware Law School. She served as Interim Dean and Vice Dean of the Law School in 2013-2015 and is the Co-Director of the Law School's Dignity Rights Project. Professor Daly has written extensively on comparative constitutional law and transitional justice issues throughout the world. In *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (U. Penn 2012), with a foreword by former President of the Israeli Supreme Court, Aharon Barak, she examines the constitutional law of dignity around the world, including in areas relating to privacy, defamation, freedom of information and expression, and other issues relating to first amendment rights. With Professor Jim May, she also published extensively on environmental constitutionalism (including co-

authored and co-edited volumes from Cambridge University Press and Edward Elgar). Her first book, *Reconciliation in Divided Societies: Finding Common Ground*, (U. Penn 2006, 2010), co-authored with South African scholar Jeremy Sarkin and with a foreword by Archbishop Desmond Tutu, examines post-conflict reconciliation and the extent to which nations can achieve justice, truth, and forgiveness after violent political upheaval. She has also written about defamation law and, in the *Delaware Law Review*, about employee speech protections.

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## **Alan E. Garfield**



Alan E. Garfield is a professor of law at Delaware Law School. He received his Bachelor of Arts, *magna cum laude*, from Brandeis University, and his Juris Doctorate from UCLA School of Law, where he was a member of the UCLA Law Review and the Order of the Coif (top 10%). Prior to joining the Delaware faculty, Professor Garfield worked for three years in the litigation department of Weil, Gotshal & Manges in New York City. He is licensed to practice in California and New York.

Professor Garfield has been honored for his scholarship and teaching. He received the Douglas E. Ray Excellence in Faculty Scholarship Award in both 2006 and 2015, and the Outstanding Faculty Award from the graduating class of 2004. He served as the H. Albert Young Fellow in Constitutional Law from 2005 to 2007 and was a

Distinguished Professor from 2011 to 2014. Professor Garfield has also been a visiting professor at American University's Washington College of Law and Bryn Mawr College, and an adjunct professor at Drexel University School of Law.

Professor Garfield writes and teaches in the areas of Constitutional Law, Copyright, and Contracts. His scholarship has appeared in numerous journals including the *Columbia Law Review Sidebar*, the *Cornell Law Review*, and the *Washington University Law Review*. He has also published op-eds in the *Philadelphia Inquirer* and *The News Journal*, including, since October 2009, a monthly column in *The News Journal* on the Supreme Court. The column, *Bench Press*, received the Delaware Press Association's first place award for a personal opinion column in 2012, 2013, 2014, and 2015, and the first-place award for a personal opinion column in a national competition sponsored by The National Federation of Press Women in 2012.

Professor Garfield is a past chair of the Association of American Law Schools Section on Mass Communication Law. He has also served on the Board of Directors of the Delaware ACLU since 2006 and is currently the Board's President.

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## **Henry R. Kaufman**



Henry Kaufman, the principal of Henry R. Kaufman, P.C., has been a nationally-recognized leader of the publishing and media law bar for more than three decades. Mr. Kaufman began his publishing law career as General Counsel of the Association of American Publishers where he represented the book publishing industry on both First Amendment and copyright law issues, including the latter stages of passage and initial implementation of the Copyright Reform Act of 1976.

While at AAP Mr. Kaufman helped to found, and thereafter served for fifteen years as General Counsel of, the Libel Defense Resource Center/LDRC (now known as the Media Law Resource Center/MLRC), a

national coalition of media companies, media and journalism organizations and law firms focused on advancing the legal rights and interests of the media in the United States, in particular as regards their First Amendment rights.

After leaving the LDRC, Mr. Kaufman joined SESAC, Inc., the music performing rights licensing company, where he served as Senior Vice President-General Counsel from 1996 to 1999. At SESAC he dealt with individual and industry-wide licensing transactions, copyright infringement litigation and copyright arbitrations, and legislative matters in connection with the Digital Millennium Copyright Act of 1999, the Copyright Term Extension Act and the Fairness in Music Licensing Act.

Mr. Kaufman's current practice focuses on litigation and transactional matters for book, newspaper and online publishers, authors, artists, film and music industry clients, higher education and other individual, corporate and law firm clients covering a range of both First Amendment and Intellectual Property law matters, including defamation, privacy, publicity, commercial speech, access, reporter's privilege, prior restraint, obscenity and indecency, and copyright, trademark, tradename, unfair competition, trade secrets, misappropriation and "hot news." He also maintains an active pre-publication and pre-broadcast review practice.

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## **Ashley Messenger**



Ashley Messenger is Senior Associate General Counsel at NPR and an adjunct professor at American University. At NPR, she oversees all legal issues related to content, including anything related to news, music, programming, podcasts, permissions, licensing, and social media. She previously served as editorial counsel to *U.S. News & World Report* and was the McCormick-Tribune Fellow at the Reporters Committee for Freedom of the Press. Early in her career, she was a commercial radio talk show host (KTEG-FM, Albuquerque) and worked at an alternative newsweekly.

She teaches graduate and undergraduate communications law classes at American University, and also taught First Amendment law at the University of Michigan Law School. She is the author of a textbook, *A Practical Guide to Media Law*, as well as numerous law review articles.

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## **Rodney A. Smolla**



Rod Smolla is Dean and Professor of Law at the Delaware Law School of Widener University, in Wilmington, Delaware. He was previously the 11<sup>th</sup> President of Furman University, in Greenville, South Carolina, the Dean of the Law School at Washington and Lee University Law School, the Dean of the University of Richmond Law School, the Director of the Institute of Bill of Rights Law at the College of William and Mary, and Senior Fellow and Project Director of the Washington Annenberg Program of Northwestern University. He has also been a faculty member at the DePaul, University of Illinois, and University of Arkansas law schools, and a visiting professor at the Duke, University of Georgia, University of Indiana, Denver University, and University of Melbourne law schools. As an educator, he has been an advocate for experiential learning, including greater emphasis on helping law students develop skills relating to counseling, problem-solving, negotiation, drafting,

advocacy, civic engagement, pro bono service, legal ethics, and professionalism. He has emphasized diversity and community outreach and important institutional missions in higher education and legal education.

Smolla is a nationally-known scholar on matters relating to constitutional law, civil rights, freedom of speech, and mass media, particularly matters relating to libel and privacy. He is the author of five multi-volume legal treatises, all published by Thomson Reuters, which are updated twice annually: *Law of Defamation*; *Smolla and Nimmer on Freedom of Speech*; *Rights and Liabilities in Media Content, Internet, Broadcast, and Print*; *Federal Civil Rights Acts*; and, *Law of Lawyer Advertising*. He is also author of *The First Amendment: Freedom of Expression, Regulation of Mass Media, Freedom of Religion* (Carolina Academic Press 1999) (a law school casebook); and co-author of *Constitutional Law: Structure and Rights in Our Federal System* (6th Edition, 2010, with Dean William Banks). He is the editor each year of the *First Amendment Law Handbook*, published annually by Thomson Reuters. He was also editor of *The Copyright Law Anthology* published by Thomson Reuters. He is also the author of many trade and university press books, including *Suing the Press: Libel, the Media, and Power* (Oxford University Press 1986) (won ABA Silver Gavel Award Certificate of Merit); *Jerry Falwell v. Larry Flynt: The First Amendment on Trial* (St. Martin's Press 1988); *Free Speech in an Open Society* (Alfred A. Knopf 1992) (winner of the William O. Douglas Award); *Deliberate Intent: A Lawyer Tells the True Story of Murder by the Book* (Crown Publishers 1999) (made into a television movie by FX, with Timothy Hutton playing the role of Rod Smolla); *The Constitution Goes to College* (New York University Press 2010). He was editor of *A Year in the Life of the Supreme Court* (Duke University Press 1995) (won ABA Civil Gavel Award). Smolla has published over 100 articles in law reviews and other publications.

Smolla has served as Chairman of the Association of American Law Schools Section on Defamation and Privacy Law, as Chairman of the Association of American Law Schools Section on Mass Communications Law, as a member of the American Bar Association Advisory Committee to the Forum on Mass Communications Law, and as a member of the First Amendment Advisory Board to the Media Institute, as the Director of the Annenberg Washington Program Libel Reform Project, and author of the Annenberg Libel Reform Report that emerged from the blue ribbon task force on that project. He served as a Director of the Media General Corporation, and as a Director of the American Arbitration Association. In 2011, he was appointed by Governor Nikki Haley to serve as a Commissioner on the South Carolina Commission of Higher Education, which included within its mission the oversight of all of South Carolina's public universities and colleges, and licensure and programmatic approval for all public and private educational programs within the state.

Smolla has been and remains an active litigator. He has participated as counsel or co-counsel in litigation matters in state and federal courts throughout the nation, and is a frequent advocate, having presented oral argument in numerous state and federal courts, including the Supreme Court of the United States.

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## **John J. Walsh**



John J. Walsh is a Senior Counsel at the New York City firm of Carter Ledyard and Milburn LLP. He has been practicing media law for over 35 years, almost always as a litigator for libel plaintiffs in trial and appellate courts, and as counselor to and advocate for individuals and businesses subjected to false and defamatory publications in newspapers, magazines, television broadcasts, books, and digital media of all types. He is one of the best known media law attorneys in the country as a result of the well-known cases in which he has appeared for prominent individuals and entities. Much of his practice involves representation of clients in pre and post-publication negotiations with major media companies to argue for fair and accurate reporting or to obtain corrections, clarifications, and retractions when false information has been published.

Mr. Walsh received his B.B.A. magna cum laude from Fairfield University, his J.D. from Boston College Law School, and is a member of the Order of the Coif. He has been a frequent guest on television talk shows, and as a speaker and panelist on media law conferences such as the Forum on Communications Law of the American Bar Association. He is a member of the Bars of New York, Connecticut, several federal District and Circuit Courts, and of the Supreme Court of the United States.

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## **Stephen Wermiel**



Steve Wermiel is a professor of practice at American University Washington College of Law where he teaches constitutional law, First Amendment law, and a seminar on the Supreme Court. Before becoming a professor, he was a newspaper reporter for 20 years, including 12 years as Supreme Court correspondent for the Wall Street Journal. He also worked for the Boston Globe for 8 years. He graduated from Tufts in 1972 with a BA in political science, and from Washington College of Law in 1982 with a JD.

He is the co-author of two books, *Justice Brennan: Liberal Champion*, published in 2010, and *The Progeny: Justice William J. Brennan's Fight to*

*Preserve the Legacy of New York Times v. Sullivan*, published in 2014. He has authored many law review articles and writes a regular online column for SCOTUSblog explaining the Supreme Court for law students. He is an active member of the American Bar Association where he has worked for sixteen years in the Section of Civil Rights and Social Justice, of which he is a past chair. He is president-elect of the Tufts University Alumni Association.

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## **Xiaoxing Xi**



Xiaoxing Xi is Laura H. Carnell Professor of Physics at Temple University, and was the interim chair of the Physics Department from 2014 - 2016. Prior to joining Temple in 2009, he was a Professor of Physics and Materials Science and Engineering at the Pennsylvania State University. He is a renowned expert on thin film materials and is an author of over 300 journal articles and 3 U.S. patents in the area of thin films of high-temperature superconductors and magnesium diboride. He is a Fellow of the American Physical Society.

Born in Beijing, China, Professor Xi received his Bachelor of Science and PhD in Physics from Peking University. He moved to the United States in 1989, and is a naturalized American citizen. In 2015, the U.S. government charged and arrested Professor Xi for sharing U.S. company technology with China. The charges were later dropped when they were proven wrong. Since then, he has spoken out to encourage the active participation of Asian Americans and scientists in the democratic process.

# **COURSE**

# **MATERIALS**

# **GAG CLAUSES AND THE RIGHT TO GRIPE: THE CONSUMER REVIEW FAIRNESS ACT OF 2016 & STATE EFFORTS TO PROTECT ONLINE REVIEWS FROM CONTRACTUAL CENSORSHIP\***

By Clay Calvert<sup>⊗</sup>

## **ABSTRACT**

This article examines new legislation, including the federal Consumer Review Fairness Act signed into law in December 2016, targeting non-disparagement clauses in consumer contracts. Such “gag clauses” typically either prohibit or punish the posting of negative reviews of businesses on websites such as Yelp and TripAdvisor. The article asserts that state and federal statutes provide the best means, from a pro-free expression perspective, of attacking such clauses, given the disturbingly real possibility that the First Amendment has no bearing on contractual obligations between private parties.

## **INTRODUCTION**

During the 2016 presidential election season, Democrats and Republicans alike complained about nearly everything – the opposing nominee,<sup>1</sup> their own nominee,<sup>2</sup> fake news,<sup>3</sup> presidential debates,<sup>4</sup> media bias<sup>5</sup> and the vacancy on the

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\* To be published in Volume 24, Issue 2 of the *Widener Law Review*.

<sup>⊗</sup> Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks graduate students Minch Minchin, Austin Vining and Sebastian Zarate, as well as undergraduates Jessie Goodman, Lynne Higby, Sophia Karnegis, Haley Schaeckel, Jayde Shulman, Van Miller and Olivia Vega of the University of Florida for their review of early drafts of this article.

<sup>1</sup> See, e.g., Amy Chozick, *Clinton to Paint Trump as a Risk to World Order*, N.Y. TIMES, June 2, 2016, at A1 (quoting Jake Sullivan, Democratic nominee Hillary Clinton’s top policy adviser, for the proposition that Republican nominee “Donald Trump is unlike any presidential candidate we’ve seen, maybe ever, certainly in decades, in that he does not cross the threshold of fitness for the job”); Maggie Haberman, *Trump Unleashes Torrent of Criticism at Clinton*, N.Y. TIMES, June 23, 2016, at A21 (reporting that Republican nominee Donald Trump called Democratic nominee Hillary Clinton a “world-class liar” and claimed she “may be the most corrupt person ever to seek the presidency”); Michael Wolff, *Establishment Lining Up to Stop the Trump Train*, USA TODAY, Aug. 8, 2016, at 1B (“The case, made by Republicans, Democrats and, more and more without restraint, the news media, gets stronger every day: Donald Trump is dangerous, unfit and crazy. And the conclusion becomes ever-more emphatic: He must not be president.”).

<sup>2</sup> See, e.g., Amy Chozick et al., *Unusual Race Tests Playbook for Clinton Bid*, N.Y. TIMES, May 29, 2016, at A1 (“In the corridors of Congress, on airplane shuttles between New York and Washington,



Supreme Court of the United States.<sup>6</sup> It is fitting, then, that one of the only measures members of Congress from both sides of the aisle agreed on that year was

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at donor gatherings and on conference calls, anxiety is spreading through the Democratic Party that Mrs. Clinton is struggling to find her footing.”); Scott Clement, *Will Immigration, Guns and Abortion be Wedge Issues in 2016?*, WASH. POST, July 20, 2016, <https://www.washingtonpost.com/news/the-fix/wp/2016/07/20/will-immigration-guns-and-abortion-be-wedge-issues-in-2016/> (“Roughly three-quarters of persuadable Republicans dislike Trump and a similar share of persuadable Democrats dislike Clinton.”); Adam Nagourney, *Convention Gives Trump Chance to Clear an Obstacle: Himself*, N.Y. TIMES, July 19, 2016, at A14 (reporting that during the Republican Convention in Cleveland, Donald Trump faced “the challenge of reassuring Republicans unhappy with their candidate, symbolized by the absence of so many party leaders, while using the event to expand his appeal to a broader electorate”); Frank Newport & Andrew Dugan, *Clinton Still Has More Negatives Among Dems Than Sanders*, GALLUP, June 6, 2016, <http://www.gallup.com/opinion/polling-matters/192362/clinton-negatives-among-dems-sanders.aspx> (reporting the results of a poll conducted in late May and early June of 2016 among voters who identified as Democrats that revealed that Bernie Sanders, who shortly thereafter failed to win the Democratic party nomination, “continues to be significantly more popular than Hillary Clinton. Sanders’ current net favorable rating among Democrats (+52) outpaces Clinton’s (+39) by 13 points”); Jennifer Steinhauer, *A Weak Bench is an Obstacle for Democrats*, N.Y. TIMES, Aug. 26, 2016, at A1 (noting that Republicans “find themselves in a fundamental conflict between Mr. Trump’s populist insurgents and traditional conservatives”).

<sup>3</sup> In December 2016, erstwhile Democratic nominee Hillary Clinton railed against what she called an “epidemic of malicious fake news” and “voiced support for some federal legislation to address the ‘fake news’ issue.” Paul Kane, *Hillary Clinton Attacks ‘Fake News’ in Post-Election Appearance on Capitol Hill*, WASH. POST, Dec. 8, 2016, <https://www.washingtonpost.com/news/powerpost/wp/2016/12/08/hillary-clinton-attacks-fake-news-in-post-election-appearance-on-capitol-hill/>.

<sup>4</sup> See, e.g., Philip Rucker et al., *Clinton Builds on Debate Gains*, WASH. POST, Sept. 28, 2016, at A1 (reporting that, after a presidential debate in September 2016 at Hofstra University, Republican nominee Donald Trump claimed “debate moderator Lester Holt, the anchor of ‘NBC Nightly News,’ was biased, and the Republican complained about the quality of his microphone”); Nicholas Confessore & Patrick Healy, *Something Was Wrong with Volume, Panel Finds*, N.Y. TIMES, Oct. 1, 2016, at A10 (reporting that the Commission on Presidential Debates determined that the first debate “was marred by an unspecified technical malfunction that affected the volume of Donald J. Trump’s voice in the debate hall,” and noting that Trump “complained that the changing volume had distracted him and alleged again that someone had created the problem deliberately”).

<sup>5</sup> See, e.g., Noah Bierman, *Trump Helps Bring Far-Right Media’s Edgier Elements into Mainstream*, L.A. TIMES, Aug. 23, 2016, at A6 (“A Morning Consult poll released Friday found a plurality of Americans of all political stripes – 38% – believed *the media were biased* in trying to help elect Hillary Clinton president, a far greater percentage than the 12% who said the media were biased in favor of Trump.”) (emphasis added); Alexander Burns & Nick Corasaniti, *Trump’s Other Campaign Foe: The ‘Lowest Form of Life’ News Media*, N.Y. TIMES, Aug. 13, 2016, at A10 (“Long a vehement critic of the political news media, Mr. Trump has increasingly organized his general-election effort around antagonizing the press. He dedicates long sections of his speeches and innumerable tweets to savaging individual outlets, and claiming that *media bias* could effectively ‘rig’ the election for Hillary Clinton.”) (emphasis added).

<sup>6</sup> See, e.g., Alan Rappeport, *Democrats Use Brighter Prospects in Fight for Supreme Court Nominee*, N.Y. TIMES, Aug. 20, 2016, at A11 (“The Senate has been stuck in a stalemate since the death of Justice Antonin Scalia in February left a vacancy on the bench. Republicans have refused to hold confirmation hearings on President Obama’s nominee, insisting that the next president should make the choice.”); Editorial, *The Senate’s Confirmation Shutdown*, N.Y. TIMES, June 9, 2016, at A22 (complaining that the failure by U.S. Senate Republicans to provide confirmation hearings for

a bill<sup>7</sup> safeguarding – you guessed it – the right to complain. Introduced in the House of Representatives in April 2016 by Republican Leonard Lance of New Jersey and Democrat Joseph Kennedy III of Massachusetts,<sup>8</sup> the Consumer Review Fairness Act of 2016 passed the House in September 2016.<sup>9</sup> The Senate then unanimously approved it without amendment two months later.<sup>10</sup> President Barack Obama, in turn, signed the bill into law on December 14, 2016.<sup>11</sup>

Codified at 15 U.S.C. § 45b, the law generally voids non-disparagement clauses – colloquially called gag clauses<sup>12</sup> or, less ominously and forebodingly, customer waivers<sup>13</sup> – in form contracts<sup>14</sup> that either penalize<sup>15</sup> or prohibit<sup>16</sup> a person entering into such an agreement with a business or another individual from reviewing or assessing the performance of “the goods, services, or conduct”<sup>17</sup> of that business or individual. The law vests the Federal Trade Commission (FTC) with primary enforcement authority,<sup>18</sup> but also allows state attorneys general and consumer protection officers to bring civil actions in federal court on behalf of their residents after clearing several procedural hurdles.<sup>19</sup> The measure does not ban

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Supreme Court nominee Merrick Garland was “shameful” and that it left the nation’s high court “hamstrung, unable to deliver conclusive rulings on some of the most pressing legal issues facing the country”).

<sup>7</sup> H.R. 5111, 114th Cong. (2015 – 16) (enacted).

<sup>8</sup> Paul Muschick, *Businesses Can’t Block Customer Reviews*, MORNING CALL (Allentown, Pa.), Dec. 29, 2016, at A5.

<sup>9</sup> Stephanie Mlot, *Congress Passes Bill Protecting Consumer Reviews*, PCMAG.COM, Nov. 30, 2016, <http://www.pcmag.com/news/349960/congress-passes-bill-protecting-consumer-reviews>.

<sup>10</sup> *Id.*

<sup>11</sup> All Actions, H.R. 5111, 114th Cong. (2015 – 16), CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/5111/all-actions>.

<sup>12</sup> Christopher Elliott, *With a Pending Act, Online Reviewers Have the Full Attention of Congress*, WASH. POST, Sept. 25, 2016, at F2.

<sup>13</sup> See Chris Moran & Ashlee Kieler, *Speak Freely America: New Federal Law Outlaws Gag Clauses That Punish You for Negative Reviews*, CONSUMERIST, Dec. 14, 2016, <https://consumerist.com/2016/12/14/consumer-review-freedom-act> (“Seven years ago, we first told you about businesses using gag orders – call them ‘customer waivers’ or ‘non-disparagement clauses,’ it’s all the same – to prevent their customers from exercising their legally protected rights to voice their honest opinions.”).

<sup>14</sup> The law defines a form contract as “a contract with standardized terms – (i) used by a person in the course of selling or leasing the person’s goods or services; and (ii) imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms.” 15 U.S.C. §45b (a) (3) (A) (2017).

<sup>15</sup> See 15 U.S.C. §45b (b) (1) (B) (2017) (rendering void of a form contract that “imposes a penalty or fee against an individual who is a party to the form contract for engaging in a covered communication”).

<sup>16</sup> See 15 U.S.C. §45b (b) (1) (A) (2017) (rendering void a form contract that “prohibits or restricts the ability of an individual who is a party to the form contract to engage in a covered communication”).

<sup>17</sup> 15 U.S.C. §15b (a) (2) (2017).

<sup>18</sup> 15 U.S.C. §15b (d) (1) – (2) (2017).

<sup>19</sup> 15 U.S.C. §15b (e) (1) – (6) (2017).



defamation<sup>20</sup> actions filed by reviewed businesses or individuals when reviews are libelous.<sup>21</sup>

Ken Paulson, president of the First Amendment Center at Vanderbilt University and dean of the College of Media and Entertainment at Middle Tennessee State University, calls the new law “a valuable piece of legislation that prevents businesses from forcing consumers to give up their free speech rights.”<sup>22</sup> Bill-cosponsor Representative Lance proclaimed after the measure cleared the Senate that it:

is about protecting consumers posting honest feedback online. Online reviews and ratings are critical in the 21st century and consumers should be able to post, comment and tweet their honest and accurate feedback without fear of retribution. Too many companies are burying non-disparagement clauses in fine print and going after consumers when they post negative feedback online. This will now end.<sup>23</sup>

Similarly, in announcing the bill in April 2016, cosponsor Representative Kennedy remarked that it “would ensure companies can never retaliate against customers for simply expressing an opinion.”<sup>24</sup> In light of such lofty rhetoric, this article analyzes both the Consumer Review Fairness Act of 2016 and state laws targeting consumer-review gag clauses. It contextualizes these statutes within the broader framework of the First Amendment freedom of speech,<sup>25</sup> which may prove irrelevant in purely contractual settings between private parties.

Part I of the article explains more broadly the nature of non-disparagement clauses and their emergence in recent years as contractual tools for stifling negative online reviews.<sup>26</sup> Part II then evaluates the relevance, or lack thereof, of the First Amendment in thwarting non-disparagement clauses.<sup>27</sup> Next, Part III examines in greater depth the Consumer Review Fairness Act of 2016, as well as the two state

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<sup>20</sup> Defamation “is the tort theory that provides a civil remedy for communications that harm a victim’s reputation.” Joseph H. King, Jr., *Defining the Internal Context for Communications Containing Allegedly Defamatory Headline Language*, 71 U. CIN. L. REV. 863, 868 (2003).

<sup>21</sup> See 15 U.S.C. §15b (b) (2) (B) (2017) (providing that the law shall not be construed to affect “any civil cause of action for defamation, libel, or slander, or any similar cause of action”).

<sup>22</sup> Steven Porter, *Businesses Barred from Gagging Customer Reviews Under New U.S. Law*, CHRISTIAN SCI. MON., Dec. 19, 2016, <http://www.csmonitor.com/Business/2016/1219/Businesses-barred-from-gagging-customer-reviews-under-new-US-law>.

<sup>23</sup> Press Release, Congressman Leonard Lance, Speaker Ryan Signs Lance Bill (Dec. 2, 2016), <https://lance.house.gov/newsroom/press-releases/speaker-ryan-signs-lance-bill>.

<sup>24</sup> Press Release, Congressman Joe Kennedy, Kennedy, Lance Intro Bill to Protect Consumer Reviews (Apr. 28, 2016), <https://kenedy.house.gov/media/press-releases/kennedy-lance-intro-bill-to-protect-consumer-reviews>.

<sup>25</sup> The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>26</sup> *Infra* notes 35 – 99 and accompanying text.

<sup>27</sup> *Infra* notes 100 – 137 and accompanying text.

efforts that preceded it in California<sup>28</sup> and Maryland<sup>29</sup> in combatting gag clauses.<sup>30</sup> Finally, Part IV concludes by suggesting, at the macro-level of analysis, that the use of non-disparagement clauses to squelch free expression highlights the need for the U.S. Supreme Court to constitutionalize contract law with a First Amendment overlay, much as it already has done in tort law with the cases of *New York Times Co. v. Sullivan*,<sup>31</sup> *Hustler Magazine v. Falwell*<sup>32</sup> and *Snyder v. Phelps*,<sup>33</sup> among others.<sup>34</sup>

## I. GAGGING ONLINE CRITICS: THE RISE OF NON-DISPARAGEMENT CLAUSES

This Part has two sections. Section A provides an overview of non-disparagement clauses, both historically and today. Section B then describes a real-life example of the abuse of such provisions that captured attention in the U.S. Congress.

### A. *An Overview of the Problem*

The Consumer Review Fairness Act is an exemplar of timely legislation targeting a troublesome and growing problem. As the *ABA Journal* reported in July 2016, some businesses increasingly are attempting “to prohibit dissatisfied customers from posting negative yet authentic reviews.”<sup>35</sup> The *Washington Post*

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<sup>28</sup> CAL. CIV. CODE § 1670.8 (Deering’s 2017).

<sup>29</sup> MD. CODE ANN. COM. LAW § 14-1325 (2017).

<sup>30</sup> *Infra* notes 138 – 193 and accompanying text.

<sup>31</sup> 376 U.S. 254 (1964). In *Sullivan*, the Court held that public officials who sue for libel based on speech relating to their official duties must prove that the defamatory statement in question “was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 279 – 280.

<sup>32</sup> 485 U.S. 46 (1988). In *Falwell*, the Court held that public figures and public officials who sue for intentional infliction of emotional distress (IIED) based on parodic and satirical speech must prove, in addition to the requisite IIED tort elements, “that the publication contains a false statement of fact which was made with ‘actual malice,’ i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.” *Id.* at 56.

<sup>33</sup> 562 U.S. 443 (2011). In *Snyder*, which involved several tort causes of action, including ones for IIED and intrusion into seclusion, Chief Justice John Roberts wrote for the majority that “[t]he Free Speech Clause of the First Amendment – ‘Congress shall make no law . . . abridging the freedom of speech’ – can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.” *Id.* at 451.

<sup>34</sup> *Infra* notes 194 – 232 and accompanying text.

<sup>35</sup> Julianne Hill, *Stars and Gripes: Legal Challenges Over Online Reviews Seek to Separate Fact from Fiction*, ABA J., July 2016, at 56, [http://www.abajournal.com/magazine/article/legal\\_challenges\\_over\\_online\\_reviews\\_seek\\_to\\_separate\\_fact\\_from\\_fiction](http://www.abajournal.com/magazine/article/legal_challenges_over_online_reviews_seek_to_separate_fact_from_fiction).

noted earlier that year that “non-disparagement clauses in contracts are multiplying.”<sup>36</sup>

These provisions detrimentally affect not only consumers, but also review-centric websites such as Yelp. Yelp “provides consumers with search and review features for restaurants, retailers and other businesses.”<sup>37</sup> It claimed in the first quarter of 2016 to have had “on a monthly average basis, about 77 million unique visitors . . . on desktop computers and 69 million on mobile devices.”<sup>38</sup> By the end of the third quarter of 2016, more than 115 million reviews were posted on Yelp.<sup>39</sup>

A common example of a non-disparagement contract term might involve “a vacation home rental owner who stipulates in the fine print of a contract that he may keep a deposit if a guest leaves an unflattering review.”<sup>40</sup> As *USA Today* noted in December 2015, “[s]ome businesses are lurking with ‘terms of service,’ often in fine print, that prohibit customers from writing negative reviews. Such ‘gag clauses’ chill free speech and undermine consumer power.”<sup>41</sup> Indeed, the same newspaper also pointed out that “an array of businesses across the country – wedding photographers, flooring installers, online retailers, hotels, vacation rentals, and even some dentists and doctors – have attempted to foist gag clauses on customers.”<sup>42</sup> Consumer advocates assert that “most customers aren’t aware of non-disparagement clauses, which often are buried deep within boilerplate language of the agreements.”<sup>43</sup>

When consumers upload negative reviews that violate gag clauses, they may be sued.<sup>44</sup> For instance, a Texas couple was sued in 2016 after it breached a non-disparagement clause with a pet-sitting company called Prestigious Pets by posting a negative, one-star review of it on Yelp.<sup>45</sup> The gag clause at issue broadly provided that “your acceptance of this agreement prohibits you from taking any action that negatively impacts Prestigious Pets, LLC, its reputation, products, services,

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<sup>36</sup> Christopher Elliott, *Write a Negative Review and Get Sued? It Can Happen, But Maybe not for Long*, WASH. POST, Jan. 17, 2016, at F2.

<sup>37</sup> James F. Peltz, *After Yahoo, Who’s Next?; These Five Tech Firms Seem to be Good Candidates to go on the Auction Block*, L.A. TIMES, Aug. 1, 2016, at A8.

<sup>38</sup> *Id.*

<sup>39</sup> *About Us: 10 Things You Should Know About Yelp*, YELP, <https://www.yelp.com/about>.

<sup>40</sup> Peltz, *supra* note 37, at A8.

<sup>41</sup> *Don’t Like That Gift? Sellers’ Fine Print Can Make You Gag*, USA TODAY, Dec. 24, 2015, at 7A.

<sup>42</sup> *Id.*

<sup>43</sup> Jenni Bergal, *Consumers Now Have the Right to Gripe Online*, PEW CHARITABLE TRUSTS, Dec. 15, 2016, <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/15/consumers-now-have-the-right-to-gripe-online>.

<sup>44</sup> See Joseph Dussault, *What the Yelp Defamation Case Could Mean for Internet Free Speech*, CHRISTIAN SCI. MONITOR, Sept. 22, 2016, <http://www.csmonitor.com/Technology/2016/0922/What-the-Yelp-defamation-case-could-mean-for-internet-free-speech> (“A bipartisan bill, sponsored by Reps. Joe Kennedy (D) of Massachusetts and Leonard Lance (R) of New Jersey, seeks to protect customers against ‘non-disparagement’ clauses imposed by businesses. Customers have often signed such contracts, and they are sued after publishing a negative review.”).

<sup>45</sup> Sarah Mervosh, *Plano Couple Sued for \$1M Over One-Star Yelp Review Asks Judge to Drop Suit*, DALLAS MORNING NEWS, June 3, 2016, <http://www.dallasnews.com/news/news/2016/06/03/plano-couple-hit-with-1m-lawsuit-over-one-star-yelp-review-asks-judge-to-drop-suit>.

management, employees or independent contractors.”<sup>46</sup> Texas District Court Judge Jim Jordan dismissed the company’s lawsuit with prejudice under the Lone Star State’s anti-SLAPP<sup>47</sup> statutes<sup>48</sup> and awarded the defendant-couple, Robert and Michelle Duchouquette, court costs and attorneys’ fees to be paid the Prestigious Pets and its owner.<sup>49</sup> According to attorney Paul Alan Levy of the Public Citizen Litigation Group, the case marked “the first time a company defended its non-disparagement clause with a brief” and, perhaps more significantly, the first time a judge refused to enforce a consumer-review gag clause.<sup>50</sup>

Although the outcome in that case was favorable from a pro-free speech perspective, the cost of breaching a gag clause can multiply fast. That’s because, as Professor Lucille Ponte recently notes, gag clauses frequently are accompanied by “liquidated damages clauses that set out daily penalties for posting a critical review until the posting is removed.”<sup>51</sup>

Gag clauses tend, somewhat intuitively, to be viewpoint based, allowing favorable reviews while stifling only negative ones. As Professor Ponte explains:

These kinds of agreements are typically not purely contracts of silence that prohibit all speech, as positive reviews and comments are not only desirable but good for a business’s customer relationships and bottom line. Rather, a nondisparagement clause prevents consumers from making or posting any negative remarks, criticisms, or ridicule about a business, its goods, and/or its services.<sup>52</sup>

Some gag clauses, as attorneys David Bell and Tiffany Ferris write, “transfer copyright ownership in any review written about a particular business to that business.”<sup>53</sup> This duplicitous intellectual property maneuver, the duo notes, “gives the business the right to have reviews removed from third-party review websites and forums.”<sup>54</sup> Indeed, the Consumer Review Fairness Act of 2016 includes a

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<sup>46</sup> Plaintiffs’ Response to Defendants’ Motion to Dismiss, *McWhorter v. Duchouquette*, No. DC-16-03561 (Tex. Dist. Ct., Dallas County, July 19, 2016), <http://www.citizen.org/documents/PPTCPAOpposition.pdf>.

<sup>47</sup> SLAPP is an acronym that stands for strategic lawsuit against public participation. Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J. L. & PUB. POL’Y 1, 7, n.30 (2006).

<sup>48</sup> TEX. CIV. PRAC. & REM. CODE §§ 27.001 – 27.011 (2016).

<sup>49</sup> Order on Defendants’ Motion to Dismiss, *McWhorter v. Duchouquette*, No. DC-16-03561 (Tex. Dist. Ct., Dallas County, Aug. 26, 2016), <https://assets.documentcloud.org/documents/3038039/Prestigious-Pets-Order-of-Dismissal.pdf>.

<sup>50</sup> Paul Alan Levy, *Texas Court Strikes Down Prestigious Pets’ Nondisparagement Clause Lawsuit*, CONSUMER L. & POL’Y BLOG, Aug. 30, 2016, <http://pubcit.typepad.com/clpblog/2016/08/texas-court-strikes-down-prestigious-pets-nondisparagement-clause-lawsuit.html>.

<sup>51</sup> Lucille M. Ponte, *Protecting Brand Image or Gaming the System? Consumer “Gag” Contracts in an Age of Crowdsourced Ratings and Reviews*, 7 WM. & MARY BUS. L. REV. 59, 79 (2016).

<sup>52</sup> *Id.* at 67.

<sup>53</sup> David A. Bell & Tiffany Ferris, *A Congressional Anti-Gag Maneuver: Senate Unanimously Approves the Consumer Review Freedom Act*, HAYNES & BOONE NEWS, Jan. 27, 2016, <http://www.haynesboone.com/publications/a-congressional-anti-gag-maneuver>.

<sup>54</sup> *Id.*

provision that specifically addresses and voids such transfers of intellectual property rights.<sup>55</sup>

Gag clauses do more, however, than just extinguish criticism. Professor Lauren Willis of Loyola Law School asserts “they’re bad for the economy. One way that markets become more efficient is by information getting out there, consumer to consumer.”<sup>56</sup> In other words, two types of markets – literal economic ones, as well as metaphorical idea marketplaces<sup>57</sup> – are stunted by non-disparagement clauses. In fact, Paul Levy, an attorney for the watchdog group Public Citizen,<sup>58</sup> stresses that gag clauses “hurt other businesses that operate on the up-and-up and don’t need these clauses to protect themselves.”<sup>59</sup>

Ultimately, the use of gag clauses “threatens the openness of the digital economy.”<sup>60</sup> They thus fall within what Professor David Orozco recently called “a broad array of strategic corporate legal bullying practices that violate fundamental business norms such as fairness, reciprocity, reputation, and community responsiveness.”<sup>61</sup>

The FTC began taking action against non-disparagement clauses in 2015. That’s when it accused weight-loss powder marketer Roca Labs of using gag clauses

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<sup>55</sup> The new law voids a form contract if it:

transfers or requires an individual who is a party to the form contract to transfer to any person any intellectual property rights in review or feedback content, with the exception of a non-exclusive license to use the content, that the individual may have in any otherwise lawful covered communication about such person or the goods or services provided by such person.

15 U.S.C. § 45b (b) (1) (C) (2017).

<sup>56</sup> David Lazarus, *Lawmakers Seek to End the Muzzling of Consumers by Some Businesses*, L.A. TIMES, May 8, 2015, <http://www.latimes.com/business/la-fi-lazarus-20150508-column.html>.

<sup>57</sup> The marketplace of ideas theory of free expression “represents one of the most powerful images of free speech, both for legal thinkers and for laypersons.” MATTHEW D. BUNKER, CRITIQUING FREE SPEECH 2 (2001). It has been described as “the dominant First Amendment metaphor.” LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 237 (1991). Dean Rodney Smolla calls the marketplace of ideas “perhaps the most powerful metaphor in the free speech tradition,” with its premise “that humankind’s search for truth is best advanced by a free trade in ideas.” RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6 (1992). In other words, under this theory, a primary “justification for free speech is that it contributes to the promotion of truth.” Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 998 (2003).

<sup>58</sup> Public Citizen describes itself on its website “as the people’s voice in the nation’s capital” and as “the countervailing force to corporate power. We fight on behalf of all Americans – to make sure your government works for you.” About Us, Public Citizen, <http://www.citizen.org/Page.aspx?pid=2306>.

<sup>59</sup> Jennie Bergal, *The Right to Gripe: States Seek to Protect Negative Online Reviews*, PEW CHARITABLE TRUSTS, June 16, 2016, <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/06/16/the-right-to-gripe-states-seek-to-protect-negative-online-reviews>.

<sup>60</sup> Reid Goldsborough, *The Freedom of Free Speech Online*, TEACHER LIBRARIAN, Feb. 2016, at 62.

<sup>61</sup> David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J.L. & BUS. 137, 140 (2016). As Orozco writes, “[t]o silence negative critiques made against them, companies sometimes assert tenuous disparagement claims against individuals or small businesses who make negative statements. These entities abuse the legal system by threatening legal action to silence any negative criticism.” *Id.* at 168.



to stop negative reviews of its multimillion-dollar business.<sup>62</sup> As the FTC asserted in a press release, Florida-based Roca Labs “attempted to intimidate their own customers from sharing truthful – and truly negative – reviews of their products.”<sup>63</sup>

The FTC’s complaint, filed September 2015 in federal court against Roca Labs and two of its officers, alleges that Roca’s use of gag clauses “have caused or are likely to cause purchasers to refrain from commenting negatively about the Defendants or their products. By depriving prospective purchasers of this truthful, negative information, Defendants’ practices have resulted or are likely to result in consumers buying Roca Labs products they would not otherwise have bought.”<sup>64</sup> The FTC contends that gag clauses “constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a) and (n).”<sup>65</sup> The gag clause in Roca Labs’ online agreement provided:

You agree that regardless of your personal experience with RL, you will not disparage RL and/or any of its employees, products, or services. This means that you will not speak, publish, or cause to be published, print, review, blog, or otherwise write negatively about RL, or its products or employees in any way.<sup>66</sup>

By April 2016, the FTC and Roca Labs reportedly were on the verge of settling the matter,<sup>67</sup> but the case was still ongoing in early 2017.<sup>68</sup> Signaling, perhaps, that the FTC might fight other businesses that deploy such gag clauses, FTC Commissioner Terrell McSweeney highlighted the case against Roca Labs in a November 2016 keynote speech at the Association of National Advertisers and Brand Activation Association’s marketing law conference in Chicago.<sup>69</sup>

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<sup>62</sup> John Hielscher, *FTC Says Local Firm’s Ads’ Claims are False*, SARASOTA HERALD TRIB. (Fla.), Oct. 3, 2015, at D1.

<sup>63</sup> Press Release, Fed. Trade Comm’n, *FTC Sues Marketers Who Used “Gag Clauses,” Monetary Threats, and Lawsuits to Stop Negative Consumer Reviews for Unproven Weight-Loss Products* (Sept. 28, 2015), <https://www.ftc.gov/news-events/press-releases/2015/09/ftc-sues-marketers-who-used-gag-clauses-monetary-threats-lawsuits>.

<sup>64</sup> Complaint for Permanent Injunction and Other Equitable Relief at 22, Fed. Trade Comm’n v. Roca Labs, Inc., No. 8:15-cv-02231-MSS-TBM (M.D. Fla. Sept. 24, 2015), <https://www.ftc.gov/system/files/documents/cases/150928rocalabscmpt.pdf>.

<sup>65</sup> *Id.* at 28. See 15 U.S.C. § 45(a) (2016) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”); 15 U.S.C. § 45(n) (2016) (providing the FTC with the power to declare unlawful an “act or practice [that] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition”).

<sup>66</sup> Lesley Fair, *Gagging Rights? FTC Case Challenges Diet Claims and Company’s Use of Consumer Gag Clauses*, FTC BUS. BLOG, Sept. 28, 2015, <https://www.ftc.gov/news-events/blogs/business-blog/2015/09/gagging-rights-ftc-case-challenges-diet-claims-companys-use>.

<sup>67</sup> Dani Kass, *FTC, Supplement Co. Request Stay in False Ad Suit*, LAW360, Apr. 18, 2016, at <http://www.law360.com/articles/785821/ftc-supplement-co-request-stay-in-false-ad-suit>.

<sup>68</sup> See Fed. Trade Comm’n v. Roca Labs, Inc., 2017 U.S. Dist. LEXIS 5298 (M.D. Fla. Jan. 13, 2017) (involving a motion for contempt and sanctions against a non-party witness in the case).

<sup>69</sup> Terrell McSweeney, FTC Commissioner, Keynote Remarks at the 2016 ANA/BAA Marketing Law Conference (Nov. 10, 2016),

Despite the FTC's recent actions targeting them, gag clauses are not new. Traditionally, they were applied in contexts other than online business reviews. For example, the *New York Times* reported in 1996 that health maintenance organizations (H.M.O.s) were imposing gag clauses on physicians that "limited their ability to talk freely with patients about treatment options and H.M.O. payment policies."<sup>70</sup>

Although the actual extent of the use of gag clauses affecting doctors was "hotly contested,"<sup>71</sup> the U.S. Department of Health and Human Services quickly stepped into the fray to hold that "H.M.O.'s may not limit what doctors tell Medicare patients about medical treatment options."<sup>72</sup> Multiple states also took legislative action against gag clauses in H.M.O. contracts.<sup>73</sup> By 1999, as Professor William Sage wrote in the *Columbia Law Review*, "nearly every state [had] enacted legislation outlawing contractual restrictions on disclosure" in managed-care contracts.<sup>74</sup> In brief, there is ample precedent for lawmakers taking effective action against gag clauses.

While gag clauses in H.M.O. contracts may be a relic of the past, they are "increasingly common" today in contexts beyond consumer reviews, such as employment contracts, where they ban "former employees from criticizing their erstwhile employer."<sup>75</sup> Additionally, as Professor Genelle Belmas and attorney Brian Larson observed in 2007, "[s]oftware manufacturers have also included clauses that forbid publication of any review of their products without consent."<sup>76</sup> Furthermore, the *New York Times* reported in June 2016 that a number of for-profit universities include enrollment contracts featuring gag clauses that:

bar students or former students from telling others about the complaint resolution process or the specifics of any final ruling. And internal process requirements prohibit students from taking their complaints public without first going through the school's own process.

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[https://www.ftc.gov/system/files/documents/public\\_statements/996554/mcsweeny-keynote\\_remarks\\_at\\_ana-baa\\_marketing\\_law\\_conference\\_11-10-16.pdf](https://www.ftc.gov/system/files/documents/public_statements/996554/mcsweeny-keynote_remarks_at_ana-baa_marketing_law_conference_11-10-16.pdf).

<sup>70</sup> Associated Press, *U.S. Healthcare to End Limits on Doctors' Advice to Patients*, N.Y. TIMES, Feb. 6, 1996, at D2. See Robert Pear, *Doctors Say H.M.O.'s Limit What They Can Tell Patients*, N.Y. TIMES, Dec. 21, 1995, at A1 ("Doctors across the country say that health maintenance organizations routinely limit their ability to talk freely with patients about treatment options and H.M.O. payment policies, including financial bonuses for doctors who save money by withholding care.").

<sup>71</sup> Julia A. Martin & Lisa K. Bjerknes, *The Legal and Ethical Implications of Gag Clauses in Physician Contracts*, 22 AM. J. L. & MED. 433, 441 (1996).

<sup>72</sup> Robert Pear, *The Gag is Off H.M.O. Doctors*, N.Y. TIMES, Dec. 8, 1996, at A2.

<sup>73</sup> See Justin D. Harris, *Health and Welfare: The Timely Demise of "Gag Orders" in Physicians' Contracts with Managed Care Providers*, 28 PAC. L.J. 906, 910 (1997) ("A number of other states have responded to the growing dissatisfaction with HMOs by passing legislation that, like the newer California legislation, prohibits HMOs from inserting gag clauses in their contracts.").

<sup>74</sup> William M. Sage, *Regulating Through Information: Disclosure Laws and American Healthcare*, 99 COLUM. L. REV. 1701, 1748–49 (1999).

<sup>75</sup> David Lazarus, *Insurer Busted for Bullying Its Employees*, N.Y. TIMES, Aug. 19, 2016, at C1.

<sup>76</sup> Genelle I. Belmas & Brian N. Larson, *Clicking Away Your Speech Rights: The Enforceability of Gagwrap Licenses*, 12 COMM. L. & POL'Y 37, 38 (2007).

In some cases, schools try to bar people from taking complaints elsewhere – even if the internal process yields no relief.<sup>77</sup>

A 2016 study by the Century Foundation<sup>78</sup> “found gag clauses in about one in every ten enrollment contracts at for-profit colleges receiving federal aid. No such provisions were found at nonprofit, public, or privately funded for-profit institutions.”<sup>79</sup> The study noted that an enrollment-contract gag clause “inserts a firewall between wronged students, reducing the likelihood that they will learn about each other’s complaints, preventing them from working together to seek a better resolution.”<sup>80</sup>

The next section turns to a real-life example that vividly demonstrates the destructive impact of gag clauses not only on free expression, but also on individual emotional tranquility and familial fiscal stability.

## B. *The Case of Jennifer Palmer*

In November 2015, during testimony before the U.S. Senate Committee on Commerce, Science, and Transportation, Jennifer Palmer explained how a non-disparagement clause, supposedly buried in a terms-of-sale-and-use agreement with an online business called KlearGear, wreaked havoc on both her life and her husband’s credit rating.<sup>81</sup> Specifically, in late 2008 her husband, John Palmer, ordered and paid for two items online from KlearGear.<sup>82</sup> After the items never arrived, the Palmers were told via email by a KlearGear representative that the order was unpaid and therefore cancelled.<sup>83</sup> The Palmers were never able to speak with anyone at KlearGear, however, because the phone numbers on the company’s website merely provided automated responses.<sup>84</sup>

Growing frustrated with the service and what she called “the impossibility of reaching anyone,”<sup>85</sup> Jennifer Palmer then took a step in February 2009 that would later haunt her and her husband: she posted her opinions about KlearGear on a

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<sup>77</sup> Editorial, *Don’t Force Students to Sign Away Their Rights*, N.Y. TIMES, June 10, 2016, at A26.

<sup>78</sup> This organization describes itself as “a progressive, nonpartisan think tank that seeks to foster opportunity, reduce inequality, and promote security at home and abroad.” About the Century Foundation, Century Foundation, <https://tcf.org/about>.

<sup>79</sup> Tariq Habash & Robert Shireman, *How College Enrollment Contracts Limit Students’ Rights*, Century Found., Apr. 28, 2016, <https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights>.

<sup>80</sup> *Id.*

<sup>81</sup> *Zero Stars: How Gagging Honest Reviews Harms Consumers and the Economy: Hearing on S. 2044 Before the S. Comm. on Commerce, Sci. & Transp.*, 114th Cong. (2015) (statement of Jennifer Kulas Palmer, Plaintiff, *Palmer v. KlearGear*) [hereinafter *Palmer Testimony*] <https://www.commerce.senate.gov/public/cache/files/2966d0eb-8812-4035-ae59-4b75979864e4/93F3E6B5DE58928F85DF4367AEC0373A.jen-palmer-testimony.pdf>.

<sup>82</sup> *Id.* at 1.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*



website called RipoffReport.com.<sup>86</sup> It was not until May 2012 that the trouble started. That's when, as Jennifer Palmer testified, her husband:

received an email from KlearGear demanding that John have the review on RipoffReport.com removed within 72 hours, or pay KlearGear \$3,500 for violations of their Terms of Sale and Use. . . . KlearGear claimed that my review violated a "non-disparagement clause" in KlearGear's Terms of Sale and Use, the text of which barred the customer – who was John, not me, but that didn't matter to them – from "taking any action that negatively impacts KlearGear.com, its reputation, products, services, management or employees." John did some research . . . and discover[ed] that the clause wasn't even present in the Terms of Sale when he placed his order back in December 2008. He found that the clause did not appear until February 2012.

Jennifer Palmer attempted to remove her review, but as she told the senators at the hearing, RipoffReport.com's policy prohibits removals.<sup>87</sup> She testified that her husband then:

tried explaining to KlearGear that the "non-disparagement clause" was not in the Terms of Sale and Use at the time of John's order from KlearGear; that it was I, not John, who wrote the review; and RipoffReport.com's policy of not removing reviews meant we had no control over whether the review remained online. The person claiming to be KlearGear's legal representative just reiterated to us that "this matter will remain open until the published content is removed," and threatened to report the \$3,500 as a debt to the credit reporting agencies.<sup>88</sup>

Indeed, the \$3,500 later showed up as debt owed to KlearGear on John Palmer's credit reports with Experian and Equifax, two of the three major credit-reporting companies in the United States.<sup>89</sup> Jennifer Palmer testified that it took more than eighteen months to remove the information from her husband's credit reports<sup>90</sup> – a result coming only after the watch-dog group Public Citizen filed suit on the Palmers' behalf against KlearGear.<sup>91</sup> The Palmers won a default judgment against KlearGear, which failed to defend the case.<sup>92</sup>

Before the lawsuit and prior to the removal of the KlearGear debt from John Palmer's credit record, however, he experienced difficulty obtaining a car loan and was denied a credit card.<sup>93</sup> The Palmers were also refused financing by several

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1 – 2.

<sup>88</sup> *Id.* at 2.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Complaint, *Palmer v. KlearGear.com*, No. 1:13-cv-00175 (D. Utah Dec. 18, 2013) [hereinafter *Palmer Complaint*], <http://www.citizen.org/documents/Palmer-v-Kleargear-Complaint.pdf>.

<sup>92</sup> *Palmer Testimony*, *supra* note 81, at 3.

<sup>93</sup> *Id.* at 2 – 3.

companies for buying a new furnace after their old one broke as winter approached.<sup>94</sup>

On top of the fiscal woes, Jennifer Palmer further testified about the emotional toll, noting “the humiliation of having to explain everything”<sup>95</sup> and “living in fear”<sup>96</sup> of “not being able to get emergency credit for basic needs.”<sup>97</sup> In fact, one of the causes of action in the Palmers’ complaint filed in federal court in Utah was for intentional infliction of emotional distress.<sup>98</sup>

The bottom line, as Jennifer Palmer explained, was that her “story shows what can happen when companies are allowed to use non-disparagement clauses in their contracts to bully consumers. And it shows why Congress should take action to prohibit the use of these clauses in consumer contracts.”<sup>99</sup> Congress now has done precisely that with the Consumer Review Fairness Act of 2016.

With this background on non-disparagement clauses and the real-world example of Jennifer Palmer in mind, the next Part addresses the bearing and significance of the First Amendment on the enforceability of these contractual terms.

## II. GAG CLAUSES AND THE FIRST AMENDMENT: IS THERE A CONSTITUTIONAL OVERLAY TO CONTRACT LAW?

More than a quarter-century ago, First Amendment scholar Vincent Blasi of checking-value fame<sup>100</sup> ruefully queried about gag clauses, “You can’t sell yourself into slavery. So can you sell yourself into silence? It would seem to me there are some inalienable rights you can’t sign away.”<sup>101</sup> It is a critical, yet relatively understudied, issue. As Professor Alan Garfield observed in 1998, “[t]he extent to which a party can bind himself contractually to silence is largely unexplored in American case law and legal literature.”<sup>102</sup>

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<sup>94</sup> *Id.* at 3.

<sup>95</sup> *Id.* at 2.

<sup>96</sup> *Id.* at 3.

<sup>97</sup> *Id.*

<sup>98</sup> Palmer Complaint, *supra* note 91, at 15. The tort of intentional infliction of emotional distress typically is defined as consisting “of four elements: (1) the defendant’s conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant’s conduct must cause the plaintiff emotional distress and (4) the distress must be severe.” Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL’Y 469, 476 (2000).

<sup>99</sup> Palmer Testimony, *supra* note 81, at 1.

<sup>100</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RES. J. 521 (1977).

<sup>101</sup> N. R. Kleinfield, *Silence is Golden*, N.Y. TIMES, Apr. 29, 1990, at A54, A79.

<sup>102</sup> Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 263 (1998).

If the First Amendment were to apply to gag clauses, then its general prohibition against prior restraints<sup>103</sup> would be directly relevant. A prior restraint, the U.S. Supreme Court has held, is a “restraint on future speech,”<sup>104</sup> often occurring in the form of “court orders that actually forbid speech activities.”<sup>105</sup> It is a fundamental tenet of First Amendment jurisprudence, in turn, that prior restraints on speech are presumptively unconstitutional.<sup>106</sup>

Although gag clauses prohibiting negative reviews certainly restrict future expression, the threshold problem in challenging their constitutionality is that the First Amendment protects the right of free expression only from government action.<sup>107</sup> As the U.S. Supreme Court wrote four decades ago, “the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.”<sup>108</sup> It added then that “while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.”<sup>109</sup>

This militates, of course, against the First Amendment playing any role in thwarting the application of a gag clause in a contract between a business and a consumer. Simply put, a contractual gag clause may fall within the realm of private law,<sup>110</sup> not constitutional law.

In his 1998 article, Professor Garfield thus raised a crucial question regarding the intersection of contract law, gag clauses – which fall within a larger bucket of “contracts of silence,”<sup>111</sup> as he aptly puts it – and the First Amendment: “Are promises of silence different because they implicate the First Amendment or violate a public policy favoring freedom of speech, or are these constitutional and policy concerns irrelevant when a private party agrees to silence himself?”<sup>112</sup>

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<sup>103</sup> See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 996 (5th ed. 2015) (pointing out that while “a clear definition of ‘prior restraint’ is elusive,” perhaps “[t]he clearest definition of prior restraint is an administrative system or a judicial order that prevents speech from occurring”).

<sup>104</sup> *Alexander v. United States*, 509 U.S. 544, 550 (1993).

<sup>105</sup> *Id.*

<sup>106</sup> See *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 556 (1976) (observing that the First Amendment guarantees of free speech and a free press “afford special protection against orders that prohibit the publication or broadcast of particular information or commentary – orders that impose a ‘previous’ or ‘prior’ restraint on speech”); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

<sup>107</sup> See *United States v. Stevens*, 559 U.S. 460, 480 (2010) (observing that “the First Amendment protects against the Government”).

<sup>108</sup> *Hudgens v. Nat’l Labor Relations Bd.*, 424 U.S. 507, 513 (1976).

<sup>109</sup> *Id.*

<sup>110</sup> See Donald J. Smythe, *Liberty at the Borders of Private Law*, 49 AKRON L. REV. 1, 4 (2016) (“Private law is usually defined as the branch of law that addresses the relationships between individuals, rather than between individuals and their governments.”).

<sup>111</sup> See Garfield, *supra* note 102, at 268 (asserting that “a ‘contract of silence’ is a contract in which a party has made an enforceable promise to keep quiet about something”).

<sup>112</sup> *Id.* at 264.

On the one hand, Professor Garfield observes that “whereas the First Amendment limits governmental suppression of speech, contractual suppression of speech may not implicate the First Amendment.”<sup>113</sup> Attorney Randolph Kline and his colleagues concur, noting that the First Amendment does not “preclude agreements to limit one’s own speech. In fact, private parties can voluntarily negotiate agreements among themselves . . . to limit the speech rights the parties would otherwise possess.”<sup>114</sup> Similarly, in addressing the problem of gag clauses found in software license agreements, Professors Michael Rustad and Maria Onufrio wrote in 2012 that “[w]hen software licensors or other content providers impose restrictions on speech, the First Amendment prohibition on prior restraints is not applicable since there is no state action.”<sup>115</sup> Furthermore, Professor Kaiponanea Matsumurd in 2014 asserted that “agreements restricting free speech,”<sup>116</sup> in fact, “are routinely enforced”<sup>117</sup> and that “the long-term trend has favored”<sup>118</sup> contractual waivers of speech rights.

Thus, while the First Amendment may limit the scope of speech-based torts,<sup>119</sup> it generally has no application in contract law. As Professors Daniel Solove and Neil Richards sum it up, “[a]lthough tort law implicates the First Amendment under modern constitutional jurisprudence, the First Amendment provides little to no restrictions when other private law rules restrict speech. Such is the case with *contract law* and property law.”<sup>120</sup>

The case of *Cohen v. Cowles Media*<sup>121</sup> provides some evidence of this. There, the Court held that the First Amendment provided no defense against a civil cause of action for promissory estoppel stemming from the breach of a promise of confidentiality given by journalists to a source.<sup>122</sup> As UCLA Professor Eugene Volokh encapsulates the holding at its broadest, “[t]he Supreme Court explicitly held in *Cohen v. Cowles Media* that contracts not to speak are enforceable with no First Amendment problems. Enforcing people’s own bargains, the Court concluded . . . doesn’t violate those people’s rights, even if they change their minds after the bargain is struck.”<sup>123</sup>

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<sup>113</sup> *Id.* at 344.

<sup>114</sup> Randolph Kline, *Beyond Advertising Controls: Influencing Junk-Food Marketing and Consumption with Policy Innovations Developed in Tobacco Control*, 39 LOY. L.A. L. REV. 603, 625 (2006).

<sup>115</sup> Michael L. Rustad & Maria Vittoria Onufrio, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1180 (2012).

<sup>116</sup> Kaiponanea T. Matsumurd, *Binding Future Selves*, 75 LA. L. REV. 71, 95 (2014).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 96.

<sup>119</sup> See *supra* notes 31 – 33 and accompanying text (identifying three key cases in which the U.S. Supreme Court has held that the First Amendment freedom of speech applies in tort law).

<sup>120</sup> Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1660 (2009) (emphasis added).

<sup>121</sup> 501 U.S. 663 (1991).

<sup>122</sup> *Id.* at 669 – 70.

<sup>123</sup> Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1057 (2000).

Nonetheless, as Professor Shelley Ross Saxer writes, the Court in *Cohen* “found state action in a private breach of contract lawsuit involving a confidential source who sued the newspaper company that exposed him after agreeing to keep him anonymous.”<sup>124</sup> On this issue, the Court in *Cohen* wrote that “the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes ‘state action’ under the Fourteenth Amendment.”<sup>125</sup> Byron White reasoned for the five-justice majority that the state-law doctrine of promissory estoppel “would be enforced through the official power of the Minnesota courts. Under our cases, that is enough to constitute ‘state action’ for purposes of the Fourteenth Amendment.”<sup>126</sup>

In brief, judicial enforcement of state contract law theory was sufficient to trigger consideration of the First Amendment by the Court in *Cohen* under principles of state action. Nonetheless, the First Amendment failed to add a layer of constitutional protection because, as the *Cohen* Court reasoned, generally applicable laws such as promissory estoppel “do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”<sup>127</sup>

Addressing the state action question, Professor Garfield points out that “[j]udicial enforcement of a contract of silence may constitute state action and thus implicate the First Amendment.”<sup>128</sup> Most courts, however, do not recognize the proposition that judicial enforcement, by itself, constitutes state action. For instance, in April 2016 a federal district court in California turned back a First Amendment challenge to a contractual arbitration agreement by rejecting the plaintiffs’ argument “that the mere fact of judicial enforcement automatically establishes state action.”<sup>129</sup> Indeed, the U.S. Court of Appeals for the Ninth Circuit in 2013 opined that “[i]n the context of First Amendment challenges to speech-restrictive provisions in private agreements or contracts, domestic judicial enforcement of terms that could not be enacted by the government has *not* ordinarily been considered state action.”<sup>130</sup>

In fact, as Professor Mark Rosen observed in a 2004 article, “with virtually no exceptions, courts have concluded that the judicial enforcement of private agreements inhibiting speech does *not* trigger constitutional review, despite the fact that identical legislative limitations on speech would have.”<sup>131</sup> Put even more bluntly by a Washington state appellate court, “[s]tate enforcement of a contract

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<sup>124</sup> Shelley Ross Saxer, *Shelley v. Kraemer, State Action, and Judicial Takings*, 21 WIDENER L.J. 847, 848 (2012).

<sup>125</sup> *Cohen*, 501 U.S. at 668.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 669.

<sup>128</sup> Garfield, *supra* note 102, at 319.

<sup>129</sup> *Roberts v. AT&T Mobility, LLC*, 2016 U.S. Dist. LEXIS 56389, \*6 (N.D. Cal. Apr. 27, 2016).

<sup>130</sup> *Ohno v. Yasuma*, 723 F.3d 984, 998 (9th Cir. 2013) (emphasis added).

<sup>131</sup> Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 193 (2004) (emphasis added).

between two private parties is *not* state action, even where one party’s free speech rights are restricted by that agreement.”<sup>132</sup>

Yet Professor Garfield emphasizes that the Supreme Court has long applied a First Amendment overlay to state tort law,<sup>133</sup> with recent cases such as *Snyder v. Phelps*<sup>134</sup> illustrating this point. As Chief Justice John Roberts observed for the eight-justice *Snyder* majority, “[t]he Free Speech Clause of the First Amendment – ‘Congress shall make no law . . . abridging the freedom of speech’ – can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.”<sup>135</sup> In other words, if a veneer of First Amendment jurisprudence can coat tort law, then why can’t that amendment similarly add a layer of constitutional protection to contract law?

Ultimately, Garfield concludes “there is no obvious answer”<sup>136</sup> regarding whether the First Amendment imposes restrictions on gag clauses entered into freely between private parties. He adds that even if the state action of judicial enforcement makes the First Amendment applicable to contracts of silence, this still fails to resolve whether such a constitutional right may be waived.<sup>137</sup>

With this unsettled state of First Amendment jurisprudence leaving a gaping chasm between the speech interests of consumers and the contractual rights of businesses to protect their reputations, both the federal government and several states now are filling the void with statutes rendering non-disparagement clauses invalid. Those laws are examined below in Part III.

### III.

#### LEGISLATIVE RESPONSES TO GAG CLAUSES: ANALYZING FEDERAL AND STATE “RIGHT TO GRIPE” STATUTES

This Part features two sections. Section A examines the federal Consumer Review Fairness Act of 2016, while Section B analyzes the legislative efforts of both California and Maryland. They were the first two states to tackle consumer-review gag clauses with legislation that predates the new federal statute.

#### A. *Consumer Review Fairness Act of 2016*

A starting point for analysis is the Consumer Review Fairness Act’s definition of non-disparagement clause. The Act, however, does not use either the term “non-disparagement clause” or “gag clause.” Instead, it employs the more neutral term “covered communication.”<sup>138</sup> A covered communication, in turn,

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<sup>132</sup> *Washington v. Noah*, 9 P.3d 858, 871 (Wash. Ct. App. 2000) (emphasis added).

<sup>133</sup> *See id.* at 347 – 48 (“Although the Supreme Court has long recognized that state enforcement of tort law can trigger the First Amendment, it has yet to decide whether the same is true for state enforcement of contracts.”).

<sup>134</sup> 562 U.S. 443 (2011).

<sup>135</sup> *Id.* at 451.

<sup>136</sup> Garfield, *supra* note 102, at 319.

<sup>137</sup> *Id.* at 354 – 55.

<sup>138</sup> 15 U.S.C. § 45b (a) (2) (2017).

“means a written, oral, or pictorial review,<sup>139</sup> performance assessment of, or other similar analysis of, including by electronic means, the goods, services, or conduct of a person by an individual who is party to a form contract with respect to which such person is also a party.”<sup>140</sup>

This definition allows consumers to post reviews consisting of *both* words and images. For instance, a person who believes a kitchen-cabinet installer shoddily performed work could not only describe, via written text, why she thinks the work was shoddy, but also post photographs and/or videos offering seemingly more objective proof of inferior performance. Such visual evidence is important because, as Chief Justice John Roberts’ pointed out in 2012, “a picture is worth a thousand words.”<sup>141</sup>

Second, it is important to understand that the Act does *not* ban all non-disparagement clauses. Specifically, it applies only when such clauses appear in form contracts.<sup>142</sup> Form contracts, per the statute, must: 1) involve “standardized terms;”<sup>143</sup> 2) for the selling or leasing of goods or services;<sup>144</sup> and 3) fail to provide a consumer with “a meaningful opportunity . . . to negotiate the standardized terms.”<sup>145</sup>

The Act’s deployment of the term “form contract”<sup>146</sup> may be strategic because it conjures up visions of adhesion contracts, which carry more than a whiff of unfairness. Indeed, contracts of adhesion, Professor Shelley Smith writes, “are standardized form contracts presented by a party with superior bargaining power to the ‘adherent’ as a ‘take-it-or-leave-it’ proposition, giving them no alternatives other than complete adherence to the terms presented or outright rejection.”<sup>147</sup> Such contracts, however, typically are enforceable under contract law principles<sup>148</sup> unless the waiver of rights in question is so vast and broad as to be unconscionable<sup>149</sup> and involves “a powerless party, usually a consumer, who has no real choice but to accede to its terms.”<sup>150</sup>

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<sup>139</sup> The concept of pictorial reviews sweeps up “pictures, photographs, video, illustrations, and symbols.” 15 U.S.C. § 45b (a) (4) (2017).

<sup>140</sup> 15 U.S.C. § 45b (a) (2) (2017).

<sup>141</sup> *FCC v. CBS Corp.*, 132 S. Ct. 2677, 2678 (2012).

<sup>142</sup> See 15 U.S.C. § 45b (c) (2017) (“It shall be unlawful for a person to offer a *form contract* containing a provision described as void in subsection (b).”) (emphasis added).

<sup>143</sup> 15 U.S.C. § 45b (a) (3) (A) (2017).

<sup>144</sup> 15 U.S.C. § 45b (a) (3) (A) (i) (2017).

<sup>145</sup> 15 U.S.C. § 45b (a) (3) (A) (ii) (2017).

<sup>146</sup> *Supra* note 142 and accompanying text.

<sup>147</sup> Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 LEWIS & CLARK L. REV. 1035, 1035, n.1 (2010).

<sup>148</sup> See *Goesel v. Boley Int’l Ltd.*, 806 F.3d 414, 423 (7th Cir. 2015) (observing that “the fact that an agreement is a contract of adhesion does not automatically defeat enforceability”).

<sup>149</sup> See Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can’t, and Shouldn’t, Control Student Athletes’ Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 40 (2014) (“And while contracts of adhesion typically are enforceable even when the parties stand in starkly uneven bargaining positions, an exceptionally broad waiver of First Amendment rights might trigger judicial scrutiny under the doctrine of unconscionability.”).

<sup>150</sup> *Woodruff v. Cunningham & Assocs., PLC*, 147 A.3d 777, 789 (2016).

Unconscionability, as the U.S. Court of Appeals for the Ninth Circuit wrote in 2016, “has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results.”<sup>151</sup> As Professor Andrea Boyack recently summarized it:

Adhesion contracts are enforceable, but legal theory has evolved to take into account the lack of voluntariness and content input inherent in adhesion contexts through modern doctrines such as unconscionability and distinct approaches to interpretation for adhesion contracts. Courts recognize that traditional deference to contractual terms may be inappropriate for contracts of adhesion, and they therefore sometimes monitor the substantive fairness of a contract in an adhesion contract context.<sup>152</sup>

In addition to applying only to gag clauses found in form contracts, the Consumer Review Fairness Act carves out multiple exemptions that truly limit its reach to only consumer reviews. For example, employer-employee contracts and independent-contractor agreements fall outside Act’s ambit.<sup>153</sup> Additionally, the Act generally does not apply to non-disclosure provisions affecting trade secrets,<sup>154</sup> personnel files,<sup>155</sup> medical information<sup>156</sup> and records compiled for law enforcement purposes.<sup>157</sup>

As explained earlier, the FTC in 2015 began attacking gag clauses as a type of unfair business practice when it filed a complaint against weight-loss marketer Roca Labs.<sup>158</sup> The Consumer Review Fairness Act now specifically codifies gag clauses in form contracts that fall within the Act’s reach as unfair and deceptive practices.<sup>159</sup> In turn, it gives the FTC the power to enforce the Act.<sup>160</sup>

State attorneys general, as well as other authorized state consumer protection officers,<sup>161</sup> also can file civil lawsuits on behalf of their residents under the Act,<sup>162</sup> provided they, unless otherwise unfeasible,<sup>163</sup> first notify the FTC in writing of their intent to bring such a claim<sup>164</sup> and accompany it with “a copy of the

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<sup>151</sup> *Tompkins v. 23andME, Inc.*, 840 F.3d 1016, 1023 (9th Cir. 2016) (quoting *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 748 (Cal. 2015)).

<sup>152</sup> Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J.L. & POL’Y 767, 794 (2014).

<sup>153</sup> 15 U.S.C. § 45b (a) (3) (B) (2017).

<sup>154</sup> 15 U.S.C. § 45b (b) (3) (A) (2017).

<sup>155</sup> 15 U.S.C. § 45b (b) (3) (B) (2017).

<sup>156</sup> *Id.*

<sup>157</sup> 15 U.S.C. § 45b (b) (3) (C) (2017).

<sup>158</sup> *Supra* notes 62 – 69 and accompanying text.

<sup>159</sup> 15 U.S.C. § 45b (d) (1) (2017).

<sup>160</sup> 15 U.S.C. § 45b (d) (2) (A)–(B) (2017).

<sup>161</sup> 15 U.S.C. § 45b (e) (6) (A) (2017).

<sup>162</sup> 15 U.S.C. § 45b (e) (1) (2017).

<sup>163</sup> 15 U.S.C. § 45b (e) (2) (A) (iii) (2017).

<sup>164</sup> 15 U.S.C. § 45b (e) (2) (A) (i) (2017).



complaint to be filed to initiate the civil action.”<sup>165</sup> The FTC may intervene in such state-driven lawsuits.<sup>166</sup>

Although the Consumer Review Fairness Act now applies nationwide as federal legislation, both California and Maryland previously adopted their own statutes targeting gag clauses. Those statutes, which remain valid and thus provide a second layer of remedies for citizens in those states, are addressed below in Section B.

## B. *State Legislation*

Prior to enactment of the federal Consumer Review Fairness Act of 2016, California and Maryland were the first states to implement laws striking at the enforcement of non-disparagement clauses in consumer contracts. The statutes of those two states are described below, thus adding enriched context for understanding the federal legislation.

### 1. **California**

Assembly Bill 2365, commonly referred to as the Yelp bill,<sup>167</sup> was signed into law by Governor Jerry Brown in September 2014 and took effect on January 1, 2015.<sup>168</sup> The measure, Professor Eric Goldman observes, became the “first-in-the-nation statute to stop businesses from contractually gagging their consumers.”<sup>169</sup>

Codified at Section 1670.8 of the California Civil Code,<sup>170</sup> the law is much briefer in both length and number of clauses than the Consumer Review Fairness Act of 2016. The California law provides in key part that “[a] contract or proposed contract for the sale or lease of consumer goods or services may not include a provision waiving the consumer’s right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services.”<sup>171</sup>

Unlike the federal legislation discussed earlier, this provision is *not* limited in applicability to only form contracts. Additionally, and in contrast to the federal

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<sup>165</sup> 15 U.S.C. § 45b (e) (2) (A) (ii) (2017).

<sup>166</sup> 15 U.S.C. § 45b (e) (2) (B) (2017).

<sup>167</sup> See Amit Singh, *The Yelp Bill: California Bans Non-Disparagement Clauses in Consumer Contracts*, STARTUP BLOG, Aug. 17, 2016, <http://www.startupblog.com/blog/the-yelp-bill-california-bans-non-disparagement-clauses-in-consumer-contracts> (“AB 2365, popularly referred to as the ‘Yelp Bill,’ prohibits companies from using non-disparagement clauses in contracts for the sale or lease of consumer goods or services.”).

<sup>168</sup> Songmee L. Connolly, *Litigation Alert: California Bans Non-Disparagement Clauses in Consumer Contracts*, FENWICK & WEST LLP, Sept. 18, 2015, <https://www.fenwick.com/publications/pages/california-bans-non-disparagement-clauses-in-consumer-contracts.aspx>.

<sup>169</sup> Eric Goldman, *California Tells Businesses: Stop Trying To Ban Consumer Reviews*, FORBES, Sept. 10, 2014, <http://www.forbes.com/sites/ericgoldman/2014/09/10/california-tells-businesses-stop-trying-to-ban-consumer-reviews/>.

<sup>170</sup> CAL. CIV. CODE § 1670.8 (Deering’s 2017).

<sup>171</sup> CAL. CIV. CODE § 1670.8 (a) (1) (Deering’s 2017).

statute, California Civil Code § 1670.8 does not carve out an exemption for employer-employee contracts and independent-contractor agreements.

In terms of enforcement, the California statute embraces a tripartite tack. Specifically, it allows consumers, the state attorney general and local officials (both district and county attorneys) to file civil actions.<sup>172</sup> A first violation is subject to a maximum civil fine of \$2,500, while second and subsequent breaches cost \$5,000.<sup>173</sup>

Furthermore, the California statute includes a provision closely akin to a punitive damages clause. In particular, an additional maximum of \$10,000 may be collected by consumers or government officials if they can prove a defendant's violation of the statute was "willful, intentional, or reckless."<sup>174</sup>

Although the sum of those fines initially seems paltry, they still will likely cause a chilling effect on gag clause usage in California. As Professor Goldman puts it, "[t]he penalties may be financially modest, but any California business foolish enough to take an anti-review contract to court will end up writing a check to their customers."<sup>175</sup>

Significantly, California's law stretches beyond the state's borders. As attorney Songmee Connolly explains, the measure "has no geographic limitations and thus would apply to any consumer-facing entity or person doing business in California. Thus, even out-of-state businesses with prospective and current customers in California should ensure compliance."<sup>176</sup>

Finally, the California statute makes it clear that a citizen of the Golden State can bring a lawsuit under California Civil Code § 1670.8 and any other statutory or common law theory.<sup>177</sup> California citizens today thus can invoke their state's own statute targeting gag clauses and also request the state's attorney general to pursue a separate claim under the federal Consumer Review Fairness Act.<sup>178</sup>

## 2. Maryland

House Bill 131, better known as the "Right to Yelp" bill,<sup>179</sup> was signed into

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<sup>172</sup> CAL. CIV. CODE § 1670.8 (c) (Deering's 2017).

<sup>173</sup> *Id.*

<sup>174</sup> CAL. CIV. CODE § 1670.8 (d) (Deering's 2017).

<sup>175</sup> Goldman, *supra* note 169.

<sup>176</sup> Songmee L. Connolly, *Don't Disregard Calif.'s Non-Disparagement Clause Ban*, LAW 360, Oct. 8, 2014, <https://www.law360.com/articles/585252/don-t-disregard-calif-s-non-disparagement-clause-ban>.

<sup>177</sup> See CAL. CIV. CODE § 1670.8 (e) (Deering's 2017) ("The penalty provided by this section is not an exclusive remedy, and does not affect any other relief or remedy provided by law.").

<sup>178</sup> See *supra* notes 161 – 166 and accompanying text (describing the power of state officials to bring claims under the federal Consumer Review Fairness Act).

<sup>179</sup> See Matt Bush, *'Right to Yelp' Bill is Gaining Fans in Maryland Legislature*, WAMU 88.5 RADIO, Feb. 18, 2016, <http://wamu.org/story/16/02/18/right-to-yelp-bill-is-gaining-fans-in-maryland-legislature/> (reporting that the measure is "unofficially dubbed the 'Right To Yelp'").

law by Maryland Governor Lawrence Hogan, Jr., on April 12, 2016.<sup>180</sup> Hogan's stroke of the pen made the Old Line State just the second in the nation, following California's lead, to adopt a law banning consumer-review gag clauses.<sup>181</sup>

Codified at Section 14-1325 of Maryland's commercial code, the new legislation took effect in October 2016.<sup>182</sup> Applying only to contracts involving "the sale or lease of consumer goods or services,"<sup>183</sup> the statute renders "void and unenforceable"<sup>184</sup> clauses that waive a "consumer's right to make any statement concerning: (1) The seller or lessor; (2) Employees or agents of the seller or lessor; or (3) The consumer goods or services."<sup>185</sup> It also prohibits enforcement and threatened enforcement of such clauses, as well as efforts to penalize consumers under such clauses.<sup>186</sup>

Maryland's statute specifies two items that California's gag-clause law fails to address. In particular, and unlike California's measure, Maryland's statute stipulates that individuals and businesses that believe they are defamed in consumer reviews retain the power to file libel actions.<sup>187</sup> Additionally, the Maryland statute exempts from its reach gag clauses restricting consumer disclosure of trade secrets and intellectual property.<sup>188</sup> California's statute, in contrast, is silent on this type of content. In accord with California's measure,<sup>189</sup> however, Maryland makes it clear that its law generally does not restrict the ability of consumer-review websites such as Yelp or TripAdvisor to take down reviews.<sup>190</sup>

In terms of enforcement authority, the Maryland statute provides that violations of it constitute "unfair and deceptive trade practice[s]"<sup>191</sup> under Maryland's Consumer Protection Act and, in turn, are "[s]ubject to the enforcement and penalty provisions contained in Title 13 of this article."<sup>192</sup> What does this mean? The general criminal penalty provision of Title 13 provides that "any person

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<sup>180</sup> H.B. 131 (Md. 2016),

<http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=billpage&stab=03&id=HB0131&tab=subject3&ys=2016rs>.

<sup>181</sup> *The Right to Yelp is Now Maryland Law*, NAT'L FED'N. INDEP. BUS., July 19, 2016,

<http://www.nfib.com/content/news/legal/the-right-to-yelp-is-now-maryland-law-74679/>.

<sup>182</sup> MD. CODE ANN. COM. LAW § 14-1325 (2017).

<sup>183</sup> MD. CODE ANN. COM. LAW § 14-1325 (b) (2017). It defines consumer goods and services as those "primarily for personal, household, or family purposes." MD. CODE ANN. COM. LAW § 14-1325 (a) (3) (2017).

<sup>184</sup> MD. CODE ANN. COM. LAW § 14-1325 (d) (2017).

<sup>185</sup> MD. CODE ANN. COM. LAW § 14-1325 (b) (2017).

<sup>186</sup> MD. CODE ANN. COM. LAW § 14-1325 (c) (1) – (2) (2017).

<sup>187</sup> MD. CODE ANN. COM. LAW § 14-1325 (e) (3) (2017).

<sup>188</sup> See MD. CODE ANN. COM. LAW § 14-1325 (e) (2) (2017) (providing that the statute does not bar inclusion "in a contract or a proposed contract for the sale or lease of consumer goods or services a provision prohibiting a consumer from disclosing proprietary information, techniques, or processes").

<sup>189</sup> See CAL. CIV. CODE § 1670.8 (e) (Deering's 2017) ("This section shall not be construed to prohibit or limit a person or business that hosts online consumer reviews or comments from removing a statement that is otherwise lawful to remove.")

<sup>190</sup> MD. CODE ANN. COM. LAW § 14-1325 (e) (1) (2017).

<sup>191</sup> MD. CODE ANN. COM. LAW § 14-1325 (f) (1) (2017).

<sup>192</sup> MD. CODE ANN. COM. LAW § 14-1325 (f) (2) (2017).

who violates any provision of this title is guilty of a misdemeanor and, unless another criminal penalty is specifically provided elsewhere, on conviction is subject to a fine not exceeding \$1,000 or imprisonment not exceeding one year or both, in addition to any civil penalties.”<sup>193</sup>

With this analysis of both the federal Consumer Review Protection Act of 2016 and the non-disparagement clause laws of California and Maryland in mind, this article next concludes by calling on the U.S. Supreme Court to adopt a layer of First Amendment protection to cover contract law cases in which an undue burden is imposed on free expression. This approach, as becomes clear, borrows a test from another constitutional law domain – namely, the Court’s current abortion-barrier jurisprudence.

#### IV. CONCLUSION

Both state laws and the federal Consumer Review Fairness Act of 2016 may successfully eradicate the pernicious effects of non-disparagement clauses lurking in contracts between consumers and businesses. For this, these articles of legislation merit praise and, in turn, the lawmakers behind them deserve kudos.

Yet the larger constitutional question regarding the First Amendment’s role in this contractual space lingers unresolved.<sup>194</sup> Although not focusing his analysis directly on gag clauses, Professor Donald Smythe lays a possible foundation for the First Amendment to play such a part, at least when contracts involve fictitious, state-created entities such as corporations. Smythe argues:

[s]ince corporations are State-sponsored entities with rights and privileges that individuals do not enjoy, private transactions between individuals and corporations raise questions about the nature of the State sponsorship and its implications for the liberty of the individuals. If liberty requires not just that individuals be as free from coercion as possible, but also that they have spheres of personal autonomy and privacy, and if the transactions between individuals and corporations intrude into individuals’ spheres of personal autonomy and privacy, then the State may indirectly contribute to the impingement upon the liberty of individuals through its sponsorship of the corporations.<sup>195</sup>

In brief, the personal and individual autonomy of deciding whether or not to speak is hindered by government-sanctioned businesses via gag clauses buried in form contracts, thus providing an entrée for First Amendment applicability.

Furthermore, in addition to impeding speakers’ rights, gag clauses also harm the rights of others – namely, the thousands of people who visit consumer-review websites – to learn important information that might very well influence where,

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<sup>193</sup> MD. CODE ANN. COM. LAW § 13-411 (a) (2017).

<sup>194</sup> See *supra* Part II (addressing the role – or lack thereof – the First Amendment plays in thwarting gag clauses).

<sup>195</sup> Smythe, *supra* note 110, at 15.

how and on what goods and services they spend money. Here, the unenumerated First Amendment right to receive speech is deployable for buttressing the argument that speaker autonomy is thwarted by gag clauses.<sup>196</sup> As the U.S. Supreme Court wrote more than a half-century ago, “the right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read.”<sup>197</sup>

The First Amendment right to receive speech is exceptionally powerful in precisely the same commercial and business contexts in which consumer-review gag clauses lurk and fester. Specifically, the U.S. Supreme Court recognized more than forty years ago in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>198</sup> that society has a “strong interest in the free flow of commercial information.”<sup>199</sup> It explained why this is so when economic decisions are at stake:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.<sup>200</sup>

In accord with this logic, the unfettered flow of opinions and reviews regarding businesses, services and products directly facilitates a “free enterprise economy”<sup>201</sup> by helping to ensure that “economic decisions”<sup>202</sup> of other potential consumers are “intelligent and well informed.”<sup>203</sup> Gag clauses throttle this process. The bottom line is that corporations, as government-sanctioned businesses, harm the rights of *both* speakers (consumers) and audiences (potential consumers) through the inclusion of non-disparagement clauses.

Adding to the impetus for applying the First Amendment to cases involving consumer non-disparagement clauses is the unequal nature of the bargaining power between the individuals and entities involved. As Professor Garfield argues, “not all contractual promises of silence should be treated alike. Surely there is a difference between contracts entered into by two parties of equal bargaining power and adhesion contracts signed by employees or ‘clicked’ onto by consumers.”<sup>204</sup>

Yet, as Part III made clear, adhesion contracts generally are enforceable.<sup>205</sup> For example, one federal court noted in 2014 that “an adhesion contract is

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<sup>196</sup> See generally Belmas & Larson, *supra* note 76, at 73 (“First Amendment jurisprudence provides considerable support to the concept of a right to hear.”).

<sup>197</sup> *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). See also *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (opining that “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”).

<sup>198</sup> 425 U.S. 748 (1976).

<sup>199</sup> *Id.* at 764.

<sup>200</sup> *Id.* at 765.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Alan E. Garfield, *The Mischief of Cohen v. Cowles Media Co.*, 35 GA. L. REV. 1087, 1120 (2001).

<sup>205</sup> *Supra* notes 148 – 150 and accompanying text.

enforceable unless the plaintiff lacked a meaningful choice whether to accept the provision in question and the provision is ‘so one-sided as to be oppressive.’”<sup>206</sup> Put slightly differently by another court, “adhesion contracts are enforceable unless unconscionable. . . . To establish unconscionability, the plaintiffs must prove both that they lacked a meaningful choice and that the terms of the contract were unreasonably favorable to the other party.”<sup>207</sup>

The mere fact, however, that consumers fail to read the terms of online agreements and therefore overlook inclusion of gag clauses is unlikely to render such contracts unconscionable. To wit, the U.S. Court of Appeals for the Seventh Circuit notes that “[a] contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome.”<sup>208</sup> Indeed, the Supreme Court of Iowa calls it “well-settled that failure to read a contract before signing it will not invalidate the contract.”<sup>209</sup>

Thus, to render a consumer-review gag clause invalid in the absence of either the Consumer Review Fairness Act of 2016 or similar state laws, a court not only must find that the contract entered into by a consumer was, in fact, one of adhesion, but also that it was unconscionable. This entails convincing a judge of procedural unconscionability – perhaps the gag clause was in smaller print than the rest of the agreement, was buried deep into the agreement and/or was written vaguely or confusingly – and substantive unconscionability. The substantive argument, in turn, needs to be that it is an overly harsh, one-sided result<sup>210</sup> for a person to forfeit his or her right to publicly criticize – but not, conversely, to laud or praise – a business, thereby depriving others of possibly truthful information that might affect their fiscal decisions.

A better approach, however, is for the U.S. Supreme Court to adopt a layer of First Amendment protection when a form contract detrimentally affects an individual’s right to express an opinion regarding the goods, services or performance of the other party to the contract. Just as the First Amendment plays such a role today in the realm of common law torts like libel<sup>211</sup> and intentional infliction of emotional distress,<sup>212</sup> so too could it play a similar speech-protective role in the face of contractual gag clauses.

The devil, of course, is in the details of determining precisely when and what contractual conditions should trigger the First Amendment’s application. A complete analysis of this issue is beyond the scope of this article, which instead focuses on legislative tacks, such as the Consumer Review Fairness Act of 2016, for

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<sup>206</sup> *Wolfe v. TBG Ltd.*, 2014 U.S. Dist. LEXIS 11039, \*10 (E.D. Pa. Jan. 28, 2014) (quoting *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 184 (3d Cir. 1998)).

<sup>207</sup> *Olle v. 5401 Western Ave. Residential, LLC*, 569 F. Supp. 2d 141, 146 (D. D.C. 2008) (citation omitted).

<sup>208</sup> *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997).

<sup>209</sup> *Bartlett Grain Co., LP v. Sheeder*, 829 N.W.2d 18, 26 (Iowa 2013) (quoting *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011)).

<sup>210</sup> *AT&T Mobility v. Concepcion*, 563 U.S. 333, 340 (2011).

<sup>211</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>212</sup> *Hustler Mag. v. Falwell*, 485 U.S. 46 (1988).

addressing gag clauses. Nonetheless, one intriguing possibility is to borrow a standard that now controls the U.S. Supreme Court's abortion-impediment jurisprudence.

Specifically, the Court in 2016 in *Whole Women's Health v. Hellerstedt*<sup>213</sup> applied an undue burden standard<sup>214</sup> to determine if two Texas statutes adopted in 2013 violated a woman's constitutional right to choose to have an abortion.<sup>215</sup> One statute required physicians who perform abortions to have admitting privileges at a hospital within thirty miles,<sup>216</sup> while the other mandated that abortion clinics comply with state regulations governing ambulatory surgical centers.<sup>217</sup>

Writing for a five-justice majority, Stephen Breyer wrote in *Hellerstedt* that "neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, *each constitutes an undue burden* on abortion access, and each violates the Federal Constitution."<sup>218</sup> Justice Breyer explained that the undue burden standard, derived from the Court's 1992 ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>219</sup> "asks courts to consider whether any burden imposed on abortion access is 'undue'"<sup>220</sup> and "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."<sup>221</sup>

As Professor Jessie Hill explains, "[b]y focusing on the health *benefits* of the law in relation to the *burdens*, the Court made sense of, and breathed new life into, the undue burden standard."<sup>222</sup> Dean Erwin Chemerinsky writes that in *Hellerstedt* the Court "stressed that in deciding whether a law imposes an undue burden on abortion it is for the judiciary to balance the justifications for the restrictions against their effect on the ability of women to have access to abortions."<sup>223</sup>

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<sup>213</sup> 136 S. Ct. 2292 (2016).

<sup>214</sup> The initial use of the undue burden standard by the Court dates back twenty-five years to its decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Justice Sandra Day O'Connor wrote in *Casey* that "the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." *Id.* at 876. She explained that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

<sup>215</sup> *Hellerstedt*, 136 S. Ct. at 2300.

<sup>216</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1)(A) (2013); 25 TEX. ADMIN. CODE §§ 139.53(c)(1), 139.56(a)(1) (2013).

<sup>217</sup> TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (2013); 25 TEX. ADMIN. CODE § 139.40 (2013).

<sup>218</sup> *Hellerstedt*, 136 S. Ct. at 2300 (emphasis added) (citations omitted).

<sup>219</sup> 505 U.S. 833 (1992).

<sup>220</sup> *Hellerstedt*, 136 S. Ct. at 2310.

<sup>221</sup> *Id.* at 2309.

<sup>222</sup> Jessie Hill, *Some Thoughts About Whole Women's Health v. Hellerstedt*, PRAWFSBLAWG (July 5, 2016), <http://prawnsblawg.blogs.com/prawnsblawg/2016/07/some-thoughts-about-whole-womans-health-v-hellerstedt.html> (emphasis added).

<sup>223</sup> Erwin Chemerinsky, *Everything Changed October Term 2015*, 19 GREEN BAG 2d 343, 355 (2016).



What might the undue burden standard, which considers both the benefits and burdens of abortion-access restrictions, look like if applied to contractual obligations curbing speech? First and importantly, the standard recognizes that in some instances a restriction on a party's speech rights may actually carry significant benefits. This might be so, for instance, in the realm of confidentiality clauses in employer-employee contracts that prevent disclosure by employees of a company's trade secrets<sup>224</sup> and intellectual property. Such clauses restrict the disclosure of proprietary property and data that are essential for businesses to succeed today.<sup>225</sup> Trade secrets encourage innovation and dissuade unethical behavior.<sup>226</sup> As attorneys Damien R. Meyer and Meaghan Kramer recently explained:

Companies invest significant resources creating confidential and proprietary information and setting themselves apart from their competitors. This information is valuable not only to its holder, but also to its competitors. The challenge to keep secret a company's most valuable information has never been greater. Temptation for employees and others to misappropriate and misuse valuable data looms in most industries.<sup>227</sup>

Such duties of confidentiality in these cases guard against the theft of property – intellectual property – by individuals who seek to exploit it for their own financial good, not a larger public interest. In brief, the benefits of restricting speech are exceedingly high in the trade secret realm,<sup>228</sup> while the burden is not undue. As the U.S. Supreme Court recognized more than four decades ago, “[t]he maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law.”<sup>229</sup> The Court also remarked at that time on “the importance of trade secret protection to the subsidization of research and development and to increased economic efficiency within large companies through the dispersion of responsibilities for creative

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<sup>224</sup> See Anna A. Onley, *Trade Secret Law: A Proposal for Eliminating Adjudicative Loopholes Under Statutory Law of Trade Secrets in the Seventh Circuit*, 11 SEVENTH CIRCUIT REV. 333, 333 – 334 (2016) (“Trade secrets include confidential customer lists, chemical formulas, and manufacturing processes as well as business methods and software, which are increasingly more difficult to protect under federal patent law.”) (internal citation omitted).

<sup>225</sup> See Andrew Beckerman-Rodau, *The Choice Between Patent Protection and Trade Secret Protection: A Legal and Business Decision*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 371, 371 (2002) (noting that “modern businesses have substantially increased reliance on intellectual property”).

<sup>226</sup> Derek E. Bambauer, *Secrecy is Dead – Long Live Trade Secrets*, 93 DENV. L. REV. 833, 846 (2016).

<sup>227</sup> Damien R. Meyer & Meaghan Kramer, *Trade Secret Protections Clarified: The Growing Struggle Over Workplace Confidences*, 51 ARIZ. ATT'Y 12, 12 (Apr. 2015).

<sup>228</sup> Professor Kurt Saunders explains that “the very survival of a business may depend on its ability to maintain the secrecy of its proprietary information. One study estimated a typical business may derive seventy percent or more of its value from its intellectual property. Theft and improper disclosure of trade secrets can be costly.” Kurt M. Saunders, *The Law and Ethics of Trade Secrets: A Case Study*, 42 CAL. W. L. REV. 209, 210 – 11 (2006).

<sup>229</sup> *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974).



developments.”<sup>230</sup> In summary, a confidentiality or non-disclosure clause restricting employee speech in the trade secrets and intellectual property spaces would not trigger First Amendment protection.

Confidentiality agreements safeguard trade secrets and intellectual property, with the intent of encouraging innovation and thwarting theft.<sup>231</sup> In contrast, consumer-review gag clauses are designed to stop dissemination of both truthful facts and honest opinions that could affect other consumers’ choices regarding fiscal expenditures and, in turn, influence a company’s reputation and financial bottom line. Efficient economic markets – ones dependent on the free flow of such information to weed out poorly performing products, services and businesses – thus are unduly burdened by gag clauses. Neither innovation nor ethical behavior is fostered by gag clauses, counter to contractual provisions restricting dissemination of trade secrets and intellectual property.<sup>232</sup>

In summary, both state laws and the federal Consumer Review Fairness Act of 2016 are significant, positive steps forward in allowing information – both factual and opinionated – to flow more freely from consumers to potential consumers in the face of business-imposed gag clauses. The next step, however, is to move beyond short-term legislative fixes to the realm of U.S. Constitutional law and, in particular, to the First Amendment. Non-disparagement clauses illustrate the importance of the U.S. Supreme Court fashioning a layer of First Amendment protection surrounding contracts that affect free expression. The undue burden standard may, this article suggests, provide one viable approach for such contractual constitutionalization.

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<sup>230</sup> *Id.* at 482.

<sup>231</sup> *Supra* notes 224 – 230 and accompanying text.

<sup>232</sup> *See supra* notes 224 – 230 and accompanying text (addressing trade secrets and intellectual property concerns).

# United States Court of Appeals for the Federal Circuit

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IN RE SIMON SHIAO TAM

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2014-1203

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Appeal from the United States Patent and Trademark Office, Trademark Trial and Appeal Board in No. 85/472,044.

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Decided: December 22, 2015

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Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MOORE, in which *Chief Judge* PROST and *Circuit Judges* NEWMAN, O'MALLEY, WALLACH, TARANTO, CHEN, HUGHES, and STOLL join.

Concurring opinion filed by *Circuit Judge* O'MALLEY, in which *Circuit Judge* WALLACH joins.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* DYK, in which *Circuit Judges* LOURIE and REYNA join with respect to parts I, II, III, and IV.

Dissenting opinion filed by *Circuit Judge* LOURIE.

Dissenting opinion filed by *Circuit Judge* REYNA.

MOORE, *Circuit Judge*.

Section 2(a) of the Lanham Act bars the Patent and Trademark Office ("PTO") from registering scandalous, immoral, or disparaging marks. 15 U.S.C. § 1052(a). The

government enacted this law—and defends it today—because it disapproves of the messages conveyed by disparaging marks. It is a bedrock principle underlying the First Amendment that the government may not penalize private speech merely because it disapproves of the message it conveys. That principle governs even when the government’s message-discriminatory penalty is less than a prohibition.

Courts have been slow to appreciate the expressive power of trademarks. Words—even a single word—can be powerful. Mr. Simon Shiao Tam named his band THE SLANTS to make a statement about racial and cultural issues in this country. With his band name, Mr. Tam conveys more about our society than many volumes of undisputedly protected speech. Another rejected mark, STOP THE ISLAMISATION OF AMERICA, proclaims that Islamisation is undesirable and should be stopped. Many of the marks rejected as disparaging convey hurtful speech that harms members of oft-stigmatized communities. But the First Amendment protects even hurtful speech.

The government cannot refuse to register disparaging marks because it disapproves of the expressive messages conveyed by the marks. It cannot refuse to register marks because it concludes that such marks will be disparaging to others. The government regulation at issue amounts to viewpoint discrimination, and under the strict scrutiny review appropriate for government regulation of message or viewpoint, we conclude that the disparagement prescription of § 2(a) is unconstitutional. Because the government has offered no legitimate interests justifying § 2(a), we conclude that it would also be unconstitutional under the intermediate scrutiny traditionally applied to regulation of the commercial aspects of speech. We therefore vacate the Trademark Trial and Appeal Board’s (“Board”) holding that Mr. Tam’s mark is unregistrable,

and remand this case to the Board for further proceedings.

## BACKGROUND

### I. The Lanham Act

Congress enacted the Lanham Act in 1946 to provide a national system for registering and protecting trademarks used in interstate and foreign commerce. Congress's purpose in enacting the Lanham Act was to advance the two related goals of trademark law. First, the purpose of the Lanham Act is to "protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 782 n.15 (1992) (Stevens, J., concurring) (quoting S. Rep. No. 79-1333, at 3 (1946)). Second, the Lanham Act ensures that a markholder can protect "his investment from . . . misappropriation by pirates and cheats." *Id.*; see also *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 n.14 (1982) ("By applying a trademark to goods produced by one other than the trademark's owner, the infringer deprives the owner of the goodwill which he spent energy, time, and money to obtain. At the same time, the infringer deprives consumers of their ability to distinguish among the goods of competing manufacturers." (citations omitted)).

"Registration is significant. The Lanham Act confers important legal rights and benefits on trademark owners who register their marks." *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 135 S. Ct. 1293, 1300 (2015) (quotation marks omitted). These benefits—unavailable in the absence of federal registration—are numerous, and include both substantive and procedural rights. The holder of a federal trademark has a right to exclusive nationwide use of that mark where there was no prior use by others. See 15 U.S.C. §§ 1072, 1115. Because the common law grants a

markholder the right to exclusive use only in the geographic areas where he has actually used his mark, *see* 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 26:32 (4th ed.) (hereinafter “McCarthy”), holders of a federally registered trademark have an important substantive right they could not otherwise obtain. Also, a registered mark is presumed to be valid, 15 U.S.C. § 1057(b), and the mark becomes incontestable (with certain exceptions) after five years of consecutive post-registration use, *id.* § 1065; *see also* *B&B Hardware*, 135 S. Ct. at 1310 (“Incontestability is a powerful protection.”). A markholder may sue in federal court to enforce his trademark, 15 U.S.C. § 1121, and he may recover treble damages if he can show infringement was willful, *id.* § 1117. He may also obtain the assistance of U.S. Customs and Border Protection in restricting importation of infringing or counterfeit goods, *id.* § 1124, 19 U.S.C. § 1526, and qualify for a simplified process for obtaining recognition and protection of his mark in countries that have signed the Paris Convention, *see id.* § 1141b (Madrid Protocol); Paris Convention for the Protection of Industrial Property art. 6*quinquies*, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305. Lastly, registration operates as a complete defense to state or common law claims of trademark dilution. 15 U.S.C. § 1125(c)(6).

Under the Lanham Act, the PTO must register source-identifying trademarks unless the mark falls into one of several categories of marks precluded from registration. *Id.* § 1052 (“*No trademark* by which the goods of the applicant may be distinguished from the goods of others *shall be refused registration on the principal register on account of its nature* unless . . . .” (emphasis added)). Many of these categories bar the registration of deceptive or misleading speech, because such speech actually undermines the interests served by trademark protection and, thus, the Lanham Act’s purposes in providing for registration. For example, a mark may not



be registered if it resembles a registered mark such that its use is likely to “cause confusion, or to cause mistake, or to deceive,” § 2(d), or if it is “deceptively misdescriptive,” § 2(e). These restrictions on registration of deceptive speech do not run afoul of the First Amendment. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980) (“The government may ban forms of communication more likely to deceive the public than to inform it.”); see also *Friedman v. Rogers*, 440 U.S. 1, 13, 15–16 (1979); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 462–63 (1978).

Section 2(a), however, is a hodgepodge of restrictions. Among them is the bar on registration of a mark that “[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute.” Section 2(a) contains proscriptions against deceptive speech, for example, the prohibition on deceptive matter or the prohibition on falsely suggesting a connection with a person or institution. But other restrictions in § 2(a) differ in that they are based on the expressive nature of the content, such as the ban on marks that may disparage persons or are scandalous or immoral. These latter restrictions cannot be justified on the basis that they further the Lanham Act’s purpose in preventing consumers from being deceived. These exclusions from registration do not rest on any judgment that the mark is deceptive or likely to cause consumer confusion, nor do they protect the markholder’s investment in his mark. They deny the protections of registration for reasons quite separate from any ability of the mark to serve the consumer and investment interests underlying trademark protection. In fact, § 2(a)’s exclusions can undermine those interests because they can even be employed in cancellation proceedings challenging a mark many years after its issuance and after the markholder

has invested millions of dollars protecting its brand identity and consumers have come to rely on the mark as a brand identifier.

This case involves the disparagement provision of § 2(a).<sup>1</sup> Section 2(a)'s ban on the federal registration of "immoral" or "scandalous" marks originated in the trademark legislation of 1905. *See* Act of Feb. 20, 1905, ch. 592, § 5(a), 33 Stat. 724, 725. The provision barring registration based on disparagement first appeared in the Lanham Act in 1946. Pub. L. 79-489, § 2(a), 60 Stat. 427, 428 (codified at 15 U.S.C. § 1052(a)). It had no roots in the earlier trademark statute or the common law. There were few marks rejected under the disparagement provision following enactment of the Lanham Act. Only in the last several decades has the disparagement provision become a more frequent ground of rejection or cancellation of trademarks. Marks that the PTO has found to be disparaging include: REDSKINS, *Pro-Football, Inc. v. Blackhorse*, No. 1-14-CV-01043-GBL, 2015 WL 4096277 (E.D. Va. July 8, 2015) (2014 PTO cancellation determination currently on appeal in Fourth Circuit); STOP THE ISLAMISATION OF AMERICA, *In re Geller*, 751 F.3d

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<sup>1</sup> We limit our holding in this case to the constitutionality of the § 2(a) disparagement provision. Recognizing, however, that other portions of § 2 may likewise constitute government regulation of expression based on message, such as the exclusions of immoral or scandalous marks, we leave to future panels the consideration of the § 2 provisions other than the disparagement provision at issue here. To be clear, we overrule *In re McGinley*, 660 F.2d 481 (C.C.P.A. 1981), and other precedent insofar as they could be argued to prevent a future panel from considering the constitutionality of other portions of § 2 in light of the present decision.

1355 (Fed. Cir. 2014); THE CHRISTIAN PROSTITUTE (2013); AMISHHOMO (2013); MORMON WHISKEY (2012); KHORAN for wine, *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215 (T.T.A.B. Mar. 4, 2010); HAVE YOU HEARD THAT SATAN IS A REPUBLICAN? (2010); RIDE HARD RETARD (2009); ABORT THE REPUBLICANS (2009); HEEB, *In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071 (T.T.A.B. Nov. 26, 2008); SEX ROD, *Bos. Red Sox Baseball Club L.P. v. Sherman*, 88 U.S.P.Q.2d 1581 (T.T.A.B. Sept. 9, 2008) (sustaining an opposition on multiple grounds, including disparagement); MARRIAGE IS FOR FAGS (2008); DEMOCRATS SHOULDN'T BREED (2007); REPUBLICANS SHOULDN'T BREED (2007); 2 DYKE MINIMUM (2007); WET BAC/WET B.A.C. (2007); URBAN INJUN (2007); SQUAW VALLEY, *In re Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d 1264 (T.T.A.B. June 2, 2006); DON'T BE A WET BACK (2006); FAGDOG (2003); N.I.G.G.A. NATURALLY INTELLIGENT GOD GIFTED AFRICANS (1996); a mark depicting a defecating dog, *Greyhound Corp. v. Both Worlds, Inc.*, 6 U.S.P.Q.2d 1635 (T.T.A.B. Mar. 30, 1988) (found to disparage Greyhound's trademarked running dog logo); an image consisting of the national symbol of the Soviet Union with an "X" over it, *In re Anti-Communist World Freedom Cong., Inc.*, 161 U.S.P.Q. 304 (T.T.A.B. Feb. 24, 1969); DOUGH-BOY for "a prophylactic preparation for the prevention of venereal diseases," *Doughboy Indus., Inc. v. Reese Chem. Co.*, 88 U.S.P.Q. 227 (T.T.A.B. Jan. 25, 1951).

A disparaging mark is a mark which "dishonors by comparison with what is inferior, slights, deprecates, degrades, or affects or injures by unjust comparison." *Geller*, 751 F.3d at 1358 (alterations omitted). To determine if a mark is disparaging under § 2(a), a trademark examiner of the PTO considers:

- (1) What is the likely meaning of the matter in question, taking into account not only dictionary

definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services; and

(2) If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols, whether that meaning may be disparaging to a substantial composite of the referenced group.

Trademark Manual of Exam. Proc. (“TMEP”) § 1203.03(b)(i) (Jan. 2015 ed.) (citing *Geller*, 751 F.3d at 1358). If the examiner “make[s] a prima facie showing that a substantial composite, although not necessarily a majority, of the referenced group would find the proposed mark, as used on or in connection with the relevant goods or services, to be disparaging in the context of contemporary attitudes,” the burden shifts to the applicant for rebuttal. *Id.* If the applicant fails to rebut the prima facie case of disparagement, the examiner refuses to register the mark. The Trademark Manual of Examining Procedure does not require an examiner who finds a mark disparaging to consult her supervisor or take any further steps to ensure the provision is applied fairly and consistently across the agency. *Compare* TMEP § 1203.03 (no discussion of action to take if examiner finds mark disparaging), *with* TMEP § 1203.01 (requiring examiner who finds a mark scandalous or immoral to consult his supervisor). A single examiner, with no input from her supervisor, can reject a mark as disparaging by determining that it would be disparaging to a substantial composite of the referenced group.

## II. Facts of This Case

Mr. Tam is the “front man” for the Asian-American dance-rock band The Slants. Mr. Tam named his band The Slants to “reclaim” and “take ownership” of Asian stereotypes. J.A. 129–30. The band draws inspiration for

its lyrics from childhood slurs and mocking nursery rhymes, J.A. 130, and its albums include “The Yellow Album” and “Slanted Eyes, Slanted Hearts.” The band “feel[s] strongly that Asians should be proud of their cultural heri[ta]ge, and not be offended by stereotypical descriptions.” J.A. 52. With their lyrics, performances, and band name, Mr. Tam and his band weigh in on cultural and political discussions about race and society that are within the heartland of speech protected by the First Amendment.

On November 14, 2011, Mr. Tam filed the instant application (App. No. 85/472,044) seeking to register the mark THE SLANTS for “Entertainment in the nature of live performances by a musical band,” based on his use of the mark since 2006.<sup>2</sup> The examiner refused to register Mr. Tam’s mark, finding it likely disparaging to “persons of Asian descent” under § 2(a). The examiner found that the mark likely referred to people of Asian descent in a disparaging way, explaining that the term “slants” had “a long history of being used to deride and mock a physical feature” of people of Asian descent. J.A. 42. And even though Mr. Tam may have chosen the mark to “reappropriate the disparaging term,” the examiner found that a substantial composite of persons of Asian descent would find the term offensive. J.A. 43.

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<sup>2</sup> This is Mr. Tam’s second application for the mark THE SLANTS. In 2010, Mr. Tam filed App. No. 77/952,263 seeking to register the mark for “Entertainment, namely, live performances by a musical band.” The examiner found the mark disparaging to people of Asian descent under § 2(a) and therefore refused to register it. Mr. Tam appealed that refusal to the Board, but the case was dismissed for failure to file a brief.

The Board affirmed the examiner’s refusal to register the mark. The Board wrote that “it is abundantly clear from the record not only that THE SLANTS . . . would have the ‘likely meaning’ of people of Asian descent but also that such meaning has been so perceived and has prompted significant responses by prospective attendees or hosts of the band’s performances.” *In re Tam*, No. 85472044, 2013 WL 5498164, at \*5 (T.T.A.B. Sept. 26, 2013) (“Board Opinion”). To support its finding that the mark likely referred to people of Asian descent, the Board pointed to dictionary definitions, the band’s website, which displayed the mark next to “a depiction of an Asian woman, utilizing rising sun imagery and using a stylized dragon image,” and a statement by Mr. Tam that he selected the mark in order to “own” the stereotype it represents. *Id.* The Board also found that the mark is disparaging to a substantial component of people of Asian descent because “[t]he dictionary definitions, reference works and all other evidence unanimously categorize the word ‘slant,’ when meaning a person of Asian descent, as disparaging,” and because there was record evidence of individuals and groups in the Asian community objecting to Mr. Tam’s use of the word. *Id.* at \*7. The Board therefore disqualified the mark for registration under § 2(a).

Mr. Tam appealed, arguing that the Board erred in finding the mark disparaging and that § 2(a) is unconstitutional. On appeal, a panel of this Court affirmed the Board determination that the mark is disparaging.<sup>3</sup> *In re Tam*, 785 F.3d 567, 570–71 (Fed. Cir. 2015) (“Panel Opinion”), *reh’g en banc granted, opinion vacated*, 600 F. App’x 775 (Fed. Cir. 2015) (“En Banc Order”). Although the

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<sup>3</sup> We reinstate the panel’s holding that Mr. Tam’s mark is disparaging.

term “slants” has several meanings, the panel found that substantial evidence supported the Board’s finding that the mark likely refers to people of Asian descent. *Panel Op.* at 570–71. This included an article in which Mr. Tam described the genesis of the band’s name by explaining: “I was trying to think of things that people associate with Asians. Obviously, one of the first things people say is that we have slanted eyes. . . .” *Id.* at 570 (quoting J.A. 130). Moreover, the band’s Wikipedia page stated that the band’s name is “derived from an ethnic slur for Asians.” *Id.* (quoting J.A. 57). The Wikipedia entry quoted Mr. Tam: “We want to take on these stereotypes that people have about us, like the slanted eyes, and own them. We’re very proud of being Asian—we’re not going to hide that fact. The reaction from the Asian community has been positive.” J.A. 57. The record included an image from the band’s website in which the mark THE SLANTS is set against Asian imagery. *Id.* (citing J.A. 59). Finally, the record included un rebutted evidence that both individuals and Asian groups have perceived the term as referring to people of Asian descent. *Id.* at 570–71 (citing, e.g., J.A. 95 (“[Mr. Tam] was initially slated to give the keynote address at the 2009 Asian American Youth Leadership Conference in Portland. But some conference supporters and attendees felt the name of the band was offensive and racist, and out of respect for these opinions the conference organizers decided to choose someone less controversial.”)).

The panel also found that substantial evidence supported the Board’s finding that the mark is disparaging to a substantial composite of people of Asian descent. *Panel Op.* at 571. It noted that the definitions in evidence universally characterize the word “slant” as disparaging, offensive, or an ethnic slur when used to refer to a person of Asian descent, including the dictionary definitions provided by Mr. Tam. *Id.* The record also included a brochure published by the Japanese American Citizens



League describing the term “slant,” when used to refer to people of Asian descent, as a “derogatory term” that is “demeaning” and “cripple[s] the spirit.” *Id.* (quoting J.A. 48–49). Finally, the record included news articles and blog posts discussing the offensive nature of the band’s name. *Id.* (citing *Board Op.* at \*2–3; J.A. 45, 51, 94–98, 100).

Having found the mark disparaging under § 2(a), the panel held that binding precedent foreclosed Mr. Tam’s arguments that § 2(a) is unconstitutional, including Mr. Tam’s argument that § 2(a) violates the First Amendment on its face. *Panel Op.* at 572–73. As the panel explained, in *McGinley*, our predecessor court held that the refusal to register a mark under § 2(a) does not bar the applicant from using the mark, and therefore does not implicate the First Amendment. *Id.* at 572 (citing *In re McGinley*, 660 F.2d 481, 484 (C.C.P.A. 1981)). The entirety of the *McGinley* analysis was:

With respect to appellant’s First Amendment rights, it is clear that the PTO’s refusal to register appellant’s mark does not affect his right to use it. No conduct is proscribed, and no tangible form of expression is suppressed. Consequently, appellant’s First Amendment rights would not be abridged by the refusal to register his mark.

660 F.2d at 484 (citations omitted). In subsequent cases, panels of this Court relied on the holding in *McGinley*. See *In re Fox*, 702 F.3d 633, 635 (Fed. Cir. 2012); *In re Boulevard Entm’t, Inc.*, 334 F.3d 1336, 1343 (Fed. Cir. 2003); *In re Mavety Media Grp.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994). Additional views by the panel’s authoring judge questioned whether the en banc court should reconsider the constitutionality of § 2(a) en banc. *Panel Op.* at 573–85 (Moore, J., additional views).

More than thirty years have passed since the decision in *McGinley*, and in that time both the *McGinley* decision

and our reliance on it have been widely criticized.<sup>4</sup> *Id.* at 573–74. Furthermore, the *McGinley* analysis was cursor-

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<sup>4</sup> See, e.g., *Ritchie v. Simpson*, 170 F.3d 1092, 1103 & n.1 (Fed. Cir. 1999) (Newman, J., dissenting); *Pro-Football Inc. v. Harjo*, No. 99-1385 (CKK), 2000 WL 1923326, at \*4 (D.D.C. Dec. 11, 2000); Stephen Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 TRADEMARK REPORTER 661, 685–86 (1993); Justin G. Blankenship, *The Cancellation of Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words That Offend?*, 72 U. COLO. L. REV. 415, 443–44 (2001); Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355, 383 (1998); Bruce C. Kelber, “Scalping the Redskins:” *Can Trademark Law Start Athletic Teams Bearing Native American Nicknames and Images on the Road to Racial Reform?*, 17 HAMLINE L. REV. 533, 556 (1994); Paul Kukuruk, *Goaded a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States*, 34 PEPP. L. REV. 629, 662 n.209 (2007); Michelle B. Lee, *Section 2(a) of the Lanham Act as a Restriction on Sports Team Names: Has Political Correctness Gone Too Far?*, 4 SPORTS L.J. 65, 66–67 (1997); Jeffrey Lefstin, *Does the First Amendment Bar Cancellation of Redskins?*, 52 STAN. L. REV. 665, 676–77 (2000); Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1030 n.109 (1995); Ron Phillips, *A Case for Scandal and Immorality: Proposing Thin Protection of Controversial Trademarks*, 17 U. BALT. INTELL. PROP. L.J. 55, 67–68 (2008); Jendi Reiter, *Redskins and Scarlet Letters: Why “Immoral” and “Scandalous” Trademarks Should Be Federally Registrable*, 6 FED. CIR. BAR.

ry, without citation to legal authority, and decided at a time when the First Amendment had only recently been applied to commercial speech. *Id.* at 574, 581 (citing *Cent. Hudson*, 447 U.S. at 566). First Amendment jurisprudence on the unconstitutional conditions doctrine and the protection accorded to commercial speech has evolved significantly since the *McGinley* decision. *Id.* at 574; see also *id.* at 574–580 (describing evolution of commercial speech doctrine and unconstitutional conditions doctrine).

Other courts’ reliance on the reasoning in *McGinley* further reinforces the importance of taking this case en banc. Without analysis, the Fifth Circuit wrote that “[w]e join our sister circuit in rejecting [the applicant’s] argument that prohibiting him from registering a mark with the PTO violates his [F]irst [A]mendment rights.” *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 578 n.9 (5th Cir. 2005). And a district court in the Eastern District of Virginia relied upon *McGinley* when it concluded that the cancellation of trademark registrations under § 2(a) did not implicate the First Amendment. *Pro-Football, Inc.*, 2015 WL 4096277, at \*8–10 (“[T]he Court agrees with the Federal Circuit and Fifth Circuit and holds that Section 2(a) of the Lanham Act does not implicate the First Amendment.”).

For these reasons, we sua sponte ordered rehearing en banc. We asked the parties to file briefs on the following issue:

Does the bar on registration of disparaging marks in 15 U.S.C. § 1052(a) violate the First Amendment?

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J. 191, 197 (1996); Lilit Voskanyan, *The Trademark Principal Register as a Nonpublic Forum*, 75 U. CHI. L. REV. 1295, 1302 (2008).

*En Banc Order* at 775. In addition to the parties' briefs, we received ten amicus briefs. We heard oral argument on October 2, 2015.

## DISCUSSION

### I. Section 2(a)'s Denial of Important Legal Rights to Private Speech Based on Disapproval of the Message Conveyed Is Subject to, and Cannot Survive, Strict Scrutiny

Strict scrutiny is used to review any governmental regulation that burdens private speech based on disapproval of the message conveyed. Section 2(a), which denies important legal rights to private speech on that basis, is such a regulation. It is therefore subject to strict scrutiny. It is undisputed that it cannot survive strict scrutiny.

#### A. The Disparagement Provision, Which Discriminates Based on Disapproval of the Message, Is Not Content or Viewpoint Neutral

"Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *see also Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). A message is content based even when its reach is defined simply by the topic (subject matter) of the covered speech. *See Reed*, 135 S. Ct. at 2230.

Viewpoint-based regulations, targeting the substance of the viewpoint expressed, are even more suspect. They are recognized as a particularly “egregious form of content discrimination,” *id.*, though they have sometimes been discussed without being cleanly separated from topic discrimination, *see, e.g., Mosley*, 408 U.S. at 95. Such measures “raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.” *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). “The First Amendment requires heightened scrutiny whenever the government creates ‘a regulation of speech because of disagreement with the message it conveys.’” *Sorrell*, 131 S. Ct. at 2664 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). This is true whether the regulation bans or merely burdens speech. “[H]eightedened judicial scrutiny is warranted” when an act “is designed to impose a specific, content-based burden on protected expression.” *Id.*; *see also Rosenberger*, 515 U.S. at 828 (“[T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.”). “The distinction between laws burdening and laws banning speech is but a matter of degree. The Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 812 (2000). “Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.” *Sorrell*, 131 S. Ct. at 2664; *see also infra* at 27–38.

It is beyond dispute that § 2(a) discriminates on the basis of content in the sense that it “applies to particular speech because of the topic discussed.” *Reed*, 135 S. Ct. at 2227. Section 2(a) prevents the registration of disparag-

ing marks—it cannot reasonably be argued that this is not a content-based restriction or that it is a content-neutral regulation of speech. And the test for disparagement—whether a substantial composite of the referenced group would find the mark disparaging—makes clear that it is the nature of the message conveyed by the speech which is being regulated. If the mark is found disparaging by the referenced group, it is denied registration. “Listeners’ reaction to speech is not a content-neutral basis for regulation.” *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

And § 2(a) does more than discriminate on the basis of topic. It also discriminates on the basis of message conveyed, “the idea or message expressed,” *Reed*, 135 S. Ct. at 2227; it targets “viewpoints [in] the marketplace,” *Simon & Schuster*, 502 U.S. at 116. It does so as a matter of avowed and undeniable purpose, and it does so on its face.<sup>5</sup>

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<sup>5</sup> Both parties agree that this appeal is appropriately viewed as involving a facial challenge. A law is facially invalid if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal quotation marks omitted). In other words, to succeed in his facial challenge, Mr. Tam must “demonstrate a substantial risk that application of the provision will lead to the suppression of speech.” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). The marks refused registration under the disparagement provision are protected speech. And the government refused to register all of these marks because it found they convey a disparaging message. More than a “substantial number” of § 2(a)’s applications of the disparagement provision rest

First, the government enacted and continues to defend § 2(a) “because of disagreement with the message [disparaging marks] convey[.]” *Sorrell*, 131 S. Ct. at 2664. When the government refuses to register a mark under § 2(a), it does so because it disapproves of “the message a speaker conveys” by the mark. *Reed*, 135 S. Ct. at 2227. Underscoring its hostility to these messages, the government repeatedly asserts in its briefing before this court that it ought to be able to prevent the registration of “the most vile racial epithets and images,” Appellee’s En Banc Br. 1, and “to dissociate itself from speech it finds odious,” *id.* 41. The legislative history of § 2(a) reinforces this conclusion. See Hearings on H.R. 4744 Before the Subcomm. on Trademarks of the House Comm. on Patents, 76th Cong., 1st Sess. 18–21 (1939) (statement of Rep. Thomas E. Robertson) (Rep. Maroney) (“[W]e would not want to have Abraham Lincoln gin.”); *id.* (Rep. Rogers) (stating that a mark like “Abraham Lincoln gin ought not to be used,” and that § 2(a) “would take care of [such] abuses”). From its enactment in 1946 through its defense of the statute today, the government has argued that the prohibited marks ought not to be registered because of the messages the marks convey. When the government

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on disapproval of the expressive message conveyed—every rejection under the disparagement provision is a message-based denial of otherwise-available legal rights. Thus, we conclude that § 2(a) is invalid on its face. That conclusion follows from the standards for First Amendment facial invalidation and also fits the rationale for those standards: it avoids maintaining on the books a rule that called for case-by-case litigation over particular marks, based on speakers’ intent and government interests or other factors, which would threaten to produce the very chilling effect that First Amendment facial-invalidity standards condemn.



discriminates against speech because it disapproves of the message conveyed by the speech, it discriminates on the basis of viewpoint. *Sorrell*, 131 S. Ct. at 2664.

The legal significance of viewpoint discrimination is the same whether the government disapproves of the message or claims that some part of the populace will disapprove of the message. This point is recognized in the Supreme Court’s long-standing condemnation of government impositions on speech based on adverse reactions among the public. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011); *R.A.V.*, 505 U.S. 377; *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Second, the disparagement provision at issue is viewpoint discriminatory on its face. The PTO rejects marks under § 2(a) when it finds the marks refer to a group in a negative way, but it permits the registration of marks that refer to a group in a positive, non-disparaging manner. In this case the PTO refused to register Mr. Tam’s mark because it found the mark “disparaging” and “objectionable” to people of Asian descent. *Tam*, 2013 WL 5498164, at \*6. But the PTO has registered marks that refer positively to people of Asian descent. *See, e.g., CELEBRASIANS, ASIAN EFFICIENCY*. Similarly, the PTO has prohibited the registration of marks that it found disparaged other groups. *See, e.g., Pro-Football*, 2015 WL 4096277 (affirming cancellation of REDSKINS); *Geller*, 751 F.3d 1355 (affirming rejection of STOP THE ISLAMISATION OF AMERICA); *Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215 (refusing to register KHORAN for wine); *Heeb Media*, 89 U.S.P.Q.2d 1071 (refusing to register HEEB); *Squaw Valley Dev. Co.*, 80 U.S.P.Q.2d 1264 (refusing to register SQUAW VALLEY for one class of goods, but registering it for another). Yet the government registers marks that refer to particular ethnic groups or religions in positive or neutral ways—for example, NAACP, THINK ISLAM, NEW MUSLIM COOL,

MORMON SAVINGS, JEWISHSTAR, and PROUD 2 B CATHOLIC.

The government argues that § 2(a) is viewpoint neutral because it does not eliminate any particular viewpoint—only particular words. Appellee’s En Banc Br. 39–40. It argues that under § 2(a), two marks with diametrically opposed viewpoints will both be refused, so long as those marks use the same disparaging term. *Id.* 39–40. It points to Mr. Tam—who does not seek to express an anti-Asian viewpoint—as proof. It cites a statement in *R.A.V.* that a hypothetical statute that prohibited “odious racial epithets . . . to proponents of all views” would not be viewpoint discriminatory. *Id.* 40 (quoting 505 U.S. at 391); see also *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 90–91 (1st Cir. 2004) (holding that “guidelines prohibiting demeaning or disparaging ads are themselves viewpoint neutral”).

The *R.A.V.* statement does not apply here. The government’s starting point—that it rejects marks conveying diametrically opposed viewpoints, if they contain the same offensive word—is incorrect. The PTO looks at what message the referenced group takes from the applicant’s mark in the context of the applicant’s use, and it denies registration only if the message received is a negative one. Thus, an applicant can register a mark if he shows it is perceived by the referenced group in a positive way, even if the mark contains language that would be offensive in another context. For example, the PTO registered the mark DYKES ON BIKES, U.S. Reg. No. 3,323,803, after the applicant showed the term was often enough used with pride among the relevant population. In *Squaw Valley*, the Board allowed the registration of the mark SQUAW VALLEY in connection with one of the applied-for classes of goods (namely, skiing-related products), but not in connection with a different class of goods. 80 U.S.P.Q.2d at \*22. Section 2(a) does not treat identical marks the same. A mark that is viewed by a substantial

composite of the referenced group as disparaging is rejected. It is thus the viewpoint of the message conveyed which causes the government to burden the speech. This form of regulation cannot reasonably be argued to be content neutral or viewpoint neutral.

The government's argument also fails because denial of registration under § 2(a) turns on the referenced group's perception of a mark. Speech that is offensive or hostile to a particular group conveys a distinct viewpoint from speech that carries a positive message about the group. STOP THE ISLAMISATION OF AMERICA and THINK ISLAM express two different viewpoints. Under § 2(a), one of these viewpoints garners the benefits of registration, and one does not. The government enacted § 2(a), and defends it today, because it is hostile to the messages conveyed by the refused marks. Section 2(a) is a viewpoint-discriminatory regulation of speech, created and applied in order to stifle the use of certain disfavored messages. Strict scrutiny therefore governs its First Amendment assessment—and no argument has been made that the measure survives such scrutiny.

B. The Disparagement Provision Regulates the Expressive Aspects of the Mark, Not Its Function As Commercial Speech

The government cannot escape strict scrutiny by arguing that § 2(a) regulates commercial speech. True, trademarks identify the source of a product or service, and therefore play a role in the “dissemination of information as to who is producing and selling what product, for what reason, and at what price.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). But they very commonly do much more than that. And, critically, it is always a mark's expressive character, not its ability to serve as a source identifier, that is the basis for the disparagement exclusion from registration. The disparagement provision

must be assessed under First Amendment standards applicable to what it targets, which is not the commercial-speech function of the mark.

This case exemplifies how marks often have an expressive aspect over and above their commercial-speech aspect. Mr. Tam explicitly selected his mark to create a dialogue on controversial political and social issues. With his band name, Mr. Tam makes a statement about racial and ethnic identity. He seeks to shift the meaning of, and thereby reclaim, an emotionally charged word. He advocates for social change and challenges perceptions of people of Asian descent. His band name pushes people. It offends. Despite this—indeed, because of it—Mr. Tam’s band name is expressive speech.

Importantly, *every time* the PTO refuses to register a mark under § 2(a), it does so because it believes the mark conveys an expressive message—a message that is disparaging to certain groups. STOP THE ISLAMISATION OF AMERICA is expressive. In refusing to register the mark, the Board explained that the “mark’s admonition to ‘STOP’ Islamisation in America ‘sets a negative tone and signals that Islamization is undesirable and is something that must be brought to an end in America.’” *Geller*, 751 F.3d at 1361. And by finding HEEB and SQUAW VALLEY disparaging, the PTO necessarily did so based on its finding that the marks convey an expressive message over and above their function as source identifiers—namely, an expressive message disparaging Jewish and Native American people. It was these expressive messages that the government found objectionable, and that led the government to refuse to register or to cancel the marks. In doing so, the government made moral judgments based solely and indisputably on the marks’ expressive content. Every single time registration is refused or cancelled pursuant to the disparagement provision, it is based upon a determination by the government that the expressive content of the message is unsuitable because it

would be viewed by the referenced group as disparaging them.

“Commercial speech is no exception” to the need for heightened scrutiny of content-based impositions seeking to curtail the communication of particular information or messages. *Sorrell*, 131 S. Ct. at 2664. Indeed, “[a] consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.” *Id.* (internal quotation marks omitted). Strict scrutiny must apply to a government regulation that is directed at the expressive component of speech. That the speech is used in commerce or has a commercial component should not change the inquiry when the government regulation is entirely directed to the expressive component of the speech. This is not a government regulation aimed at the commercial component of speech. *See Va. State Bd. of Pharmacy*, 425 U.S. at 765 (commercial speech involves the “dissemination of information as to who is producing and selling what product, for what reason, and at what price”); *see id.* at 762 (defining “commercial speech” as speech that does “no more than propose a commercial transaction”); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993).

In *R.A.V.*, the Supreme Court explained the key point: under First Amendment law, government measures often affect speech that has a dual character, and when they do, which First Amendment standard is applicable depends on which aspect of the speech is targeted by the measure being reviewed. *See* 505 U.S. at 385 (“The proposition that a particular instance of speech can be proscribable on the basis of one feature (*e.g.*, obscenity) but not on the basis of another (*e.g.*, opposition to the city government) is commonplace and has found application in many contexts.”). In particular, commercial speech that is “inextricably intertwined” with expressive speech is treated as

expressive speech under the First Amendment when the expressive aspect is being regulated. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). Here, § 2(a) targets speech that is of “public concern,” because it “can be fairly considered as relating to any matter of political, social, or other concern to the community.” *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (internal quotation marks omitted). It therefore “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Id.* at 452 (internal quotation marks omitted).

Because § 2(a) discriminates on the basis of the content of the message conveyed by the speech, it follows that it is presumptively invalid, and must satisfy strict scrutiny to be found constitutional. “In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory.” *Sorrell*, 131 S. Ct. at 2667. The government here does not even argue that § 2(a) satisfies strict scrutiny.

## II. Section 2(a) Is Not Saved From Strict Scrutiny Because It Bans No Speech or By Government-Speech or Government-Subsidy Doctrines

Faced with the daunting prospect of defending a content- and viewpoint-discriminatory regulation of speech, the government argues that § 2(a) does not implicate the First Amendment at all. First, the government suggests that § 2(a) is immune from First Amendment scrutiny because it prohibits no speech, but leaves Mr. Tam free to name his band as he wishes and use this name in commerce. Second, the government suggests that trademark registration is government speech, and thus the government can grant and reject trademark registrations without implicating the First Amendment. Finally, the government argues that § 2(a) merely withholds a government subsidy for Mr. Tam’s speech and is valid as a

permissible definition of a government subsidy program. We reject each of the government's arguments.

A. Strict Scrutiny Applies to § 2(a), Which Significantly Chills Private Speech on Discriminatory Grounds, Though It Does Not Ban Speech

The government argues that § 2(a) does not implicate the First Amendment because it does not prohibit any speech. Appellee's En Banc Br. 17. The government's argument is essentially the same as that of our predecessor court in *McGinley*: "it is clear that the PTO's refusal to register appellant's mark does not affect his right to use it. No conduct is proscribed, and no tangible form of expression is suppressed." 660 F.2d at 484 (citations omitted). But the First Amendment's standards, including those broadly invalidating message discrimination, are not limited to such prohibitions. See *Pitt News v. Pappert*, 379 F.3d 96, 111–12 (3d Cir. 2004) (Alito, J.) ("The threat to the First Amendment arises from the imposition of financial burdens that may have the effect of influencing or suppressing speech, and whether those burdens take the form of taxes or some other form is unimportant.").

The point has been recognized in various doctrinal settings. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (internal quotation marks and alterations omitted). This premise—that denial of a benefit would chill exercise of the constitutional right—undergirds every unconstitutional conditions doctrine case, discussed *infra*. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("It is settled that speech can be effectively limited by the exercise of the taxing power. To deny an exemption to claimants who

engage in certain forms of speech is in effect to penalize them for such speech.” (citation omitted)); *Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996) (loss of a valuable benefit “in retaliation for speech may chill speech on matters of public concern”); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001); *Rosenberger*, 515 U.S. at 835 (explaining that “[v]ital First Amendment speech principles are at stake here,” including danger arising “from the chilling of individual thought and expression”).

The general principle is clear: “Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.” *Sorrell*, 131 S. Ct. at 2664. “[T]he government’s ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.” *Simon & Schuster*, 502 U.S. at 116. A law may burden speech even when it does so indirectly. In *Sorrell*, the challenged statute did not directly ban speech, but rather forbade certain pharmaceutical marketing executives from obtaining and using information that could help them market their products more effectively. 131 S. Ct. at 2659–60. The Court found that the state “ha[d] burdened a form of protected expression,” while leaving “unburdened those speakers whose messages are in accord with its own views.” *Id.* at 2672.

Here, too, § 2(a) burdens some speakers and benefits others. And while it is true that a trademark owner may use its mark in commerce even without federal registration, it has been widely recognized that federal trademark registration bestows *truly* significant and financially valuable benefits upon markholders. *B&B Hardware*, 135 S. Ct. at 1300; *Park ’N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 199–200 (1985) (valuable new rights were created by the Lanham Act); *McCarthy* at § 19:9, :11 (“Registration of a mark on the federal Principal Register confers a number of procedural and substantive legal



advantages over reliance on common law rights. . . . Registration on the Principal Register should be attempted if it is at all possible.”); McCarthy at § 2:14 (“Businesspeople regard trademarks as valuable assets and are willing to pay large sums to buy or license a well-known mark.”); Lee Ann W. Lockridge, *Abolishing State Trademark Registrations*, 29 Cardozo Arts & Ent. L.J. 597, 605 (2011) (“[T]he incentives to pursue federal registration. . . are now so significant as to make federal registration indispensable for any owner making an informed decision about its trademark rights. A federal registration is the only rational choice.”); Susan M. Richey, *The Second Kind of Sin: Making the Case for a Duty to Disclose Facts Related to Genericism and Functionality in the Trademark Office*, 67 Wash. & Lee L. Rev. 137, 174 (2010) (“Federal registration has evolved into a powerful tool for trademark holders . . . .”); Patricia Kimball Fletcher, *Joint Registration of Trademarks and the Economic Value of a Trademark System*, 36 U. Miami L. Rev. 297, 298–99 (1982) (“Federal registration under the Lanham Act is advantageous, however, because it increases the owner’s legal rights in the mark, making the mark itself more valuable. Thus, trademark owners have significant legal and economic interests in obtaining federal registration of trademarks.”).

Denial of these benefits creates a serious disincentive to adopt a mark which the government may deem offensive or disparaging. Br. of Amici Curiae ACLU 12 (“If a group fears that its chosen name will be denied federal trademark protection by the government’s invocation of Section 2(a), it will be less likely to adopt the name, at least in part because the associative value of the trademark itself is lessened when it is unlikely that a group will be the exclusive holder of that mark.”); Br. of Amicus Curiae Pro-Football, Inc. 15 (“Section 2(a) certainly works to chill speech . . . . Through it, the Government uses threatened denial of registration to encourage potential

registrants not to use ‘disparaging’ names. Faced with the possibility of being denied a registration—or worse, cancellation after years of investment-backed brand development—new brand owners are more likely to avoid brand names that may be arguably controversial for fear of later being deemed ‘disparaging.’”); Br. of Amicus Curiae First Amendment Lawyers Ass’n 7 (“Individuals and businesses refrain from using certain terms as trademarks for fear the PTO might see the terms as immoral, scandalous, or derogatory, in violation of section 2(a). Such self-censorship narrows the spectrum of speech in the public marketplace.”); Br. of Amici Curiae Rutherford Inst. 12 (“Denial of registration indisputably has the effect of placing applicants at a legal and financial disadvantage.”); Jeffrey Lefstin, *Does the First Amendment Bar Cancellation of Redskins?*, 52 Stan. L. Rev. 665, 678 (2000) (“[I]t is clear that section 2(a) of the Lanham Act, by denying the valuable registration right to scandalous or disparaging trademarks, imposes a financial disincentive to the use of such marks in commercial communication.”); Michelle B. Lee, *Section 2(a) of the Lanham Act as a Restriction on Sports Team Names: Has Political Correctness Gone Too Far?*, 4 Sports L.J. 65, 69 (1997) (“Use [of disparaging marks] is discouraged by cancellation of registration by a loss of the benefits that go along with it. These benefits go well beyond those granted by the common law, and a loss of them will remove advantages which make the property more valuable.”).

For those reasons, the § 2(a) bar on registration creates a strong disincentive to choose a “disparaging” mark. And that disincentive is not cabined to a clearly understandable range of expressions. The statute extends the uncertainty to marks that “may disparage.” 15 U.S.C. § 1052(a). The uncertainty as to what *might be deemed*

disparaging is not only evident on its face, given the subjective-reaction element and shifting usages in different parts of society.<sup>6</sup> It is confirmed by the record of PTO grants and denials over the years, from which the public would have a hard time drawing much reliable guidance.<sup>7</sup>

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<sup>6</sup> In 1939, the Assistant Commissioner of Patents testified during congressional hearings on the Lanham Act that “it is always going to be just a matter of the personal opinion of the individual parties as to whether they think it is disparaging.” See Hearings on H.R. 4744 Before the Subcomm. on Trademarks of the House Comm. on Patents, 76th Cong., 1st Sess. 18–21 (1939) (statement of Leslie Frazer, Assistant Comm’r of Patents) (Mr. Frazer). And further interpretation has helped little. The definition of a disparaging mark—a mark that “dishonors by comparison with what is inferior, slights, deprecates, degrades, or affects or injures by unjust comparison”—provides little clarity. *Geller*, 751 F.3d at 1358 (alterations omitted). In *In re In Over Our Heads*, the PTO admitted that “[t]he guidelines for determining whether a mark is scandalous or disparaging are somewhat vague and the determination of whether a mark is scandalous or disparaging is necessarily a highly subjective one.” No. 755,278, 1990 WL 354546, at \*1 (T.T.A.B. 1990) (alterations and quotation marks omitted).

<sup>7</sup> The PTO’s record of trademark registrations and denials often appears arbitrary and is rife with inconsistency. The PTO denied the mark HAVE YOU HEARD SATAN IS A REPUBLICAN because it disparaged the Republican Party, App. Ser. No. 85/077647, but did not find the mark THE DEVIL IS A DEMOCRAT disparaging, App. Ser. No. 85/525,066 (abandoned after publication for other reasons). The PTO registered the mark FAGDOG three times and refused it twice, at least once

Such uncertainty of speech-affecting standards has long been recognized as a First Amendment problem, *e.g.*, in the overbreadth doctrine. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973). It has also been recognized as a problem under Fifth Amendment vagueness standards as they have been specially applied in the First Amendment setting.<sup>8</sup> All we need say about the uncer-

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as disparaging. *Compare* Reg. Nos. 2,926,775; 2,828,396; and 3,174,475, *with* App. Ser. Nos. 76/454,927 and 75/950,535. The PTO refused to register the marks FAG FOREVER A GENIUS!, App. Ser. No. 86/089,512, and MARRIAGE IS FOR FAGS, App. Ser. No. 77/477,549, but allowed the mark F\*A\*G FABULOUS AND GAY, Reg. No. 2,997,761 (abandoned after publication for other reasons). And PTO examiners have registered DANGEROUS NEGRO, CELEBRETARDS, STINKY GRINGO, MIDGET-MAN, and OFF-WHITE TRASH—all marks that could be offensive to a substantial composite of the referenced group. We see no rationale for the PTO's seemingly arbitrary registration decisions, let alone one that would give applicants much guidance.

<sup>8</sup> A vague law that regulates speech on the basis of message “raises special First Amendment concerns because of its obvious chilling effect on free speech.” *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997). Thus, if a “law interferes with the right of free speech or of association, a more stringent vagueness test should apply.” *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). The Supreme Court reiterated these principles just three years ago:

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is re-

tainty here, however, is that it contributes significantly to the chilling effect on speech.

The disincentive to choose a particular mark extends to any mark that could require the expenditure of substantial resources in litigating to obtain registration in the first place. And the disincentive does not stop there, because the disparagement determination is not a one-time matter. Even if an applicant obtains a registration initially, the mark may be challenged in a cancellation proceeding years later. Thus, after years of investment in promoting a registered mark and coming to be known by it, a mark's owner may have to (re)litigate its character under § 2(a) and might lose the registration. This effectively forces the mark's owner to find a new mark and make substantial new investments in educating the public that the products known by the old mark are now known by the new mark and, more generally, in establishing recognition of the new mark. The "disparagement" standard steers applicants away from choosing a mark that might result in these problems any time in the future.

Not surprisingly, "those who are denied registration under Section 2(a) often abandon the denied application

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quired of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *See Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

*F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317–18 (2012).

and file a new one, indicating that they have changed their name rather than bear the costs of using a ‘disparaging’ mark or challenge the PTO’s determination.” Br. of Amicus Curiae Pro-Football, Inc. 15. In many cases, as soon as a trademark examiner issues a rejection based upon disparagement, the applicant immediately abandons the trademark application. *See, e.g.*, AMISHHOMO (abandoned 2013); MORMON WHISKEY (abandoned 2012); HAVE YOU HEARD THAT SATAN IS A REPUBLICAN? (abandoned 2010); DEMOCRATS SHOULDN’T BREED (abandoned 2008); REPUBLICANS SHOULDN’T BREED (abandoned 2008); 2 DYKE MINIMUM (abandoned 2007); WET BAC/WET B.A.C. (abandoned 2007); DON’T BE A WET BACK (abandoned 2006); FAGDOG (abandoned 2003).

The importance of the benefits of federal trademark registration explains the strength of the incentive to avoid marks that are vulnerable under § 2(a). For example, the holder of a federally registered trademark has a right to exclusive nationwide use of that mark anywhere there is not already a prior use that proceeds registration. *See* 15 U.S.C. §§ 1072, 1115. In the absence of federal registration, if a trademark owner has any common law rights, they are “limited to the territory in which the mark is known and recognized by those in the defined group of potential customers.” McCarthy at § 26:2. Without the recognition of nationwide constructive use conferred by federal registration, a competitor can swoop in and adopt the same mark for the same goods in a different location. Without federal registration, the applicant does not have prima facie evidence of the mark’s validity or its ownership or exclusive use of the mark. 15 U.S.C. § 1057(b). And a common law trademark can never become incontestable. *Id.* § 1065. Without federal registration, a trademark user cannot stop importation of goods bearing the mark, or recover treble damages for willful infringe-

ment. *Id.* §§ 1117, 1124. The common law provides no rights like these.

Contrary to the suggestion by the government, Mr. Tam is likely also barred from registering his mark in nearly every state. Three years after the enactment of the Lanham Act, the United States Trademark Association prepared the Model State Trademark Act—a bill patterned on the Lanham Act in many respects. McCarthy at § 22:5. The Model Act contains language barring a mark from registration if it “consists of or comprises matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” 1964 Model State Trademark Act, § 2. Following the lead of the federal government, virtually all states have adopted the Model Act and its disparagement provision. McCarthy at § 22:5. Thus, not only are the benefits of federal registration unavailable to Mr. Tam, so too are the benefits of trademark registration in nearly all states.<sup>9</sup>

The government argues that the denial of Mr. Tam’s registration “does not eliminate any common-law rights that might exist in [his] mark.” Appellee’s En Banc Br. 20. But as the government’s use of “might” indicates, it is unclear whether Mr. Tam could actually enforce any common law rights to a disparaging mark.<sup>10</sup> The 1964

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<sup>9</sup> And even if Mr. Tam could register his mark in a state, the benefits of state registration are limited by the boundaries of the individual state or the geographic scope of the actual use of the mark within the state. They are by no means the nationwide benefits afforded to federally registered trademarks.

<sup>10</sup> Not surprisingly, holders of disparaging marks like Mr. Tam have not argued that they lack these common law rights on account of their marks not being regis-

Model State Trademark Act, which most states have adopted, provides that “[n]othing herein shall adversely affect the rights or the enforcement of rights in marks acquired in good faith at any time at common law.” § 14. However, the term “mark” is defined as “any trademark or service mark *entitled* to registration under this Act whether registered or not.” § 1.C (emphasis added). Common law rights to a mark may thus be limited to marks “entitled to registration.” Whether a user of an unregistrable, disparaging mark has any enforceable common law rights is at best unclear. See Justin G. Blankenship, *The Cancellation of Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words That Offend?*, 72 U. Colo. L. Rev. 415, 451 (2001) (“[A]ny mark that is canceled under section 2(a) of the Lanham Act for being scandalous or disparaging is unlikely to find much protection under common law principles either, although this will ultimately be determined by state courts applying their own common law principles.”); Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(A) Trademark Law After Lawrence v. Texas*, 9 Marq. Intell. Prop. L. Rev. 187, 232 (2005) (“[A]s immoral, scandalous, and/or disparaging marks may not be registered under either state or federal law, nor do they enjoy common law protection, there appears to be no way of establishing a legally recognized property right in these marks.”); Stephen Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 TRADEMARK REPORTER 661, 795 (1993) (disparaging marks are presumably “unprotect[a]ble pursuant to state common law”). The Restatement (Third) of Unfair Competition notes that

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trable. They have little incentive to give this argument away.



the Lanham Act and the Model State Trademark Bill both prohibit registration of disparaging marks and that adoption and use of such marks may preclude enforcement under the common law doctrine of unclean hands. Restatement (Third) of Unfair Competition § 32 cmt. c (1995). The government has not pointed to a single case where the common-law holder of a disparaging mark was able to enforce that mark, nor could we find one. The government’s suggestion that Mr. Tam has common-law rights to his mark appears illusory.<sup>11</sup>

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<sup>11</sup> The government also argues that Mr. Tam “may” have rights under 15 U.S.C. § 1125(a) (“Section 43(a)”). First, those rights would not include the benefits afforded to federally registered marks. Furthermore, it is not at all clear that Mr. Tam could bring a § 43(a) unfair competition claim. Section 43(a) allows for a federal suit to protect an unregistered trademark, much like state common law. But there is no authority extending § 43(a) to marks denied under § 2(a)’s disparagement provision. To the contrary, courts have suggested that § 43(a) is only available for marks that are registrable under § 2. *See Two Pesos*, 505 U.S. at 768 (section 43(a) “protects qualifying unregistered trademarks and . . . the general principles qualifying a mark for registration under § 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection under § 43(a)”); *Yarmuth-Dion, Inc. v. D’ion Furs, Inc.*, 835 F.2d 990, 992 (2d Cir. 1987) (requiring a plaintiff to “demonstrate that his [unregistered] mark merits protection under the Lanham Act”); *see also Renna v. Cty. of Union*, 88 F. Supp. 3d 310, 320 (D.N.J. 2014) (“Section 2 declares certain marks to be unregistrable because they are inappropriate subjects for trademark protection. It follows that such unregistrable marks, not actionable as

Whether Mr. Tam has enforceable common-law rights to his mark or could bring suit under § 43(a) does not change our conclusion. Federal trademark registration brings with it valuable substantive and procedural rights unavailable in the absence of registration. These benefits are denied to anyone whose trademark expresses a message that the government finds disparages any group, Mr. Tam included. The loss of these rights, standing alone, is enough for us to conclude that § 2(a) has a chilling effect on speech. Denial of federal trademark registration on the basis of the government's disapproval of the message conveyed by certain trademarks violates the guarantees of the First Amendment.

#### B. Trademark Registration Is Not Government Speech

The government suggests, and several amici argue, that trademark registration is government speech, and as such outside the coverage of the First Amendment. *See* Appellee's En Banc Br. 41–42; Br. of Amici Curiae Nat'l Asian Pacific Am. Bar Ass'n 19–22; Br. of Amici Curiae Blackhorse 13–23. “The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Although we find it difficult to understand the government's precise position as to how trademark registration constitutes government speech, we conclude that there is no government speech at issue in the rejection of disparaging trademark registrations that would insulate § 2(a) from First Amendment review.

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registered marks under Section 32, are not actionable under Section 43, either.”). And we have found no case allowing a § 43(a) action on a mark rejected or cancelled under § 2(a).

Wisely, the government does not argue that a markholder's use or enforcement of its federally registered trademark is government speech. Use of a mark by its owner is clearly private speech. Trademarks identify the source of a product, and are often closely associated with the actual product. A mark's purpose—to identify the source of goods—is antithetical to the notion that a trademark is tied to the government. The fact that COCA COLA and PEPSI may be registered trademarks does not mean the government has endorsed these brands of cola, or prefers them over other brands. We see no reason that a markholder's use of its mark constitutes government speech.

Instead, the government appears to argue that trademark registration and the accoutrements of registration—such as the registrant's right to attach the ® symbol to the registered mark, the mark's placement on the Principal Register, and the issuance of a certificate of registration—amount to government speech. *See* Oral Argument at 52:40–53:07; 54:20–54:32. This argument is meritless. Trademark registration is a regulatory activity. These manifestations of government registration do not convert the underlying speech to government speech. And if they do, then copyright registration would likewise amount to government speech. Copyright registration has identical accoutrements—the registrant can attach the © symbol to its work, registered copyrights are listed in a government database, and the copyright owner receives a certificate of registration. The logical extension of the government's argument is that these indicia of registration convert the underlying speech into government speech unprotected by the First Amendment. Thus, the government would be free, under this logic, to prohibit the copyright registration of any work deemed immoral, scandalous, or disparaging to others. This sort of censorship is not consistent with the First Amendment or government speech jurisprudence.

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Supreme Court detailed the indicia of government speech. 135 S. Ct. 2239 (2015). The Court concluded that specialty license plates were government speech, even though a state law allowed individuals, organizations, and nonprofit groups to request certain designs. The Court found several considerations weighing in favor of this holding. It emphasized that “the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States.” *Id.* at 2248. It stressed that “[t]he State places the name ‘TEXAS’ in large letters at the top of every plate,” that “the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State,” that “Texas also owns the designs on its license plates,” and that “Texas dictates the manner in which drivers may dispose of unused plates.” *Id.* As a consequence, the Court reasoned, “Texas license plate designs ‘are often closely identified in the public mind with the State.’” *Id.* (quoting *Summum*, 555 U.S. at 472 (alteration omitted)). Amidst all of its other aspects of control, moreover, “Texas maintains direct control over the messages conveyed on its specialty plates.” *Id.* at 2249. “Indeed, a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message.” *Id.*

The government’s argument in this case that trademark registration amounts to government speech is at odds with the Supreme Court’s analysis in *Walker* and unmoored from the very concept of government speech. When the government registers a trademark, the only message it conveys is that a mark is registered. The vast array of private trademarks are not created by the government, owned or monopolized by the government, sized and formatted by the government, immediately understood as performing any government function (like

unique, visible vehicle identification), aligned with the government, or (putting aside any specific government-secured trademarks) used as a platform for government speech. There is simply no meaningful basis for finding that consumers associate registered private trademarks with the government.

Indeed, the PTO routinely registers marks that no one can say the government endorses. *See, e.g.*, RADICALLY FOLLOWING CHRIST IN MISSION TOGETHER, U.S. Reg. No. 4,759,522; THINK ISLAM, U.S. Reg. No. 4,719,002 (religious marks); GANJA UNIVERSITY, U.S. Reg. No. 4,070,160 (drug-related); CAPITALISM SUCKS DONKEY BALLS, U.S. Reg. No. 4,744,351; TAKE YO PANTIES OFF, U.S. Reg. No. 4,824,028; and MURDER 4 HIRE, U.S. Reg. No. 3,605,862. As the government itself explains, “the USPTO does not endorse any particular product, service, mark, or registrant” when it registers a mark. Appellee’s En Banc Br. 44. For decades, the government has maintained that:

[J]ust as the issuance of a trademark registration by this Office does not amount to government endorsement of the quality of the goods to which the mark is applied, the act of registration is not a government imprimatur or pronouncement that the mark is a “good” one in an aesthetic, or any analogous, sense.

*In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d 1216, 1219–20 n.3 (T.T.A.B. Mar. 3, 1993); *see also* McCarthy at § 19:3.50 (“[G]overnment registration of a mark is neither a government endorsement of the quality of the goods to which the mark is applied nor a government pronouncement that the mark is a good or reliable one in any moral or commercial sense.”); Jeffrey Lefstin, *Does the First Amendment Bar Cancellation of Redskins?*, 52 Stan. L. Rev. 665, 684 (2000) (“The overwhelming majority of the public encounters trademarks in their roles as product

identifiers, not as the beneficiaries of a federal registration scheme. The public is unlikely to believe that a registered trademark designation accompanying a word or logo on a product reflects government endorsement.”). Trademarks are understood in society to identify the source of the goods sold, and to the extent that they convey an expressive message, that message is associated with the private party that supplies the goods or services. Trademarks are not understood to convey a government message or carry a government endorsement.

The government argues that use of the ® symbol, being listed in a database of registered marks, and having been issued a registration certificate makes trademark registration government speech. These incidents of registration do not convert private speech into government speech. The government does not own the trademark designs or the underlying goods to which the trademark is affixed as the state owned the license plates in *Walker*. Markholders are not even required to use the ® symbol on their goods. 15 U.S.C. § 1111. And if simply affixing the ® symbol converted private speech into government speech then the government would be free to regulate the content, viewpoint, and messages of registered copyrights. A copyright registration likewise allows the copyright owner to affix a © symbol, 17 U.S.C. § 401, but this symbol does not convert the copyrighted work into government speech or permit the government to grant some copyrights and deny others on account of the work’s message. Just as the public does not associate the copyrighted works *Nigger: The Strange Career of a Troublesome Word* or *Fifty Shades of Grey* with the government, neither does the public associate individual trademarks such as THE SLANTS with the government.

Similarly, a registered mark’s placement on the Principal Register or publication in the PTO’s Official Gazette does not morph the private expression being registered into government expression. As a preliminary matter, it

is not entirely clear what the Principal Register is. There is apparently no government-published book of all trademark registrations; instead, the Principal Register is at most an internet database hosted on the PTO's website. *See* U.S. Patent and Trademark Office, Search Trademark Database, *available at* <http://www.uspto.gov/trademarks-application-process/search-trademark-database>. If being listed in a government database or published in a list of registrations were enough to convert private speech to government speech, nearly every action the government takes—every parade permit granted, every property title recorded, every hunting or fishing license issued—would amount to government speech. The government could record recipients of parade permits in an official database or publish them weekly, thus insulating content-based grants of these permits from judicial review. Governmental agencies could assign TV and radio licenses and states could refuse to license medical doctors with no First Amendment oversight by “registering” these licenses in an online database, or by allowing licensees to display a mark by their name. The fact that the government records a trademark in a database of all registered trademarks cannot possibly be the basis for concluding that government speech is involved.

Finally, the issuance of a registration certificate signed by the Director with the seal of the United States Patent and Trademark Office does not convert private expression or registration into government speech. This is a certificate, a piece of paper, which the trademark owner is free to do with as it wishes. The government maintains no control over the certificates. The government does not require companies to display their trademark registration certificate, or dictate the manner in which markholders may dispose of unused registration certificates. It is not public like license plates or monuments. When copyrights are granted, the copyright owner receives a similar registration certificate with the seal

and signed by the Registrar of Copyrights. 17 U.S.C. § 410(a). And patents issue “in the name of the United States of America, under the seal of the Patent and Trademark Office,” with a gold seal and red ribbon attached. 35 U.S.C. § 153; *see also* U.S. Patent and Trademark Office, Patent Process Overview, *available at* <http://www.uspto.gov/patents-getting-started/patent-process-overview#step7> (explaining that patent grants are issued with “a gold seal and red ribbon on the cover”). These certificates do not convert the registered subject matter into government speech such that the government is free to regulate its content. The public simply does not view these registration certificates as the government’s expression of its ideas or as the government’s endorsement of the ideas, inventions, or trademarks of the private speakers to whom they are issued.

In short, the act of registration, which includes the right (but not the obligation) to put an ® symbol on one’s goods, receiving a registration certificate, and being listed in a government database, simply cannot amount to government speech. The PTO’s processing of trademark registrations no more transforms private speech into government speech than when the government issues permits for street parades, copyright registration certificates, or, for that matter, grants medical, hunting, fishing, or drivers licenses, or records property titles, birth certificates, or articles of incorporation. To conclude otherwise would transform every act of government registration into one of government speech and thus allow rampant viewpoint discrimination. When the government registers a trademark, it regulates private speech. It does not speak for itself.

### C. Section 2(a) Is Not a Government Subsidy Exempt from Strict Scrutiny

We reject the government’s argument that § 2(a)’s message-based discrimination is merely the government’s



shaping of a subsidy program. The government's defense is contrary to the long-established unconstitutional conditions doctrine. The Supreme Court has repeatedly invalidated denials of "benefits" based on message-based disapproval of private speech that is not part of a government-speech program. In such circumstances, denial of an otherwise-available benefit is unconstitutional at least where, as here, it has a significant chilling effect on private speech. *Bd. of Cty. Comm'rs*, 518 U.S. at 674 (1996) (explaining that "the threat of the loss of [a valuable financial benefit] in retaliation for speech may chill speech on matters of public concern"); *id.* ("[r]ecognizing that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental efforts that fall short of a direct prohibition against the exercise of First Amendment rights") (citations and alterations omitted)).

Under the unconstitutional conditions doctrine:

[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

*Perry*, 408 U.S. at 597. The Supreme Court, applying this doctrine, held that a state college could not refuse to retain a professor because of his public criticism of that college's policy, even though the professor had no right to reemployment, and even though the government had not directly prohibited the professor from speaking. *Id.* at 597–98. This is because "[t]o deny [a benefit] to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Speiser v. Randall*, 357 U.S. 513, 518 (1958); *Perry*, 408 U.S. at 597 ("For if the government could deny a benefit to a person because of

his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.”).

Since *Perry*, the Supreme Court has wrestled with how to apply the unconstitutional conditions doctrine while protecting Congress’s ability to direct government spending. The Spending Clause of the U.S. Constitution, which grants Congress the power “[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States,” U.S. Const. Art. I, § 8, cl. 1, “provides Congress broad discretion to tax and spend for the ‘general Welfare,’ including by funding particular state or private programs or activities.” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2327–28 (2013). This includes “the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends,” even when these limits exclude protected speech or other constitutionally protected conduct. *Id.* at 2328 (citing *Rust v. Sullivan*, 500 U.S. 173, 195 n.4 (1991)). The Court reasoned that “if a party objects to a condition on the receipt of federal funding,” it can always decline the funds. *Id.*

“[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program.” *United States v. Am. Library Ass’n*, 539 U.S. 194, 211 (2003) (quoting *Rust*, 500 U.S. at 194). For purposes of a message-discriminatory condition on the grant of government funds, the Supreme Court has said that the government can “disburse[] public funds to private entities to convey a governmental message.” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (citation omitted). When it does so, “it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.” *Id.* Therefore, “viewpoint-based funding decisions can be sustained in instances . . . in which the government used private

speakers to transmit specific information pertaining to its own program.” *Id.* (citations omitted).

Thus, in *Rust*, the government could prohibit the expenditure of public federal family planning funds on abortion-related counseling because the government distributed those funds to promote the conveying of a particular message. *Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 194); *Velazquez*, 531 U.S. at 541 (noting that *Rust* must be understood as resting on the conclusion that it involved “government speech”). Relatedly, although there was no majority opinion in *American Library Ass’n*, the Court upheld a specific congressional determination not to give money for technology to be used for supporting particular speech (pornography) in particular circumstances (in public libraries where non-user patrons likely would inadvertently see it), even then only upon confirming the minor nature of the burden on the user patrons involved. 539 U.S. at 211–12 (upholding conditioning public libraries’ receipt of federal subsidies on their use of Internet filtering software, because Congress was entitled to insist that “public funds be spent for the purposes for which they were authorized” (quotation marks omitted)). Earlier, the Court had recognized that tax exemptions or deductions were a form of subsidy for First Amendment analysis. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983) (“Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system.”); *id.* (explaining that tax-exempt status “has much the same effect as a cash grant to an organization”).

The government’s discretion to direct its spending, while broad, is not unbounded, and the limits take account of the real-world effect on the speech of those subject to the conditions. If a program arises under the Spending Clause, Congress is free to attach “conditions that define the limits of the government spending program—those that specify the activities Congress wants to

subsidize.” *Agency for Int’l Dev.*, 133 S. Ct. at 2328. However, Congress does not have the authority to attach “conditions that seek to leverage funding to regulate speech outside the contours of the program itself.” *Id.* “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.” *Velazquez*, 531 U.S. at 547. The Court held that Congress could not restrict appropriations aimed at combating the spread of HIV/AIDS to only organizations having policies affirmatively opposing prostitution and sex trafficking, which would make such organizations unable to convey a contrary message. *Agency for Int’l Dev.*, 133 S. Ct. at 2230–31. The Court struck down Congress’s conditioning of funding to public broadcasters on their refraining from editorializing, even with their non-federal money. *FCC v. League of Women Voters*, 468 U.S. 364 (1984). And in *Regan*, the Court, in upholding the subsidy of certain organizations for lobbying, took pains to note the relatively easy work-around for other unsubsidized organizations to achieve a comparable position for lobbying and the absence of any attempt to suppress ideas. 461 U.S. at 548; see *Leathers v. Medlock*, 499 U.S. 439, 452 (1991) (discussing *Regan*).

The government argues that trademark registration is a form of government subsidy that the government may refuse where it disapproves of the message a mark conveys. It contends: “Congress has at least as much discretion to determine which terms and symbols should be registered and published by a federal agency as it would to determine which private entities should receive federal funds.” Appellee’s En Banc Br. 29. But as already described, trademark registration is not a program through which the government is seeking to get its message out through recipients of funding (direct or indirect). And for the reasons described above, the denial of registration has a major chilling effect on private speech, because the

benefits of registration are so substantial. Nor is there a ready work-around to maintain private speech without significant disadvantage. Markholders cannot, for example, realistically have two brand names, one inoffensive, non-disparaging one (which would be able to secure registration) and a second, expressive, disparaging one (which would be unregistrable and unprotectable).

In any event, the scope of the subsidy cases has never been extended to a “benefit” like recognition of legal rights in speakers against private interference. The cases cannot be extended to any “program” conferring legal rights on the theory that the government is free to distribute the legal rights it creates without respecting First Amendment limits on content and viewpoint discrimination. Not surprisingly, the subsidy cases have all involved government funding or government property.

The government cites *Ysursa v. Pocatello Education Ass’n*, 555 U.S. 353 (2009), and *Davenport v. Washington Education Ass’n*, 551 U.S. 177 (2007), in support of its subsidy defense of § 2(a). Appellee’s En Banc Br. 28–29. But they are inapposite. Both *Davenport* and *Ysursa* center on challenges to the constitutionality of state laws limiting the ability of public-sector unions to spend on political speech non-members’ money the unions obtain through the government’s affirmative use of its own payroll systems. *Davenport*, 551 U.S. at 180 (considering constitutionality of law prohibiting payroll deductions for political spending unless the union had the affirmative consent of the non-member); *Ysursa*, 555 U.S. at 355 (considering constitutionality of law completely prohibiting payroll deductions for political spending). Even in the context of use of government property, the Court focused on the absence of viewpoint discrimination, holding that the programs placed a “reasonable, viewpoint-neutral limitation” on the unions’ abilities to enlist the government’s aid in acquiring the money of government employees for spending on political speech to which particular

employees might object. *Davenport*, 551 U.S. at 189; see also *Ysursa*, 555 U.S. at 361 n.3. The prohibitions were not “aimed at the suppression of dangerous ideas.” *Ysursa*, 555 U.S. at 359 (alterations omitted); see also *Davenport*, 551 U.S. at 190 (“Quite obviously, no suppression of ideas is afoot.”).

These cases do not speak to Congress’s power to enact viewpoint-discriminatory regulations like § 2(a). The government does not shy away from the fact that the purpose of § 2(a) is to discourage, and thereby eliminate, disparaging marks, particularly marks that include “the most vile racial epithets,” “religious insults,” “ethnic caricatures,” and “misogynistic images.” Appellee’s En Banc Br. 1–3. On its face, § 2(a) is aimed at the suppression of dangerous ideas, unlike the provisions in *Ysursa* and *Davenport*. Moreover *Ysursa* and *Davenport* both took place in “the unique context of public-sector agency-shop arrangements,” where the government was “act[ing] in a capacity other than as regulator.” *Davenport*, 551 U.S. at 188, 190. Thus, the risk that the government “may effectively drive certain ideas or viewpoints from the marketplace [was] attenuated.” *Id.* at 188. Section 2(a) is regulation of speech that targets expressive content and thereby threatens to drive ideas or viewpoints from the marketplace.

In determining if a condition on a favorable government action is unconstitutional, courts—both before and after *Davenport* and *Ysursa*—have distinguished between government actions that implicate the government’s power to spend and government actions that do not. For example, the Ninth Circuit considered the constitutionality of a treaty under which certain “educational, scientific and cultural audio-visual materials” were granted various benefits, including exemption from import duties. *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 503 (9th Cir. 1988). The government argued, as it does here, that the regulations stemming from the treaty did not “punish or directly

obstruct [filmmakers'] ability to produce or disseminate their films," but amount to "the government simply declining to pay a subsidy." *Id.* at 509. The Ninth Circuit rejected the government's "benign characterization" of the regulations and held that the trade benefits were not a subsidy because "no Treasury Department funds [were] involved." *Id.* at 509. Because the trade benefits were not a subsidy, the Ninth Circuit held that the unconstitutional conditions doctrine applied, and found the treaty and implementing regulations unconstitutional. *Id.* at 511.

The Fifth Circuit, sitting en banc, recently considered the constitutionality of a Texas law allowing charitable organizations to hold bingo games so long as the resulting funds were not used for lobbying. *Dep't of Tex., Veterans of Foreign Wars v. Tex. Lottery Comm'n*, 760 F.3d 427, 430 (5th Cir. 2014) (en banc). The Texas Lottery Commission argued that the restrictions were constitutional because they fell within the state government's spending power, which is analogous to the federal government's spending power. *Id.* at 434. The Fifth Circuit agreed that "the government may attach certain speech restrictions to funds linked to the public treasury—when either granting cash subsidies directly from the public coffers . . . or approving the withholding of funds that otherwise would go to the public treasury." *Id.* at 435. But it found the Texas bingo program "wholly distinguishable . . . because no public monies or 'spending' by the state are involved." *Id.* at 436. Reasoning that the bingo program's primary function is regulatory, further "underscor[ing] the incongruity of [applying] the 'subsidy' paradigm to the bingo program," the Fifth Circuit applied the unconstitutional conditions doctrine and found the lobbying provision unconstitutional. *Id.* at 437–41.

Similarly, the D.C. Circuit recently held that a presidential directive barring lobbyists from serving on international trade advisory committees implicated the First Amendment. *Autor v. Pritzker*, 740 F.3d 176, 177 (D.C.

Cir. 2014). The government argued that “when [it] appropriates public funds to establish a program, its decision not to use program funds to subsidize the exercise of a fundamental right does not infringe” the First Amendment. *Id.* at 182 (quotations and alterations omitted). The D.C. Circuit rejected this argument because membership in the advisory committees was a non-financial—albeit valuable—benefit. *Id.* at 182–83. Explaining that “[t]he Supreme Court has never extended the [spending exception] to situations not involving financial benefits,” the D.C. Circuit found the directive could be an unconstitutional condition, and remanded for further consideration. *Id.* at 183–84.

Trademark registration does not implicate Congress’s power to spend or to control use of government property.<sup>12</sup> Trademark registration is not a subsidy. The benefits of trademark registration, while valuable, are not monetary. Unlike a subsidy consisting of, for example, HIV/AIDS funding, or tax exemptions, a trademark registration does not directly affect the public fisc. Instead, a registered trademark redefines the nature of the markholder’s rights as against the rights of other citizens, depriving others of their ability to use the mark. Like the programs in *Bullfrog* and *Texas Lottery Commission*, the system of trademark registration is a regulatory regime, not a government subsidy program.

The government also argues that because the PTO is funded by appropriations, any government spending requirement is met here. Appellee’s En Banc Br. 29–30 (citing 35 U.S.C. § 42(c)(1)–(2)). Trademark registration

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<sup>12</sup> Counsel for the United States at oral argument disclaimed the notion that a government forum approach was appropriate in the context of trademark registration. See Oral Argument at 1:14:25–1:14:58; 1:16:20–1:17:15.



fees are collected and, “[t]o the extent and in the amounts provided in advance in appropriations Acts,” made available “to carry out the activities of the [PTO].” 35 U.S.C. § 42(c)(1). However, since 1991 these appropriations have been funded entirely by registration fees, not the taxpayer. *Figueroa v. United States*, 466 F.3d 1023, 1028 (Fed. Cir. 2006); *see also* 56 Fed. Reg. 65147 (1991); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, S. 10101, 1990 U.S.C.C.A.N. (104 Stat.) 1388. The fact that registration fees cover all of the operating expenses associated with registering marks is further evidence that, despite conveying valuable benefits, trademark registration is not a government subsidy.

While PTO operations are fully underwritten by registration fees, some federal funds are nonetheless spent on the registration and enforcement of trademarks. For example, PTO employee benefits, including pensions, health insurance, and life insurance, are administered by the Office of Personnel Management and funded from the general treasury. *Figueroa*, 466 F.3d at 1028. And registering a trademark may lead to additional government spending, such as when the trademark owner seeks to enforce the trademark through the federal courts and U.S. Customs and Border Patrol. This spending, however, is attenuated from the benefits bestowed by registration. Trademark registration does not implicate the Spending Clause merely because of this attenuated spending, else every benefit or regulatory program provided by the government would implicate the Spending Clause. The Copyright Office is only partially funded by user fees, but copyright registration is nonetheless not a subsidy. *Copyright Office Fees: Registration, Recordation and Related Services; Special Services; Licensing Division Services; FOIA Services*, 79 Fed. Reg. 15910-01 (Mar. 24, 2014) (setting fees to recover “a significant part of the costs to the Office of registering copyright claims”). It would be unreasonable to argue that the government

subsidizes an author when it grants him a copyright. Similarly, the programs in *Bullfrog* and *Texas Lottery Commission* were likely funded in some part by the government—perhaps also by government benefits paid to employees administering the programs—but the Ninth Circuit and the Fifth Circuit considered only whether the conditioned benefits were paid for by government spending, and not whether the programs were subsidized in more indirect ways. And while the government argued in *Autor* that the government had appropriated public funds to establish the international trade advisory committees, 740 F.3d at 182, the D.C. Circuit nonetheless found that membership on these advisory committees was not a financial benefit, *id.* at 183.

The fact that the Lanham Act derives from the Commerce Clause, not the Spending Clause, is further evidence that trademark registration is not a subsidy. The purpose of the Lanham Act is to regulate marks used in interstate commerce, prevent customer confusion, and protect the goodwill of markholders, 15 U.S.C. § 1127, not to subsidize markholders. Moreover, the government funding cases have thus far been limited to situations where the government has chosen to limit funding to individuals that are advancing the goals underlying the program the government seeks to fund. *See generally Agency for Int’l Dev.*, 133 S. Ct. at 2324–25; *Rust*, 500 U.S. at 191; *cf. American Library Ass’n*, 539 U.S. at 211 (it is not unconstitutional for the government to insist that “public funds be spent for the purposes for which they were authorized”). The restriction on the registration of disparaging marks bears no relation to the objectives, goals, or purpose of the federal trademark registration program. Preventing disparaging marks does not protect trademark owners’ investments; in fact, because § 2(a) can be brought in cancellation proceedings decades after a mark is granted, this provision actually undermines this important purpose of the Lanham Act. And the dispar-

agement proscription has never been alleged to prevent consumer confusion or deception. The government's viewpoint- and content-based discrimination in this case is completely untethered to the purposes of the federal trademark registration program. It would be a radical extension of existing precedent to permit the government to rely upon its power to subsidize to justify its viewpoint discrimination, when that discrimination has nothing to do with the goals of the program in which it is occurring.

Were we to accept the government's argument that trademark registration is a government subsidy and that therefore the government is free to restrict speech within the confines of the trademark program, it would expand the "subsidy" exception to swallow nearly all government regulation. In many ways, trademark registration resembles copyright registration. Under the logic of the government's approach, it follows that the government could refuse to register copyrights without the oversight of the First Amendment. Congress could pass a law prohibiting the copyrighting of works containing "racial slurs," "religious insults," "ethnic caricatures," and "misogynistic images." Appellee's *En Banc Br.* 2–3. It is difficult to imagine how trademark registration with its attendant benefits could be deemed a government subsidy but copyright registration with its attendant benefits would not amount to a government subsidy. And if both must be treated as government subsidies by virtue of their conferment of benefits or advantages, though not public money, then the government has the right to make content- or viewpoint-based determinations over which works to grant registration. This idea—that the government can control speech by denying the benefits of copyright registration to disfavored speech—is anathema to the First Amendment. With this, the government agrees, arguing that copyright registration, unlike trademark registration, is protected by the First Amendment. *Oral Arg.* at 36:45–38:50. But the government has advanced no prin-

ciplered reason to treat trademark registration differently than copyright registration for present purposes. The government admits that any message-based regulation of copyrights would be subject to the First Amendment. We agree, and extend the government's reasoning to § 2(a)'s message-based regulation of trademarks. These registration programs are prototypical examples of regulatory regimes. The government may not place unconstitutional conditions on trademark registration. We reject the government's argument that it is free to restrict constitutional rights within the confines of its trademark registration program.

### III. Section 2(a) Is Unconstitutional Even Under the *Central Hudson* Test for Commercial Speech

As discussed above, § 2(a) regulates expressive speech, not commercial speech, and therefore strict scrutiny is appropriate. Trademarks have at times been referred to as commercial speech. *See, e.g., Friedman v. Rogers*, 440 U.S. 1, 11 (1979) (holding that the trade name of an optometrist was commercial speech). They are, after all, commercial identifiers, the symbols and words by which companies distinguish and identify their brands. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (defining commercial speech as the "dissemination of information as to who is producing and selling what product, for what reason, and at what price"). It does not follow, however, that all government regulation of trademarks is properly reviewed under the *Central Hudson* intermediate scrutiny standard. Section 2(a) bars registration of disparaging marks. This regulation is squarely based on the expressive aspect of the speech, not its commercial-speech aspects. It should therefore be evaluated under the First Amendment standards applicable to the regulation of expressive speech. Discrimination against a mark by virtue of its offensive, disparaging nature discriminates against the mark's political or social message. Sec-

tion 2(a) should be subject to strict scrutiny, and be invalidated for its undisputed inability to survive such scrutiny.

Even if we were to treat § 2(a) as a regulation of commercial speech, it would fail to survive. In *Central Hudson*, the Supreme Court laid out the intermediate-scrutiny framework for determining the constitutionality of restrictions on commercial speech. 447 U.S. at 566. First, commercial speech “must concern lawful activity and not be misleading.” *Id.* If this is the case, we ask whether “the asserted governmental interest is substantial,” *id.*, and whether the regulation “directly and materially advanc[es]” the government’s asserted interest and is narrowly tailored to achieve that objective. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555–56 (2001). “Under a commercial speech inquiry, it is the State’s burden to justify its content-based law as consistent with the First Amendment.” *Sorrell*, 131 S. Ct. at 2667.

First, we ask whether the regulated activity is lawful and not misleading. *Cent. Hudson*, 447 U.S. at 563–64. Unlike many other provisions of § 2, the disparagement provision does not address misleading, deceptive, or unlawful marks. There is nothing illegal or misleading about a disparaging trademark like Mr. Tam’s mark.

Next, for speech that is lawful and not misleading, a substantial government interest must justify the regulation. *Id.* at 566. But § 2(a) immediately fails at this step. The entire interest of the government in § 2(a) depends on disapproval of the message. That is an insufficient interest to pass the test of intermediate scrutiny, as the Supreme Court made clear in *Sorrell*. 131 S. Ct. at 2668 (law must not “seek to suppress a disfavored message”); *id.* at 2670 (rejecting message-based interest as “contrary to basic First Amendment principles”); *see id.* at 2667–68 (finding it unnecessary to rely on strict scrutiny; rejecting justification under *Central Hudson*); *Bolger v. Youngs*

*Drug Prods. Corp.*, 463 U.S. 60, 69–72 (1983); *Carey v. Population Servs., Int’l*, 431 U.S. 678, 701 & n.28 (1977).

The government proffers several interests to justify its bar on disparaging trademarks. It argues principally that the United States is “entitled to dissociate itself from speech it finds odious.” Appellee’s En Banc Br. 41. This core argument rests on intense disapproval of the disparaging marks. See, e.g., Appellee’s En Banc Br. 1 (“the most vile racial epithets and images”); *id.* at 2–3 (“racial slurs . . . or religious insults, ethnic caricatures, misogynistic images, or any other disparaging terms or logos”); *id.* at 14 (“racial epithets”); *id.* at 21 (“racial slurs and similar disparagements”); *id.* at 22 (“including the most vile racial epithets”); *id.* at 41 (“speech [the government] finds odious”); *id.* at 44 (“racial slurs”). And that disapproval is not a legitimate government interest where, as here, for the reasons we have already discussed, there is no plausible basis for treating the speech as government speech or as reasonably attributed to the government by the public.

The government also argues that it has a legitimate interest in “declining to expend its resources to facilitate the use of racial slurs as source identifiers in interstate commerce.” Appellee’s En Banc Br. 43. The government’s interest in directing its resources does not warrant regulation of these marks. As discussed, trademark registration is user-funded, not taxpayer-funded. The government expends few resources registering these marks. See *supra* at 53–55. Its costs are the same costs that would be incidental to any governmental registration: articles of incorporation, copyrights, patents, property deeds, etc. In fact, the government spends far more significant funds defending its refusal decisions under the statute. See *McGinley*, 660 F.2d at 487 (Rich, J., dissenting) (“More ‘public funds’ are being expended in the prosecution of this appeal than would ever result from the registration of the mark.”). Finally, labeling this sort of interest as substantial creates an end-run around the

unconstitutional conditions doctrine, as virtually all government benefits involve the resources of the federal government in a similar sense. Nearly every government act could be justified under this ground, no matter how minimal. For example, the government could also claim an interest in declining to spend resources to issue permits to racist, sexist, or homophobic protests. The government cannot target speech on this basis, even if it must expend resources to grant parade permits or close down streets to facilitate such speech.

This holds true even though the government claims to have a “compelling interest in fostering racial tolerance.” Appellee’s En Banc Br. 43 (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983)). *Bob Jones University* does not stand for the broad proposition the government claims. *Bob Jones University* is a case about racially discriminatory conduct, not speech. The Court held that the government has an interest in combating “racial discrimination in education,” not a more general interest in fostering racial tolerance that would justify preventing disparaging speech. *Id.* at 595.

The invocation of the general racial-tolerance interest to support *speech* regulation is a sharply different matter, as the Supreme Court explained in *R.A.V.*:

One must wholeheartedly agree with the Minnesota Supreme Court that “[i]t is the responsibility, even the obligation, of diverse communities to confront [virulent notions of racial supremacy] in whatever form they appear,” but the manner of that confrontation cannot consist of selective limitations upon speech. St. Paul’s brief asserts that a general “fighting words” law would not meet the city’s needs because only a content-specific measure can communicate to minority groups that the “group hatred” aspect of such speech “is not condoned by the majority.” The point of the First

Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.

505 U.S. at 392 (first alteration in original; citations omitted). What is true of direct “silencing” is also true of the denial of important legal rights. “[I]n public debate we must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.” *Snyder*, 562 U.S. at 458 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)) (alterations omitted). The case law does not recognize a substantial interest in discriminatorily regulating private speech to try to reduce racial intolerance.

Moreover, at the level of generality at which the government invokes “racial tolerance,” it is hard to see how one could find that § 2(a) “directly and materially advanc[es]” this interest and is narrowly tailored to achieve that objective. *Lorillard Tobacco Co.*, 533 U.S. at 555–56. Disparaging speech abounds on the Internet and in books and songs bearing government registered copyrights. And the PTO has granted trademark registrations of many marks with a racially charged character. Further, the connection to a broad goal of racial tolerance would be even weaker to the extent that the government suggests, contrary to our conclusion in II.A *supra*, that denial of registration has no meaningful effect on the actual adoption and use of particular marks in the marketplace.

Finally, the government argues that it has a legitimate interest in “allowing States to make their own determinations about whether trademarks should be unenforceable on grounds of public policy.” Appellee’s En Banc Br. 44. However, this interest cannot stand alone. If § 2(a) is otherwise unconstitutional, the government cannot render it constitutional by arguing that it is necessary so that states can partake in the same unconstitutional message-based regulation of trademarks. The



government, in essence, argues that it has a legitimate interest in leaving the door open for states to violate the Constitution. This interest is certainly not legitimate, let alone substantial.

We conclude that the government has not presented us with a substantial government interest justifying the § 2(a) bar on disparaging marks. All of the government's proffered interests boil down to permitting the government to burden speech it finds offensive. This is not a legitimate interest. With no substantial government interests, the disparagement provision of § 2(a) cannot satisfy the *Central Hudson* test. We hold the disparagement provision of § 2(a) unconstitutional under the First Amendment.

#### CONCLUSION

Although we find the disparagement provision of § 2(a) unconstitutional, nothing we say should be viewed as an endorsement of the mark at issue. We recognize that invalidating this provision may lead to the wider registration of marks that offend vulnerable communities. Even Mr. Tam, who seeks to reappropriate the term “slants,” may offend members of his community with his use of the mark. See Br. of Amici Curiae Nat'l Asian Pacific Am. Bar Ass'n 3, 5. But much the same can be (and has been) said of many decisions upholding First Amendment protection of speech that is hurtful or worse. Whatever our personal feelings about the mark at issue here, or other disparaging marks, the First Amendment forbids government regulators to deny registration because they find the speech likely to offend others. Even when speech “inflict[s] great pain,” our Constitution protects it “to ensure that we do not stifle public debate.” *Snyder*, 562 U.S. at 461. The First Amendment protects Mr. Tam's speech, and the speech of other trademark applicants.

We hold that the disparagement provision of § 2(a) is unconstitutional because it violates the First Amendment. We vacate the Board's holding that Mr. Tam's mark is unregistrable, and remand this case to the Board for further proceedings.

# United States Court of Appeals for the Federal Circuit

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IN RE SIMON SHIAO TAM

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2014-1203

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Appeal from the United States Patent and Trademark Office, Trademark Trial and Appeal Board in No. 85/472,044.

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O'MALLEY, *Circuit Judge*, with whom WALLACH, *Circuit Judge*, joins, concurring.

I agree that the disparagement provision of 15 U.S.C. § 1052(a) (“§ 2(a)”) is unconstitutional on its face. I agree, moreover, that § 2(a) cannot survive the searching constitutional scrutiny to which the majority subjects it under the First Amendment to the United States Constitution. On this point, the majority rightly dispenses with this court’s precedent in *In re McGinley*, 660 F.2d 481 (CCPA 1981) and its progeny. I write separately, however, because, I believe § 2(a) is also unconstitutionally vague, rendering it unconstitutional under the Fifth Amendment to the United States Constitution.

While the majority acknowledges the vague and uncertain application of § 2(a), Maj. Op. 30–33, it finds that “[a]ll we need say about the uncertainty here, however, is that it contributes significantly to the chilling effect on speech,” *id.* at 32–33. I agree with the majority’s concern about the uncertain nature of § 2(a), but believe those

concerns should lead us to do more than note 2(a)'s undoubted chilling effect on speech. I find § 2(a)'s disparagement provision to be so vague that I would find it to be unconstitutional, whether or not it could survive Appellant's First Amendment challenge.

#### DISCUSSION

Section 2(a) provides that the Trademark Trial and Appeal Board ("Board") may refuse an application when the trademark "[c]onsists of or comprises . . . matter which *may disparage* . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." (emphasis added). As the majority correctly notes, the language of the statute creates "uncertainty as to what *might be deemed* disparaging." Maj. Op. 30–31. Both would-be applicants and the Board are left to guess at what may have the potential to disparage a broad range of persons, institutions, symbols, and even undefined "beliefs." And, they are left to guess at whether "may disparage" is the equivalent of bringing into contempt or disrepute, or is a distinct category of impropriety from these latter evils.

Where, as here, the language of a statute evades clarity, "[t]he area of proscribed conduct will be adequately defined and the deterrent effect of the statute contained within constitutional limits only by authoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition." *Dombrowski v. Pfister*, 380 U.S. 479, 490–91 (1965). The Board has developed a two-step test to determine whether a mark is disparaging:

- (1) What is the likely meaning of the matter in question, taking into account not only dictionary definitions, but also the relationship of the matter to the other elements in the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services; and

(2) If that meaning is found to refer to identifiable persons, institutions, beliefs or national symbols, whether that meaning may be disparaging to a substantial composite of the referenced group.

Trademark Manual of Exam. Proc. (“TMEP”) § 1203.03(b)(i) (Oct. 2015 ed.) (citing, *inter alia*, *In re Geller*, 751 F.3d 1355, 1358 (Fed. Cir. 2014); *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705, 1740–41 (T.T.A.B. 1999)). Thus, the Board has concluded that a mark may disparage within the meaning of § 2(a) when a majority of the Board believes it “dishonor[s] by comparison with what is inferior, slight[s], deprecate[s], degrade[s], or affect[s] or injure[s] by unjust comparison.” *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 124 (D.D.C. 2003) (internal quotation marks omitted) (quoting *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705, 1737 n.98 (T.T.A.B. 1999)).

The two-step test does little to alleviate § 2(a)’s uncertainty. Indeed, by adding the caveat that a mark can be rejected whenever a mark’s meaning may be disparaging to “a substantial composite” of an “identifiable” group, (TMEP § 1203.03(b)(i)), the TMEP compounds the confusion the statute engenders. Thus a mark need only *potentially* disparage a *subset* of *any group* as long as that group can be “identifi[ed].”

One need only examine the disparate ways in which § 2(a) has been applied to see the confusion. While it is true that a “fertile legal ‘imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question,” *Grayned v. City of Rockford*, 408 U.S. 104, 112 n.15 (1972) (alteration in original) (quoting *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 412 (1950)), the arbitrary application of § 2(a) is easily demonstrated. The majority discusses numerous examples of inconsistent registration decisions. Maj. Op. 31 n.7. These include examples where there is no conceiva-

ble difference between the applied-for marks, yet one is approved and the other rejected. *Compare* HAVE YOU HEARD SATAN IS A REPUBLICAN (Trademark Application Serial No. 85,077,647) (rejected because it disparaged the Republican Party), *with* THE DEVIL IS A DEMOCRAT, Registration No. 85,525,066 (accepted and later abandoned for other reasons). I agree with the majority that there appears to be “no rationale for the PTO’s seemingly arbitrary registration decisions, let alone one that would give applicants much guidance.” Maj. Op. 31 n.7.<sup>1</sup>

For § 2(a) to survive a vagueness challenge, the Supreme Court requires it “give the person of ordinary

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<sup>1</sup> Amici also were easily able to uncover examples of inconsistencies in the application of the § 2(a). *See* Br. for American Civil Liberties Union, the American Civil Liberties Union of Oregon, and the American Civil Liberties Union of the Nation’s Capital as Amici Curiae 22–24 (discussing “a long line of arbitrary and contradictory decisions” as evidenced by the “countless examples of such irregularities,” including, but not limited to, examples where the same mark is rejected in one instance and accepted in another, even for the same use—for example *compare* MADONNA, *In re Riverbank Canning Co.*, 95 F.2d 327 (CCPA 1938) (affirming rejection of mark for use on wines as scandalous), *with* MADONNA, Registration No. 3,545,635 (accepted for use on wine) (Dec. 16, 2008); and MESSIAS, *In re Sociedade Agricola E. Comerical Dos Vinhos Messias, S.A.R.L.*, 159 U.S.P.Q. 275 (T.T.A.B. 1968) (rejected for use on wine and brandy), *with* IL MESSIA, Registration No. 4,093,035 (accepted for use on wine) (Jan. 31, 2012)). These examples further highlight the subjective nature of the registration standard under § 2(a): it is an unstable standard that apparently depends on shifting sensibilities over time.

intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned*, 408 U.S. at 108. Further, “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” *Id.* Given the subjective and hypothetical language of the statute and its well-documented, inconsistent application by the Board, § 2(a) is void for vagueness under even a lax test for vagueness. But the standard we should apply to § 2(a) is not lax.

“The degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment.” *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). “[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech . . . , a more stringent vagueness test should apply.” *Id.* at 499. The First Amendment concerns articulated by the majority support application of a “more stringent vagueness test”—one that § 2(a) simply cannot pass.

a. First Amendment Concerns Require a Stringent Vagueness Test

As the majority points out, “[i]t is beyond dispute that § 2(a) discriminates on the basis of content.” Maj. Op. 18. “[T]he test for disparagement—whether a substantial composite of the referenced group would find the mark disparaging—makes clear that it is the nature of the message conveyed by the speech which is being regulated. If the mark is found disparaging by the referenced group, it is denied registration.” *Id.* at 19. Indeed, the problems with § 2(a) are more substantial than the majority even acknowledges—not only is a trademark’s registrability adjudged by the message it conveys, but the message

conveyed is adjudged by the potential sensibilities of a broad range of potential listeners.

Under First Amendment principles, “content-based regulation of speech . . . raises special First Amendment concerns because of its obvious chilling effect on free speech.” *Reno v. ACLU*, 521 U.S. 844, 872 (1997). Indeed, “[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (internal quotation marks omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). The Supreme Court’s emphasis on precision for content-based regulations is premised on its understanding of

at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

*FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (citing *Grayned*, 408 U.S. at 108–109).

b. Section 2(a) is Void for Vagueness

Section 2(a)’s undeniable chilling effect on speech requires it to pass a “more stringent test” for vagueness in order to pass constitutional muster. *Hoffman*, 455 U.S. at 498. Recognizing that due process vagueness challenges are more difficult to sustain where civil regulation—as distinct from criminal penalty provisions—are at issue, I believe § 2(a)’s inherent ambiguity makes it difficult for would-be applicants to discern its boundaries and leads to



inconsistent and unreliable actions on the part of the government as it seeks to regulate on the basis of content.

First, the imprecise, content-based regulation of trademark registration affects the types of marks sought by would-be registrants. “Vague laws force potential speakers to “steer far wider of the unlawful zone” . . . than if the boundaries of the forbidden areas were clearly marked.” *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2743 (2011) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). The majority opinion rightly concludes that, given the Board’s inconsistency, “the public would have a hard time drawing much reliable guidance.” Maj. Op. 31. The “uncertainty of speech-affecting standards has long been recognized as a First Amendment problem,” and the uncertainty inherent in § 2(a) “contributes significantly to the chilling effect on speech.” Maj. Op. 32–33.<sup>2</sup>

Next, the absence of clear standards for the application of § 2(a) provides the government with virtually unlimited ability to pick and choose which marks to allow and which to deny. And neither § 2(a) itself nor the TMEP’s two-step test provides the PTO, the courts, or the

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<sup>2</sup> Numerous amici have come to the same conclusion. *See, e.g.*, Br. for First Amendment Lawyers Ass’n as Amicus Curiae 14 (“The multitude of Section 2(a) cases show that Section 2(a) does not convey ‘sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices,’ as required by the Constitution.” (quoting *Roth v. United States*, 354 U.S. 476, 491 (1957))); Br. for Pro-Football, Inc. as Amicus Curiae 33 n.13 (“Even if Section 2(a) sought to advance a legitimate state interest, its language is impermissibly vague to advance that interest. The statute provides no guidance as to which trademarks will be deemed disparaging, scandalous, or immoral.”).

public with any certainty as to what *may* disparage a given subset of any given population or group of believers. That is simply inadequate under the Fifth Amendment. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) (“Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards.”); *Grayned*, 408 U.S. at 108–09 (1972) (“[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”) (footnotes omitted). Cf. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (noting in the context of a criminal penalty scheme that, although the vagueness doctrine “focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine ‘is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.’ Where the legislature fails to provide such minimal guidelines, a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’” (quoting *Smith v. Goguen*, 415 U.S. 566, 574, 575 (1974))).

Other circuits to have considered the use of the subjective terms connoting insult—like disparagement—have expressed similar concerns about the absence of objective standards governing their application.

In *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), for example, the Sixth Circuit considered the discriminatory harassment policy of Central Michigan University (“CMU”). That policy defined racial and ethnic harassment as:

any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . (c) **de-meaning** or **slurring** individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer **negative connotations** about the individual's **racial or ethnic affiliation**.

*Id.* at 1182 (emphases added). The court found the policy impermissibly vague because it required “one [to] make a subjective reference” and because “different people find different things offensive.” *Id.* at 1184. As such, the policy’s enforcement was too tied to subjective reference and, thus, both failed to “provide fair notice” and gave rise to an “unrestricted delegation of power” to university officials. *Id.* See also *Wynn Oil Co. v. Purolator Chem. Corp.*, 536 F.2d 84, 86 (5th Cir. 1976) (finding the subsection of an “injunction which restrains defendants from ‘slandering and disparaging the Wynn Oil Co. and its products’ [to be] impermissively vague”).

In *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65 (1st Cir. 2004), the First Circuit upheld the validity of the Massachusetts Bay Transportation Authority’s (“MBTA”) “guideline prohibiting demeaning or disparaging material,” *id.* at 93, because, in that case, “there [was] no serious concern about either notice or chilling effects[] where there [were] no consequences for submitting a non-conforming advertisement and having it rejected” *id.* at 94. But that court specifically distinguished the guidelines at issue—“given the nature of the MBTA’s advertising program and its chief purpose of raising revenue without losing ridership,” *id.* at 94—from “the concern over subjective decision making[, which has the] most effect in government licensing schemes” *id.* at 95. While the trademark registration scheme is not a

traditional public forum making use of a licensing scheme to “maintain basic order,” it implicates the “[e]xcessive discretion and vagueness inquiries under the First Amendment” in much the same way. *Id.* at 94. As the majority notes, trademark registrants receive substantial benefits from the fact of registration, Maj. Op. 5–6; denial of those benefits based on the subjective views of governmental employees about the potential subjective views of those who might be exposed to the proposed mark is an essentially standardless measure.

In *McGinley*, we found § 2(a)’s ban on scandalous subject matter, “sufficiently precise to enable the PTO and the courts to apply the law fairly and to notify a would-be registrant that the mark he adopts will not be granted a federal registration.” 660 F.2d at 484. While I agree that the PTO is capable of “notify[ing] a would-be registrant” of its decision to deny registration under § 2(a), the law is by no means precise enough to “enable the PTO and the courts to apply [it] fairly.” *Id.* As the majority points out, the Board has allowed use of a term by one trademark holder while disallowing use of precisely the same term by another based apparently on its view of how use of that term might be received by the audience the Board has chosen to “identify.” Maj. Op. 21–23. This fact alone evidences the absence of explicit standards for the application of § 2(a).

As it turns out, the PTO’s Assistant Commissioner was correct in 1939 in expressing concern that “the word ‘disparage’ . . . is going to cause a great deal of difficulty in the Patent Office, because . . . it is always going to be just a matter of the personal opinion of the individual parties as to whether they think it is disparaging.” *Hearing on H.R. 4744 Before the Subcomm. on Trademarks of the H. Comm. on Patents*, 76th Cong. 21 (1939) (statement of Leslie Frazer). The Board has likewise commented on the vague and subjective nature of § 2(a). *See, e.g., In re In Over Our Heads*, 1990 WL 354546, at \*1 (T.T.A.B. 1990)

(“[T]he guidelines for determining whether a mark is scandalous or disparaging are somewhat vague and the determination of whether a mark is scandalous or disparaging is necessarily a highly subjective one.”) (bracketing and quotation marks omitted); *Harjo v. Pro-Football, Inc.*, 1999 WL 375907, at \*35 (T.T.A.B. 1999) (noting that whether a mark is disparaging “is highly subjective and, thus, general rules are difficult to postulate”).

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned*, 408 U.S. at 108. The need for clarity is especially relevant when a law implicates First Amendment rights, as § 2(a) indisputably does. Section 2(a) does not provide a “person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Id.* And inconsistent, indeed seemingly rudderless, application of § 2(a) demonstrates the “arbitrary and discriminatory enforcement” that occurs when regulations do not “provide explicit standards for those who apply them.” *Id.*

While I agree with the majority’s thoughtful First Amendment analysis, I do not believe it is the only predicate to the conclusion that § 2(a) is unconstitutional.

#### CONCLUSION

For the above reasons, I concur in the majority’s conclusions and separately concur in the result.

# United States Court of Appeals for the Federal Circuit

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IN RE SIMON SHIAO TAM

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2014-1203

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Appeal from the United States Patent and Trademark Office, Trademark Trial and Appeal Board in No. 85/472,044.

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DYK, *Circuit Judge*, concurring in part and dissenting in part, with whom *Circuit Judges* LOURIE and REYNA join with respect to parts I, II, III, and IV.

The majority is correct that the bar on registration of disparaging marks is unconstitutional as applied to Mr. Tam. But in my view the majority errs in going beyond the facts of this case and holding the statute facially unconstitutional as applied to purely commercial speech.

It is noteworthy that the majority seeks to justify its sweeping holding by describing § 2(a) as being something it is not. The provision bars the registration of marks that “disparage . . . or bring into contempt, or disrepute.” 15 U.S.C. § 1052(a) (otherwise identified as § 2(a)). The majority repeatedly asserts that “[t]he government enacted § 2(a), and defends it today, because it is hostile to the

messages conveyed by the refused marks.”<sup>1</sup> Maj. Op. at 23. In my view, there is nothing in the statute itself or the legislative history that supports this interpretation. On its face, and as interpreted by the Trademark Trial and Appeal Board (“the Board”), the statute is designed to preclude the use of government resources not when the *government* disagrees with a trademark’s message, but rather when its meaning “may be disparaging to a *substantial composite of the referenced group*.” *In re Lebanese Arak Corp.*, 94 U.S.P.Q.2d 1215, 1217 (T.T.A.B. 2010) (emphasis added). The PTO uses an objective test in making this determination, looking to dictionaries, the relationship of the matter to the other elements of the mark, the nature of the goods or services, and the manner in which the mark is used in the marketplace in connection with the goods or services. *See id.*<sup>2</sup>

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<sup>1</sup> The majority frequently characterizes the statute as “discriminat[ing] on the basis of message conveyed” and hence “viewpoint.” Maj. Op. at 19. “It does so as a matter of avowed and undeniable purpose, and it does so on its face.” *Id.* “Denial of these benefits creates a serious disincentive to adopt a mark which the government may deem offensive or disparaging.” *Id.* at 29. “The entire interest of the government in § 2(a) depends on disapproval of the message.” *Id.* at 57. “All of the government’s proffered interests boil down to permitting the government to burden speech it finds offensive.” *Id.* at 61.

<sup>2</sup> To be sure, the Board may have rendered inconsistent results in some cases, but this has no bearing on the facial validity of § 2(a). *See, e.g., Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 396 (1969). In any event, when the government is not acting in its sovereign,

Thus the purpose of the statute is to protect underrepresented groups in our society from being bombarded with demeaning messages in commercial advertising. The question is whether the statute so designed can survive First Amendment scrutiny. My answer is that the statute is constitutional as applied to purely commercial trademarks, but not as to core political speech, of which Mr. Tam's mark is one example. Ultimately, unlike the majority, I do not think that the government must support, or society tolerate, disparaging trademarks in the name of commercial speech. The majority's opinion not only invalidates the bar on disparaging marks in § 2(a) but may also effectively invalidate the bar on scandalous marks and the analogous provisions of the Model State Trademark Act. *See* 1964 Model State Trademark Act, § 2(b). The government need not support the inevitable consequence of this decision—"the wider registration of marks that offend vulnerable communities." Maj. Op. at 61.

## I

As the majority notes, the Supreme Court has long recognized the protection of offensive speech that constitutes core political expression. "The right to free speech . . . may not be curtailed simply because the speaker's message may be offensive to his audience." *Hill v. Colorado*, 530 U.S. 703, 716 (2000). Underpinning the First Amendment's protection of core speech that is disparaging is the fundamental constitutional value of preserving an "uninhibited marketplace of ideas in which truth will ultimately prevail," a marketplace that provides "suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion*, 395 U.S. at 390. Integral to

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regulatory capacity, "the consequences of imprecision are not constitutionally severe." *Finley*, 524 U.S. at 589.



an “uninhibited marketplace of ideas” is the ability to incite debate. “[A] principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989). Thus to maintain a “meaningful dialogue of ideas,” “we must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.” *Snyder v. Phelps*, 562 U.S. 443, 452, 458 (2011) (internal quotation marks, citations, and alterations omitted).<sup>3</sup> At bottom, as Justice Holmes described, in the core speech area the First Amendment enshrines the “principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.” *U.S. v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting).

But this principle simply does not apply in the commercial context. For example, it is well established that racially or sexually disparaging speech in the workplace, when severe, may constitute a violation of Title VII, either as harassment or the creation of a hostile work environment. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998); *Rogers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993). The same is necessarily true in the context of federal public accommodations law governing commercial establishments. No case of which I am aware suggests that imposing liability for disparaging speech in those commercial contexts, even

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<sup>3</sup> *See also, e.g., Cohen v. California*, 403 U.S. 15, 25 (1971); *Hess v. Indiana*, 414 U.S. 105, 107 (1973); *Denver Area Educ. Telecom. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 753–54 (1996).

when separated from conduct, violates the First Amendment.

So too in the area of commercial speech race or sex disparagement can claim no First Amendment protection. Unlike core political expression, the “extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.” *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Its constitutional protection derives not from any dialogic function in the marketplace of ideas, but rather from its “informational function” in the marketplace of goods and services, *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980), in other words, “who is producing and selling what product, for what reason, and at what price.” *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2673–74 (Breyer, J., dissenting). We protect the dissemination of this information to ensure that “private economic decisions” are “intelligent and well informed.” *Va. State Bd. Of Pharmacy*, 425 U.S. at 765.

Speech proposing a commercial transaction is “an area traditionally subject to government regulation.” 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (citing and quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978)). The Court has “been careful to distinguish commercial speech from speech at the First Amendment’s core,” *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995), recognizing the “commonsense distinctions that exist between commercial and noncommercial speech.” 44 *Liquormart*, 517 U.S. at 502 (quoting *Virginia Bd. of Pharmacy*, 425 U.S. at 771 n.24). The “greater objectivity” and “greater hardiness” of commercial speech and the different constitutional values underlying its protection “likely diminish[] the chilling

effect that may attend its regulation.” 44 *Liquormart*, 517 U.S. at 499 (internal quotation marks and citations omitted). Accordingly, the Court has explained that “the State may regulate some types of commercial advertising more freely than other forms of protected speech,” *id.* at 498 (internal quotations marks and citations omitted), and “the State may at times prescribe what shall be orthodox in commercial advertising,” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (internal quotation marks and citations omitted)—something it could never do with core political speech.

Recognizing the more limited protection of commercial speech, the Court has repeatedly upheld regulations “protect[ing] consumers from misleading, deceptive, or aggressive sales practices,” because such regulations are “consistent with the reasons for according constitutional protection to commercial speech” in the first place. 44 *Liquormart*, 517 U.S. at 501; *see also, e.g., Florida Bar*, 515 U.S. 618 (1995); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). “There can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.” *Central Hudson*, 447 U.S. at 563.

This stands in stark contrast to core political speech, for which “constitutional protection does not turn upon ‘the truth . . . of the ideas and beliefs which are offered.’” *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)). “The erroneous statement is inevitable in free debate, and [] it must be protected [absent a showing of actual malice] if the freedoms of expression are to have the breathing space that they need to survive.” *Id.* at 271–72 (internal quotation marks, citations, and alterations omitted). “Authoritative interpretations of the First Amendment

guarantees have consistently refused to recognize an exception for any test of truth.” *N. Y. Times*, 376 U.S. at 271. See also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

To be sure, the Court has held that commercial advertising cannot be restricted just because the product or service may be offensive to some members of the audience. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977). But, at the same time, the Court has explained that the manner of advertising itself may be restricted to protect the audience’s privacy interests. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 630 (1995). “[T]he existence of [First Amendment] protection does not deprive the State of all power to regulate such advertising in order to minimize its offensiveness.” *Bolger*, 463 U.S. at 84 (1983) (Stevens, J., concurring) (citing and quoting from *Carey*, 431 U.S. at 716 (Stevens, J., concurring)).

For example, in *Florida Bar* the Court upheld a ban on lawyer advertising targeted to recent accident victims and their families. 515 U.S. at 634–35. There the Court distinguished *Bolger*, which rejected a total ban on advertising related to contraceptives, because the government’s interest in *Bolger* had been only to shield citizens from generally “offensive” and “intrusive” products. See *id.* at 630–31. That interest, the Court explained, was entirely different from the interest in “protecting the personal privacy and tranquility of [Florida’s] citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma.” *Id.* at 630 (alterations omitted). The Court thus had “little trouble crediting the Bar’s” “privacy-based” interest as “substantial,” and held that it was sufficient to justify the advertising ban. *Id.* at 625, 629, 635.

Disparagement as defined by the Board “is essentially a violation of one’s right of privacy—the right to be let alone from contempt or ridicule.” TMEP § 1203.03(b). While in the trademark context the dissemination of the disparaging material is not limited to the disparaged group, the disparaged group is nonetheless targeted in the sense that it is singled out for ridicule. Furthermore, the fact that the dissemination of the disparaging advertising is not limited to the disparaged group makes the government’s interest here all the greater—the effect on the disparaged group is amplified, not lessened, by disseminating the disparaging material to the public at large.

This well-recognized disparity in the types of restrictions that are permissible as applied to commercial as opposed to political speech derives from the very different constitutional values underlying their protection in the first place. The Court has recognized that the government has greater authority to “distinguish between the relative value of different categories of commercial speech” than of noncommercial speech. *Metromedia*, 453 U.S. at 514. Specifically, the government has a distinct and substantial interest in “proscribing intrusive and unpleasant formats” for commercial expression. *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984); see also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974); *Metromedia*, 453 U.S. at 514. Indeed, “it may not be the content of the speech, as much as the deliberate ‘verbal or visual assault,’ that justifies proscription.” *Hill*, 530 U.S. at 716 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–11, n.6 (1975)).

Unlike core political speech, where offensiveness or disparagement has recognized value in its tendency to provoke debate, disparagement in commercial advertising furthers no First Amendment value. Indeed, neither counsel at oral argument nor the majority in its opinion

has identified any First Amendment value served by disparaging speech in the commercial context. Thus even blanket bans on commercial speech may be the kind of consumer protective regulations that are consistent with the “informational function” of commercial advertising. See *Central Hudson*, 447 U.S. at 563.

The majority, apparently recognizing that purely commercial speech is entitled to lesser protection, urges that all disparaging trademarks deserve heightened First Amendment protection because they have an expressive component. See Maj. Op. at 23–24. While I agree that some marks, including Mr. Tam’s, have an expressive component, it would seem beyond debate that many do not, as is the case with respect to routine product identifiers. Indeed, the Supreme Court confirmed the lack of an expressive component in most trade names in *Friedman v. Rogers*, where it explicitly distinguished between advertisements that “editorialize on any subject, cultural, philosophical, or political,” which might be entitled to greater First Amendment protection, and the “mere solicitation of patronage implicit in a trade name,” which “is a form of commercial speech and nothing more.” 440 U.S. 1, 11, n.10 (1979). The Court again recognized this distinction in *S.F. Arts & Athletics Inc. v. U.S. Olympic Comm’n*, 483 U.S. 522, 535 (1987). “To the extent that [the statute] applies to uses for the purpose of trade [or] to induce the sale of any goods or services, its application is to commercial speech.” *Id.* (alterations omitted).

In short, many trademarks lack the kind of “expressive character” that would merit First Amendment protection for offensive content, and a regulation of the use of those marks could satisfy the *Central Hudson* test for commercial speech—a substantial government interest reflected in a narrowly tailored regulation. The majority’s contrary conclusion seems to me to be unsupported.

## II

Even if disparaging commercial speech were protected from government ban or regulation, this case does not turn on the legitimacy of a regulation or a “blanket ban” on disparaging commercial speech. The refusal to register disparaging marks is not a regulation or “blanket ban” on anything. Rather, it involves the denial of a subsidy, and because it is a subsidy, it may be content based. It is “well established that the government can make content-based distinctions when it subsidizes speech.” *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188–89 (2007). The First Amendment “does not confer an affirmative right to use government [] mechanisms for the purpose of” expression, nor is the government “required to assist others in funding the expression of particular ideas, including political ones.” *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 355, 358 (2009) (internal quotations and citations omitted). Significantly, every single Supreme Court decision upholding the protection of commercial speech has involved a prohibition or restriction of speech—not a subsidy.<sup>4</sup>

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<sup>4</sup> See, e.g., *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 97 (1977) (striking down a ban on placing “For Sale” and “Sold” signs on residential property); *Carey*, 431 U.S. at 701–02 (invalidating a ban on all advertising and display of contraceptives); *Bolger*, 463 U.S. at 71 (invalidating a ban on unsolicited mailing of contraceptive advertisements); *Va. State Bd. of Pharmacy*, 425 U.S. at 773 (invalidating a ban on advertising prescription drug prices); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011) (invalidating a state law that prohibited the sale, disclosure, and use of pharmacy records without the prescriber’s consent and subject to limited exceptions).

That trademark registration is a subsidy is not open to doubt. Contrary to the majority's characterization, federal trademark registration is not a "regulatory regime." Maj. Op. at 52. Section 2(a) does not regulate any speech, much less impose a blanket ban. It merely deprives a benefit. The majority claims that federal trademark registration is not a subsidy because "the subsidy cases have all involved government funding or government property." Maj. Op. at 49. But this assertion is belied by the Court's recent decisions in *Davenport* and *Ysursa*—neither involving government funding or property. Each made clear that the government can make content-based distinctions when it provides a benefit.

In *Davenport*, the Court considered a government benefit that gave unions "the power, in essence, to tax government employees," by having the state collect fees from its employees on behalf of the unions. *Davenport*, 551 U.S. at 184. The state limited this collection mechanism by refusing to collect nonmember fees for election-related purposes unless the nonmember affirmatively consented. *Id.* at 180. The unions argued that this restriction was an unconstitutional content-based discrimination. *Id.* at 188. The Court disagreed. The First Amendment's usual aversion to content-based speech regulation is inapposite when "the government is acting in a capacity other than as regulator," such as "when it subsidizes speech." *Id.* at 188. Because the collection of nonmember fees was a "state-bestowed entitlement," "a matter of grace [that] [it] can, of course, disallow . . . as it chooses," *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983) (internal quotations and citations omitted), the content-based condition on that benefit did not raise a "realistic possibility that official suppression of ideas is afoot." *Davenport*, 551 U.S. at 189–90 (citations and quotation marks omitted). The unions remained "as free as any other entity to participate in the



electoral process with all available funds other than the state-coerced agency fees.” *Id.* at 190. Thus the Court declined to apply heightened scrutiny and upheld the restriction in light of the state’s “narrow” and legitimate interest in “protect[ing] the integrity of the election process.” *See id.* at 189–90.

In *Ysursa*, the Court considered a similar benefit where the state collected dues on behalf of unions by providing payroll deductions. *Ysursa*, 555 U.S. at 355. The state restricted that collection mechanism by preventing unions from using payroll deductions for any political purposes. *Id.* Again the unions argued that this restriction was an impermissible content-based speech restriction, and again the Court disagreed. The First Amendment “protects the right to be free from government abridgement of speech,” not the right to be “assist[ed] [] in funding the expression of particular ideas.” *Id.* at 358. “While publicly administered payroll deductions for political purposes can enhance the unions’ exercise of First Amendment rights, Idaho is under no obligation to aid the unions in their political activities.” *Id.* at 359. Because collecting payroll deductions was a government benefit, the State’s decision not to extend that benefit was “not an abridgement of the unions’ speech.” *Id.* As in *Davenport*, the unions remained “free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor.” *Id.* Thus the Court again declined to apply heightened scrutiny and upheld the regulation in light of the “government’s interest” in “avoiding the reality or appearance of government favoritism.” *Id.*

The same is true here. Federal trademark registration, like the state-bestowed collection mechanisms for unions in *Davenport* and *Ysursa*, is a government-bestowed collection mechanism for enforcing trademarks. It opens the federal courts to enforce trademark rights by

providing, *inter alia*, original jurisdiction in federal courts for infringement claims, eligibility for treble damages for willful infringement, the ability to petition Customs to prevent the importation of infringing articles, and various enhanced protections for marks. See 15 U.S.C. §§ 1057(c), 1141, 1117, 1124. These benefits all “enlist” the government in support of the mark holder’s commercial identification, much like the collection of nonmember fees in *Davenport* and the payroll deductions in *Ysursa* enlisted the states in support of the unions’ political speech. See *Ysursa*, 555 U.S. at 359. Just as the states were not obligated to enable labor unions to collect nonmember fees or take payroll deductions in the first place, the federal government is not obligated to provide these benefits of a trademark enforcement mechanism. And just as the unions remained free to speak for election-related purposes using all other funds, trademark holders remain free to use their marks—however disparaging—as far as the federal government is concerned.<sup>5</sup> That states may deny state-law protection to these marks cannot make the denial of the federal subsidy any less constitutional.

Finally, the majority argues that § 2(a) should be treated as a regulatory provision because the denial of registration benefits will have a chilling effect on the use of disparaging marks and cause mark holders to abandon such marks. See Maj. Op. at 32–33. But that is commonly the effect of the denial of subsidies, as the Supreme Court has recognized. See *Regan*, 461 U.S. at 550 (“Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like,” the decision not to subsidize its speech does

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<sup>5</sup> That alternative federal enforcement under 15 U.S.C. § 1125(a) is potentially available to denied applicants only bolsters this point. See Maj. Op. at 37 n.11.

not violate the First Amendment). A chilling effect does not turn a subsidy provision into a regulatory provision, so long as the subsidy is not designed to limit speech outside of the subsidized program. That is not the case here.

“[T]he relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (“*AID*”). An example of such impermissible leverage was found in *FCC v. League of Women Voters*, where federal funds were denied to public broadcasters if they engaged in editorializing. 468 U.S. 364, 399–401 (1984). The restriction was invalidated because it affected editorializing engaged in without federal funds. *Id.* Section 2(a) is not designed to limit speech outside of the federal trademark program. Accordingly, it does not run afoul of the unconstitutional conditions doctrine.<sup>6</sup> *See id.*

The majority’s contrary arguments are the very arguments rejected in the Supreme Court’s recent decision

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<sup>6</sup> *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 503 (9th Cir. 1988), *Dep’t of Tex., Veterans of Foreign Wars v. Tex. Lottery Comm’n*, 760 F.3d 427, 430 (5th Cir. 2014) (en banc), and *Autor v. Pritzker*, 740 F.3d 176, 177 (D.C. Cir. 2014), relied on by the majority, Maj. Op. at 50–52, are all inapposite. In all three cases, the government was attempting to leverage speech outside of the “contours” of its defined program, thus running afoul of the unconstitutional conditions doctrine. Here, on the other hand, no expression beyond the trademark is suppressed, and therefore no unconstitutional condition obtains.

in *AID*. See 133 S. Ct. at 2328. *AID* explicitly disclaimed the majority’s assertion that the condition must be limited to “advancing the goals underlying the program the government seeks to fund.” Maj. Op. at 54. The question is not whether “the condition is [] relevant to the objectives of the program,” but rather whether the condition “seek[s] to leverage funding to regulate speech outside the contours of the program itself,” which the restriction here does not. *AID*, 133 S. Ct. at 2328. Similarly, in *Regan* the Court upheld a requirement that nonprofit organizations seeking tax-exempt status under 26 U.S.C. § 501(c)(3) not engage in lobbying. 461 U.S. at 544. The Court upheld that condition not because it was related in some way to the “goals” of 501(c)(3) tax exemption, but rather because “the condition did not prohibit that organization from lobbying Congress” with separate funds, *i.e.*, it did not leverage funds outside of the nonprofit structure. *Id.* at 2329. The majority’s arguments fail to show a colorable violation of the unconstitutional conditions doctrine here.

### III

The majority urges, however, that subsidies require viewpoint neutrality, and argues that the subsidy provided by § 2(a) discriminates based on viewpoint because favorable racial and other marks are allowed while disparaging ones are not. See Maj. Op. at 21–23. Contrary to the majority, the Supreme Court has never held that this kind of subsidy must be viewpoint neutral. The question was raised, but not answered, in *Davenport* and *Ysursa*. See *Davenport*, 551 U.S. at 189 (“Even if it be thought necessary that the content limitation be reasonable and viewpoint neutral . . .”); *Ysursa*, 555 U.S. at 361, n.3. And the Court has upheld subsidies that were facially viewpoint discriminatory. See, *e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding a condition limiting Title X funding to clinics that do not advocate abortion as a method of family planning). The Court made an exception

in a subsidy case involving the unique context of legal services, where “the traditional role of the [subsidized] attorneys” is to “speak[] on the behalf of his or her private, indigent client” and viewpoint discrimination undermined the very purpose of the subsidy. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542, 544 (2001). There is no tradition of unfettered advocacy in commercial advertising. Thus even if the regulation here could be deemed viewpoint discriminatory, it would not fail under the First Amendment. *See Davenport*, 551 U.S. at 189.

But § 2(a) is in any event viewpoint neutral. In *Boos v. Barry*, 485 U.S. 312 (1988), the Court addressed a nearly identical standard as applied to core political speech. The law there prohibited the display of any sign within 500 feet of a foreign embassy if the sign would tend to bring that foreign government into “public odium” or “disrepute.” *Id.* at 315. Justice O’Connor’s plurality opinion confirmed that the restriction is “content-based,” but it specifically found that “the provision is *not* viewpoint based.” *Id.* at 319 (emphasis added). “The display clause determines which viewpoint is acceptable in a *neutral fashion* by looking to the policies of foreign governments.” *Id.* (emphasis added). This “prevents the display clause from being directly viewpoint based, a label with potential First Amendment ramifications of its own.” *Id.* This aspect of the plurality opinion has since been cited with approval by a majority of the Court in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645 (1994). The same reasoning applies here. Just as the restriction in *Boos* operated in a “neutral fashion” by looking only to foreign governments, the bar on registration of disparaging marks operates in a “neutral fashion” by looking only to the views of the referenced group. Accordingly, just as the restriction in *Boos* was viewpoint neutral, so too is § 2(a). In *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65 (1st Cir. 2004), the

First Circuit arrived at the same conclusion, holding that a regulation “prohibit[ing] demeaning or disparaging ads” was viewpoint neutral because “the state is not attempting to give one group an advantage over another in the marketplace of ideas.” *Id.* at 90–91.

Finding § 2(a) to be viewpoint neutral is consistent with the Court’s treatment of viewpoint discrimination in other areas. The Court has defined viewpoint discrimination as the *government’s* disagreement with the underlying “ideology,” “opinion” or “perspective of the speaker.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Here, as in *Boos*, the standard is not based on the *government’s* disagreement with anything. Rather, it is based on an objective, “neutral” assessment of a non-government perspective—in this case, a “substantial composite of the referenced group.” As in *Davenport* and *Ysursa*, there is no “realistic possibility that official suppression of ideas is afoot,” *Ysursa*, 555 U.S. at 190, and the content-based regulation here is not subject to heightened First Amendment scrutiny.

#### IV

Even in subsidy cases, however, the government needs some interest sufficient to justify its regulation defined in terms of “reasonableness.” *See Ysursa*, 555 U.S. at 359; *Regan*, 461 U.S. at 550. In my view, the protection of disparaged groups is sufficient. As demonstrated on college campuses across the nation, members of some groups, whether or not justified, are particularly sensitive to disparaging material.<sup>7</sup> There is significant

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<sup>7</sup> *See, e.g.,* Chuck Culpepper, *How Missouri football’s boycott helped bridge a familiar campus divide*, Wash. Post (Nov. 13, 2015), <https://www.washingtonpost.com/sports/colleges/how->

social science evidence demonstrating the harmful psychological effects of holding a minority group up for ridicule on a national stage, particularly on children and young adults.<sup>8</sup> In the case of core protected speech, as discussed above, the government has no legitimate interest in protecting disparaged groups. The groups must tolerate the disparagement in pursuit of the greater goal of a free marketplace of ideas. But, as discussed above, commercial speech is different. Disparagement as defined by the Board “is essentially a violation of one’s right of privacy—the right to be let alone from contempt or ridicule.” TMEP § 1203.03(c).

The government has an interest in “proscribing intrusive and unpleasant formats” for commercial expression. *Taxpayers for Vincent*, 466 U.S. at 806; *see also Lehman*, 418 U.S. at 304; *Metromedia*, 453 U.S. at 514. The Supreme Court’s “precedents [] leave no room for doubt that the protection of potential clients’ privacy is a substantial state interest.” *Florida Bar*, 515 U.S. at 625 (internal quotations marks omitted). We need not decide whether this interest is sufficiently compelling to justify a ban of disparaging commercial speech. It is more than sufficient to justify the government’s “decision not to assist” disparaging commercial expression. *Ysursa*, 555 U.S. at 360

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missouri-footballs-boycott-helped-unite-a-troubled-campus/2015/11/13/64fe68ea-8a0f-11e5-be8b-1ae2e4f50f76\_story.html.

<sup>8</sup> *See, e.g., American Psychological Ass’n, APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations* (2011), available at <http://www.apa.org/about/policy/mascots.pdf> (citing many studies finding psychological harm of exposure to negative stereotypes).

n.2; *Taxpayers for Vincent*, 466 U.S. at 806. At the same time, there is no countervailing First Amendment interest. It is certainly difficult to imagine, for example, how the disparaging elements of an advertisement such as “CHLORINOL SODA BLEACHING—we are going to use Chlorinol and be like de white nigger,”<sup>9</sup> or “The Plucky Little Jap Shredded Wheat Biscuit,”<sup>10</sup> or “Dr. Scott’s Electric Hair Brush—will not save an Indian’s scalp from his enemies but it will preserve yours from dandruff,”<sup>11</sup> further any legitimate “informational function” associated with the relevant product.

## V

Finally, contrary to the majority’s implication, it is quite feasible to distinguish between core and commercial speech. Congress has already determined that trademark law should distinguish between pure commercial speech and fully protected speech. Section 1125(c)(3) of title 15 excludes from liability for dilution parody, criticism, and any noncommercial use of a mark. And the noncommercial use of a mark, for parody, as an example, weighs against likelihood of confusion. *See, e.g., Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989); *Davis v. Walt Disney Co.*, 430 F.3d 901 (8th Cir. 2005); *see also Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ’g, Inc.*, 886 F.2d 490, 494-

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<sup>9</sup> Julian Casablancas, *15 Shockingly Racist Vintage Ads*, Business Pundit (Dec. 17, 2012), <http://www.businesspundit.com/15-shockingly-racist-vintage-ads/?img=42884>.

<sup>10</sup> Dan Beard, 24 *Recreation* 1 (1905) available at <https://books.google.com/books?id=LPQXAAAAYAAJ&pg=PA474-IA18#v=onepage&g&f=false>.

<sup>11</sup> Brian D. Behnken & Gregory D. Smithers, *Racism in American Popular Media: From Aunt Jemima to the Frito Bandito* 39 (2015).



95 (2d Cir. 1989) (“the expressive elements of titles require[] more protection than the labeling of ordinary commercial products . . . so here the expressive element of parodies requires more protection than the labeling of ordinary products.”). Congress has made a similar judgment in the copyright context. *See* 17 U.S.C. § 107 (one of four fair use factors includes assessing whether the use is commercial). I see no reason why the Board would be unable to make such distinctions here.

## VI

Turning from the application of § 2(a) to commercial speech to the facts of this case, I agree with the majority that the bar on registration of disparaging marks is unconstitutional as applied to Mr. Tam. Here there can be no doubt that Mr. Tam’s speech is both political and commercial. Unlike *Friedman*, where the trade name proponent did “not wish to editorialize on any subject, cultural, philosophical, or political,” 440 U.S. at 11, Mr. Tam’s choice of mark reflects a clear desire to editorialize on cultural and political subjects. Mr. Tam chose THE SLANTS at least in part to reclaim the negative racial stereotype it embodies: “We want to take on these stereotypes that people have about us, like the slanted eyes, and own them. We’re very proud of being Asian—we’re not going to hide that fact.” *In re Simon Shiao Tam*, 108 U.S.P.Q. 2d 1305 at \*2 (T.T.A.B. 2013). *See* Maj. Op. at 12 (Mr. Tam “selected the mark in order to ‘own’ the stereotype it represents.”).

Given the indisputably expressive character of Mr. Tam’s trademark in this case, the government’s recognized interests in protecting citizens from targeted, demeaning advertising and proscribing intrusive formats of commercial expression—interests that are sufficient to justify the provision as applied to commercial speech—are insufficient to justify application of the provision to Mr.

Tam. As discussed, because of the fundamental values underlying the First Amendment's robust protection of offensive speech that are unique to core political expression, the government cannot justify restricting disparaging trademarks when those marks, like Mr. Tam's, actually consist of core expression. *See, e.g., Snyder*, 562 U.S. at 459–61. Accordingly, because no government interest can justify restricting Mr. Tam's core speech on the basis of its capacity to injure others, § 2(a) is invalid as applied. This also explains why the majority's concern regarding copyright is misplaced. *See, e.g., Maj. Op.* at 55–56. Copyrights, unlike trademarks, principally cover core protected expression. Thus, as for Mr. Tam, any government interest related to suppressing offensive speech would be insufficient to justify a comparable restriction as applied to copyright registration except for commercial advertising.

No case before the majority's opinion today has imposed an obligation on the government to subsidize offensive, commercial speech. As Judge Lourie points out, the bar on registration of disparaging marks is longstanding, and we have previously upheld it in a number of decisions. I see no basis for invalidating it now as applied to commercial speech. I would adhere to those decisions in this respect, and I respectfully dissent.

# United States Court of Appeals for the Federal Circuit

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IN RE SIMON SHIAO TAM

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2014-1203

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Appeal from the United States Patent and Trademark Office, Trademark Trial and Appeal Board in No. 85/472,044.

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LOURIE, *Circuit Judge*, dissenting.

I join Parts I–IV of Judge Dyk’s concurrence-in-part, dissent-in-part, but I respectfully dissent with respect to the result reached by the majority holding the disparagement provision of § 2(a) unconstitutional as violating the First Amendment. For the following additional reasons, I would affirm the USPTO’s decision refusing to register Mr. Tam’s trademark.

First, one wonders why a statute that dates back nearly seventy years—one that has been continuously applied—is suddenly unconstitutional as violating the First Amendment. Is there no such thing as settled law, normally referred to as *stare decisis*? Since the inception of the federal trademark registration program in 1905, the federal government has declined to issue registrations of disparaging marks. The Trademark Act of 1905 provided specific authority to refuse to register immoral or scandalous marks, *see* Act of Feb. 20, 1905, ch. 592, 33 Stat. 724; the USPTO refused to register disparaging

marks on those grounds before the Lanham Act of 1946 was enacted, which explicitly incorporated a disparagement proscription, *see* Appellee's En Banc Br. 6. The USPTO's authority to refuse to issue trademark registrations with certain offensive content has thus existed in U.S. law for over one hundred years. As the majority notes, these are not prohibitions that have lain unused and latent for all of those years. The USPTO has been rejecting applications for trademark registrations on this basis throughout this period of time. By finding § 2(a) unconstitutional, we interfere with the long-standing Congressional policy of delegating authority to the USPTO to filter out certain undesirable marks from the federal trademark registration system. We should not further the degradation of civil discourse by overturning our precedent that holds that the First Amendment is not implicated by § 2(a)'s prohibition against disparaging trademarks.

In addition, the refusal of the USPTO to register a trademark is not a denial of an applicant's right of free speech. The markholder may still generally use the mark as it wishes; without federal registration, it simply lacks access to certain federal statutory enforcement mechanisms for excluding others from confusingly similar uses of the mark. Mr. Tam may use his trademark as he likes, whether it be encouraging discussion on or taking ownership of racial slurs, or identifying goods and services with his band. In fact, it seems quite likely that Mr. Tam will continue to use his band name to make a statement regardless of federal registration—the expressive purpose of his mark undoubtedly overshadows the commercial considerations. The argument, therefore, that a trademark applicant's right of free speech has been impaired by the failure of the USPTO to grant a federal registration is unconvincing.

Furthermore, it is not entirely clear that a trademark, even an expressive trademark, is protected commercial

speech. The lack of a federal registration does not alter the informational function of a trademark: disparaging marks may still be used to identify the source of goods or services. The government's decision to support certain choices and not others will invariably have some discouraging effect, but the government does not necessarily violate an individual's constitutional rights merely by refusing to grant registration and thereby provide additional assistance in the enforcement of trademark rights.

Moreover, trademark rights, as amicus International Trademark Association informs us, are not limited to those marks deemed registrable by the USPTO. "Section 43(a) of the Lanham Act is available to protect all designations of origin, even—indeed, especially—those that cannot be registered under Section 2(a)." Br. of amicus curiae Int'l Trademark Ass'n 4. The fear that markholders would be left with absolutely no recourse for trademark protection, once an application for federal registration is denied, appears unfounded. Rather, all that is at issue here is the government's decision not to facilitate enforcement with the additional mechanisms attendant to federal registration. The denial of federal trademark registration thus does not deprive the markholder of trademark protection because of the content of its mark; the markholder still has trademark rights under the Act in addition to its common law rights.

Finally, it has been questioned whether federal registration imparts the "imprimatur" of the federal government on a mark, such that registration could be permissibly restricted as government speech. I believe that such action is justified. The USPTO does in fact "publish" trademarks, in the Trademark Official Gazette. Despite being in electronic form, it is still a form of government speech that is partially controlled or affected by government action. The USPTO may also require that a disclaimer of unregistrable components be included for publication. Moreover, a federally registered mark is

usually “stamped” with some indication of government oversight, *viz.*, the use of the ® symbol or a phrase that the mark is registered in the USPTO, giving proof to the public that the government has in some sense approved the mark. Without that designation, the markholder cannot take advantage of some of the benefits of federal registration, *e.g.*, constructive notice for damages.

Similarly to specialty license plate designs, federally registered trademarks can be identified with two message contexts: one from the provider of goods or services, who has chosen to use a certain mark to link its product or services to itself, and one from the government, which has deemed the mark qualified for the federal registration program. The evaluation of disparagement is not based on the government’s moral judgment, despite any distaste expressed in its briefing for cancelled or applied-for marks; a mark is disqualified based only on evidence of its perception by the affected persons. The government action does not include a judgment on the worthiness or the effectiveness of the mark; if it did, it might—but not necessarily—venture into viewpoint-discrimination territory. And while a trademark alone, as a word placed on private property, is not government speech, once it claims that federally registered status, it becomes more than the private owner’s speech. It is not simply private speech as is the holding of a placard in a parade.

In my view, holding the disparagement provision of § 2(a) unconstitutional would be unsound, and the USPTO’s refusal to register Mr. Tam’s disparaging mark should therefore be affirmed.

Accordingly, I respectfully dissent.

# United States Court of Appeals for the Federal Circuit

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IN RE SIMON SHIAO TAM

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2014-1203

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Appeal from the United States Patent and Trademark Office, Trademark Trial and Appeal Board in No. 85/472,044.

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REYNA, *Circuit Judge*, dissenting.

The Majority holds today that Mr. Tam's speech, which disparages those of Asian descent, is valuable political speech that the government may not regulate except to ban its use in commerce by everyone but Mr. Tam. I believe the refusal to register disparaging marks under § 2(a) of the Lanham Act is an appropriate regulation that directly advances the government's substantial interest in the orderly flow of commerce. Because I would uphold the constitutionality of § 2(a), I respectfully dissent.

Trademarks are commercial speech. And precisely because trademarks are commercial speech, the government's decision to grant or deny registration must be reviewed under an intermediate standard of scrutiny. Intermediate scrutiny is satisfied whenever the decision is narrowly tailored to directly advance a substantial government interest. When the commercial or political content of a trademark threatens the government's sub-

stantial interest in the orderly flow of commerce, appropriate regulation may be justified.

#### DISCUSSION

##### A. Intermediate Scrutiny Applies Because Trademarks Are Commercial Speech

The Supreme Court has held that trademarks are “a form of commercial speech and nothing more.” *Friedman v. Rogers*, 440 U.S. 1, 11 (1979); accord *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 563 (1987). The purpose of a trademark is merely to “propos[e] a commercial transaction” by identifying the source of goods or services. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 562 (1980).

Because “the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression,” *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64-65 (1983), the government may regulate the use of trademarks to ensure the orderly flow of commerce. For example, the government may disallow trade names that create “[t]he possibilities for deception,” even if the names are not untruthful. *Friedman*, 440 U.S. at 13. The government may similarly implement a trademark registration program, as it did through the Lanham Act, which provides certain speakers exclusive rights to their chosen marks in commerce. Such regulation is permissible under the First Amendment only because the speech being regulated is commercial and because the government has a substantial interest in facilitating commerce by “insuring that the stream of commercial information flows cleanly as well as freely.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976).

The courts have long recognized that some trademarks can include expressive elements concerning mat-



ters of public interest, and that such trademarks nevertheless remain commercial speech. Historically, commercial speech received no First Amendment protection, see *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), and the seminal cases bringing commercial speech within the First Amendment's purview did so, at least in part, because commercial speech often communicates on matters of public interest. *Virginia State Bd.*, 425 U.S. at 764-65. As the Supreme Court recognized in *Virginia State Board*, "not all commercial messages contain the same or even a very great public interest element," but "[t]here are few to which such an element, however, could not be added." *Id.*

The protections of commercial speech are therefore based, at least in part, on the recognition that commercial speech is not always entirely commercial, but that it may contain political messages that make the speech "commercial" in widely varying degrees." *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). For this reason, the Supreme Court has routinely held that various examples of speech "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues." *Bolger*, 463 U.S. at 67; see also *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989). Put simply, commercial speech does not transform into core political speech with full First Amendment protections simply because it "links a product to a current public debate." *Cent. Hudson*, 447 U.S. at 563.

To determine whether speech is commercial, we consider "the nature of the speech taken as a whole." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). For example, in *Bolger*, the Supreme Court found that certain pamphlets were commercial speech, despite containing "discussions of important public issues," because (1) the speaker conceded that the pamphlets were advertisements, (2) the pamphlets referenced a specific product, and (3) the speaker had an economic motivation for mailing the pamphlets. *Bolger*, 463 U.S. at 66-68. The Court

concluded that “[t]he combination of *all* these characteristics” supported the conclusion that “the informational pamphlets are properly characterized as commercial speech.” *Id.*

All three factors from *Bolger* are necessarily also present in trademarks. Trademarks are used to identify specific products and to advertise the sources of those products. Trademarks, and in particular those federally registered for exclusive use in interstate commerce, are necessarily tools of commerce used with an “economic motive.”<sup>1</sup> A trademark is therefore commercial speech, and as such, it lacks full First Amendment protections, regardless of whether it also includes a political element.

The Majority reasons that because the commercial and political elements of trademarks are “inextricably intertwined,” the combined whole must be treated as expressive speech. Maj. Op. at \*26 (*citing Riley*, 487 U.S. at 796). But as explained above, commercial speech is frequently intertwined with political elements, and this intertwining does not necessarily alter the essentially commercial character of the speech. *Riley*, on which the Majority relies, is not to the contrary. *Riley* only reiterates that “in deciding what level of scrutiny to apply” we must consider “the nature of the speech taken as a whole.” *Riley*, 487 U.S. at 796. The nature of trademarks seeking federal registration for use in interstate commerce, when considered as a whole, is indisputably commercial, not political.

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<sup>1</sup> The registration of a trademark confers a competitive advantage in the marketplace to the owner of the mark. Typically, in trademark disputes, opposition to the registration or use of a certain mark involves the commercial activities of a competitor. In such cases, the interests of both the owner and competitor are fundamentally commercial in nature.

Judge Dyk concurs in the result today only because he believes the *content* of Mr. Tam’s mark is so “indisputably expressive” that it cannot be regulated under the lesser standards applied to commercial speech. Dyk, J., concurring at \*20-21. But if the expressive *content* of the mark precludes regulation, on what authority may the government grant Mr. Tam the exclusive right to use this mark in commerce? Whatever standard of scrutiny protects the content of Mr. Tam’s trademark from government regulation, that same standard must necessarily be overcome by the government’s substantial interest in the orderly flow of commerce, or no trademark could issue.

B. Intermediate Scrutiny Applies Because Section 2(a)  
is Content-Neutral

The Majority applies strict scrutiny not necessarily because of the expressive content of Mr. Tam’s mark, but because of the government’s supposed *purpose* of suppressing the political elements of the mark. Maj. Op. at \*23-26. The Majority thus invokes the modern test for content-neutrality, under which the “principal inquiry” is “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Under *Ward*, “[t]he government’s purpose is the controlling consideration.” *Id.* The Supreme Court has endorsed the applicability of this test to commercial speech. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011).

If this appeal turns on a content-neutrality analysis, we should be clear that the government has never stated that the purpose of § 2(a) is to suppress speech. Only the Majority has advanced this rationale, and it has done so only by default after eliminating all other interests of which it could conceive. I do not think we need to search so hard and so far. The purpose of § 2(a) is the same as

the purpose of the Lanham Act as a whole—to promote the orderly flow of commerce.

The Lanham Act declares unequivocally that “[t]he intent of this chapter is to regulate commerce.” 15 U.S.C.A. § 1127. In analyzing content-neutrality, an apparently content-based law is nevertheless considered content-neutral if the government’s purpose is *not* to suppress speech, but to address the harmful secondary effects of that speech. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. Am. Mini Theatres*, 427 U.S. 50 (1976). The Supreme Court has repeatedly applied this “Secondary Effects” doctrine to uphold not only time, place, and manner restrictions on particular types of speech, *id.* (upholding regulations on the locations of adult businesses), but also regulations on the content of expression itself, see, e.g., *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) (upholding ban on fully nude dancing); *Barnes v. Glen Theatre*, 501 U.S. 560 (1991) (same). For example, applying *Ward*, the Supreme Court upheld a city’s ban on fully nude dancing because the ban was only a minimal burden on speech and was narrowly tailored to advance the “substantial government interest in protecting order and morality.” *Barnes*, 501 U.S. at 569. In *City of Erie*, the Court upheld a nearly identical statute as content-neutral because it did “not attempt to regulate the primary effects of the expression” but rather, “the secondary effects, such as impacts on public health, safety, and welfare.” *City of Erie*, 529 U.S. at 291.

The Supreme Court has also permitted regulation of speech based on the speech’s effect on commerce. For instance, it was under *Ward* that the Supreme Court upheld the FCC’s must-carry provisions as content-neutral, despite the provisions’ mandate that cable providers transmit particular types of content. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 647 (1994). The Court upheld the must-carry regulations because they furthered the substantial government interest in “protecting non-

cable households from loss of regular television broadcasting service.” *Id.* The Court has also upheld regulations on highly-protected private speech where the government sought to eliminate the secondary effects of that speech on the market for illegal goods. *See Osborne v. Ohio*, 495 U.S. 103 (1990). Thus, when a regulation’s purpose is to address the secondary effects of certain speech, intermediate scrutiny is appropriate, even if the regulation implicates content.

Section 2(a) serves the same substantial government interest as the Lanham Act as a whole—the orderly flow of commerce. Commercial speech that insults groups of people, particularly based on their race, gender, religion, or other demographic identity, tends to disrupt commercial activity and to undermine the stability of the marketplace in much the same manner as discriminatory conduct. The government’s refusal to promote such speech in commerce is not an effort to suppress free expression, but to mitigate the disruptive secondary effects that a particular type of low-value speech may have when used in a commercial context. Because the government’s purpose is to mitigate these secondary effects on commerce rather than to suppress speech, the regulation is content-neutral and intermediate scrutiny applies.

#### C. Section 2(a) Advances the Substantial Government Interest in the Orderly Flow of Commerce

The government’s interest in the orderly flow of commerce is substantial. If it were not, the government would be powerless to implement a trademark registry because doing so necessarily requires a ban on infringing commercial speech. The government has a substantial interest in regulating “deceptive or misleading” commercial speech, even if that speech is not wholly false, because of the government’s substantial interest in “insuring that the stream of commercial information flow

cleanly as well as freely.” *Virginia State Bd. of Pharmacy*, 425 U.S. at 771. The Supreme Court has never held, however, that deceptive and misleading speech is the *only* type of commercial speech subject to regulation for its disruptive effect. See *Cent. Hudson*, 447 U.S. at 566 (“For commercial speech to come within that provision, it *at least* must concern lawful activity and not be misleading.”) (emphasis added). Instead, any speech that substantially undermines the orderly flow of commerce may potentially be subject to at least some regulation.

The marketplace of ideas differs dramatically from the marketplace of goods and services. While the marketplace of ideas may tolerate or even benefit from the volatility that accompanies disparaging and insulting speech, the marketplace of goods and services is a wholly different animal. Commerce does not benefit from political volatility, nor from insults, discrimination, or bigotry. Commerce is a communal institution regulated for the mutual economic benefit of all. Commercial speech that discredits or brings reproach upon groups of Americans, particularly based on their race, has a discriminatory impact that undermines commercial activity and the stability of the marketplace in much the same manner as discriminatory conduct.

That discriminatory *conduct* disrupts commerce is long established. In upholding Title II of the Civil Rights Act, for example, the Supreme Court noted a record “replete with testimony of the burdens placed on interstate commerce by racial discrimination.” *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964). The Court cited an “impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel,” and that such discrimination therefore “obstructs interstate commerce.” *Id.* at 300. It cited “many references” to discrimination causing “a depressant effect on general business conditions in the respective communities” and it noted evidence that discrimination

“deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there.” *Id.* The Court thus found “ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it.” *Id.*

Although these findings were specific to public accommodations, they are applicable to commerce generally. Commercial goods and services pervade all economic channels, including all public accommodations, such as stores, restaurants, hotels, theaters, and the like. Discriminatory messages within such commercial channels threaten the same disruptive effects as the discrimination itself. Although the Majority distinguishes between conduct and speech, Maj. Op. at \*59, the distinction is without a difference in this context. Whether a restaurant named “SPICS NOT WELCOME” would actually serve a Hispanic patron is hardly the point. The mere use of the demeaning mark in commerce communicates a discriminatory intent as harmful as the fruit produced by the discriminatory conduct.

Because even speech without accompanying conduct can have a discriminatory impact, other parts of the Civil Rights Act expressly regulate pure speech in commerce. For instance, Title VIII specifically bans advertising that indicates a discriminatory preference, even where discriminatory conduct is legal. *See* 42 U.S.C. § 3604(c); *see also* § 3603(b) (listing exemptions). Title VII places similar restrictions on job advertisements. *See* 42 U.S.C. § 2000e-3(b). Title VII also bans pure speech in the workplace when the speech is harassing, even when unaccompanied by any adverse employment action, because such speech creates a discriminatory impact. *See*

*Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

Nearly every disparaging mark identified in the voluminous briefing and opinions in this case has involved disparagement of race, gender, ethnicity, national origin, religion, sexual orientation, and similar demographic classification. The impact of advancing these bigoted messages through the ubiquitous channels of commerce may be discriminatory, and even if not discriminatory, at least *disruptive* to commerce. The only question is whether the government's interest in avoiding this commercial disruption outweighs the modest "burden" that its refusal to register the offending marks places on the freedom of speech. I believe it does.

#### D. Section 2(a) Survives Intermediate Scrutiny

To be clear, I do not believe that the government may ban any speech it finds commercially undesirable, but only that when we are presented with a regulation, we must engage meaningfully in "the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow*, 421 U.S. at 826. Here, the government's substantial interest in the orderly flow of commerce is counterbalanced only by a minimal "burden" on a small subset of low-value commercial speech. Section 2(a) should survive intermediate scrutiny because it is only an "incidental restriction on First Amendment freedom [that] is no greater than is essential to the furtherance of the governmental interest" in the orderly flow of commerce. *See Barnes*, 501 U.S. at 561.

Section 2(a) imposes only a modest "burden" on speech. First, the statute applies only in the commercial context, meaning that it does nothing to impact private speech. Mr. Tam remains free to spread his chosen message to all who would listen without fear of government intervention or reprisal. Second, § 2(a) does not strictly



“burden” Mr. Tam’s speech, but only denies him a government-created benefit—the exclusive right to use that speech in commerce in connection with the sale of particular goods or services. At bottom, the only burden the application of § 2(a) imposes in this case is that Mr. Tam is free to communicate his chosen message within or without commerce, so long as he is willing to permit others to do the same.

Section 2(a) also implicates only a modest sliver of particularly low-value speech. Speech that disparages is a narrow subset of speech that offends, and it is a particularly low-value subset at that. *See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 989 F. Supp. 2d 182, 192 (D. Mass. 2013) *aff’d*, 781 F.3d 571 (1st Cir. 2015) (distinguishing speech that “crosses the line from being offensive or hurtful to being demeaning or disparaging”). To borrow a phrase from Justice Stevens, few of us would march our sons and daughters off to war to preserve the citizen’s right to be the exclusive purveyor of “OLD COON SMOKING TOBACCO.” *See Young*, 427 U.S. at 70; *McCann v. Anthony*, 21 Mo. App. 83, 91-92 (1886).

The Supreme Court has routinely considered the relative value of burdened speech in its First Amendment analysis. *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *Young*, 427 U.S. at 70-71; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510-11 (1969). For instance, the Court has held that a student’s interest in high-value political speech outweighed his school’s interest in avoiding a “substantial disruption,” *Tinker*, 393 U.S. at 510-11, but that a student’s interest in low-value “insulting” speech did not, *Fraser*, 478 U.S. at 683. When low-value materials are concerned, “the State may legitimately use the content of these materials as the basis for placing them in a different classification” of First Amendment protection. *Young*, 427 U.S. at 71.

At the extremes, disparaging speech enjoys no First Amendment protection. *Chaplinsky v New Hampshire*, 315 U.S. 568 (1942). “Insulting” words, which “by their very utterance inflict injury” are part of the “limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Id.* at 571-72. To whatever extent “disparaging” speech differs from “insulting” speech, its value is not much greater.

Additionally, any minimal value disparaging speech might offer in the marketplace of ideas is far diminished in the marketplace of goods and services, which is the only context at issue in this appeal. One can hardly imagine what legitimate interest a vendor of goods or services may have in insulting potential customers. Whatever value disparaging speech might possess when used in private life, it loses when used in commerce.

When we balance the government’s substantial interest in the orderly flow of commerce against the modest imposition of § 2(a) on a narrowly tailored portion of particularly low-value speech, the standards of intermediate scrutiny are satisfied. Whatever modest imposition the statute makes on the free flow of public discourse, it is nothing more than an “incidental restriction on First Amendment freedom [that] is no greater than is essential to the furtherance of the governmental interest” in the orderly flow of commerce. *See Barnes*, 501 U.S. at 561. For the foregoing reasons, I believe that § 2(a) is constitutional. I respectfully dissent.

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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JANE DOE, ET AL., PETITIONERS

*v.*

BACKPAGE.COM LLC, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT*

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

In the Trafficking Victims Protection Reauthorization Act (TVPRA), Congress provided a private right of action to victims of child sex trafficking against those who knowingly participate in the trafficking venture. Massachusetts provides a similar cause of action against those who “knowingly aid[]” such a venture. Petitioners are child sex trafficking victims who were trafficked through Backpage.com, which is owned and operated by respondents. Petitioners sued respondents under the TVPRA and its state analogue for their role in promoting, facilitating, and aiding the trafficking of petitioners. The First Circuit held that even if petitioners had plausibly alleged a cause of action under the TVPRA and state law, Section 230(c)(1) of the Communications Decency Act (CDA) made respondents “immune” from liability. Section 230(c)(1) provides that no internet service provider “shall be treated as the publisher or speaker” of internet content that was “provided by another.” The First Circuit held that petitioners’ claims “treated” respondents as a “publisher or speaker” of “information provided by another” for purposes of Section 230(c)(1) because online advertisements created by third-party traffickers were a “but-for” cause of petitioners’ injuries. The question presented is:

Whether Section 230 of the CDA precludes a civil lawsuit against a website owner and operator based on its own criminal conduct any time online content created by a third party was a part of the chain of causation leading to the plaintiff’s injuries.

## **PARTIES TO THE PROCEEDING**

Petitioners Jane Doe No. 1, Jane Doe No. 2, Jane Doe No. 3, Sam Loe, and Sara Loe were the plaintiffs in the District Court and the appellants in the Court of Appeals.

Respondents Backpage.com LLC, Camarillo Holdings, LLC, and New Times Media, LLC were the defendants in the District Court and the appellees in the Court of Appeals.

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**In the Supreme Court of the United States**

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No. \_\_\_\_\_

JANE DOE ET AL., PETITIONERS

*v.*

BACKPAGE.COM LLC, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT*

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**PETITION FOR WRIT OF CERTIORARI**

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Petitioners Jane Doe No. 1, Jane Doe No. 2, Jane Doe No. 3, Sam Loe, and Sara Loe respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

**OPINIONS BELOW**

The opinion of the Court of Appeals (App., *infra*, 1a-33a) is reported at 817 F.3d 12. The opinion of the District Court granting respondents' motion to dismiss (App., *infra*, 34a-67a) is reported at 104 F. Supp. 3d 149.

**JURISDICTION**

The Court of Appeals entered judgment on March 14, 2016. The court denied Doe's timely petition for rehearing en banc on May 3, 2016. See App., *infra*, 68a-

69a. This Court has jurisdiction under 28 U.S.C. 1254(1).

### RELEVANT STATUTORY PROVISIONS

The relevant statutes are the Communications Decency Act of 1996 (CDA), 47 U.S.C. 230; the Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA), 18 U.S.C. 1591 and 1595; and the Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010 (MATA), Mass. Gen. Laws ch. 265, § 50(d).

The relevant provisions of the statutes are reproduced in full in the appendix (App., *infra*, 70a-80a).

### STATEMENT OF THE CASE

This petition involves a statutory provision—Section 230 of the Communications Decency Act (CDA)—that Congress enacted in 1996 to protect internet service providers (ISPs) serving as passive intermediaries of online content from liability for claims that treat them as a traditional publisher. 47 U.S.C. 230(c)(1). The First Circuit applied Section 230 to preclude petitioners’ claims alleging affirmative conduct by an ISP itself that violated federal and state anti-trafficking statutes, specifically the federal Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), 18 U.S.C. 1591(a), and the Massachusetts Anti-Trafficking Act of 2010 (MATA), Mass. Gen. Laws ch. 265, § 50(d).

Petitioners brought suit in the United States District Court for the District of Massachusetts, under the TVPRA and MATA alleging that respondents had knowingly profited from aiding and participating with traffickers in the sexual exploitation of children by in-

tentionally creating an online marketplace to facilitate the trafficking. App., *infra*, 35a-40a. The district court granted respondents motion to dismiss, concluding that Section 230 of the CDA barred petitioners' claims under the TVPRA and MATA. The First Circuit affirmed, holding that, even assuming respondents directly violated the TVPRA and MATA, petitioners' claims under those statutes "treated" respondents "as a publisher" under Section 230(c)(1), because advertisements that third-party traffickers created were part of the chain of causation that led to petitioners' injuries.

The First Circuit's decision conflicts with several decisions of the Ninth Circuit rejecting the "chain of causation" principle adopted by the First Circuit. Additionally, the decision conflicts with a September 2015 decision of the Washington Supreme Court in a nearly identical case brought against these same respondents. Finally, the First Circuit disregards the guidance provided by this Court in *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014), and other cases about the need to harmonize intersecting statutes.

## **A. Statutory Provisions**

### **1. Section 230 of the CDA**

Section 230 of the CDA provides that no ISP defendant "shall be treated as the publisher or speaker" of Internet content that was "provided by another." 47 U.S.C. 230(c)(1). Passed in 1996, the CDA represents an effort by Congress to regulate access to indecent or obscene content on the Internet. Congress was additionally motivated by the then-recent New York state court decision in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24,

1995), superseded by statute, Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 137, as recognized in *Shiamili v. Real Estate Group of N.Y., Inc.*, 952 N.E.2d 1011, 1016 (2011). In *Stratton Oakmont*, an Internet service provider was held liable for a third party's libelous statements posted on a neutral message board. *Id.* at \*6-7. The court determined that, because the interactive computer service Prodigy sometimes "deleted \* \* \* distasteful third-party postings" that appeared on Prodigy-owned bulletin boards, Prodigy was subject to strict, common law "publisher's liability" for defamatory content that any one of its millions of users might choose to post on any one of Prodigy's numerous online bulletin boards. *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009). Concerned that *Stratton Oakmont* would deter ISPs from exercising any editorial control over potentially offensive third-party content, Congress passed Section 230 to remove traditional publisher liability for ISPs who acted in good faith to remove or restrict such content. See H.R. Rep. No. 458, at 194 (1996), 104th Cong., 2d Sess. (stating that specific purpose of Section 230(c)(1) was to overrule *Stratton Oakmont*); 141 Cong. Rec. 22044-22045 (1995) (amendment offered by Rep. Cox). Senator Coats, one of the two main authors of the CDA, made clear while discussing Section 230 that its intention was to prevent ISPs that try to keep offensive material off the Internet "from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable." 141 Cong. Rec. S8345 (daily ed. June 14, 1995) (statement of Sen. Coats).

Given its historical context, courts have accepted that the wording of Section 230(c)(1) has its roots in the



common law of defamation, which “treats as publishers” those who participate, either intentionally or negligently, in the communication of a defamatory matter to a person other than the person defamed. See Restatement (Second) of Torts §§ 577, 581 (1977). In fact, early decisions applying Section 230 generally arose out of facts similar to those that inspired its passage. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998). Federal courts have generally agreed, however, that Section 230 is not limited to defamation claims and “does more than just overrule *Stratton Oakmont*.” *Accusearch*, 570 F.3d at 1195. In those instances where courts have specifically interpreted the phrase “treat[] as the publisher or speaker of any information provided by another,” they have concluded that it bars claims that seek to impose liability solely on the basis of a website operator’s “exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.” *Zeran*, 129 F.3d at 330.

## 2. TVPRA

In 2000, Congress enacted the Trafficking Victims Protection Act. The statute represents a congressional effort to criminalize conduct related to human trafficking. Reauthorized five times—in 2003,<sup>1</sup> 2005, 2008, 2011 and 2013—the TVPRA imposes severe penalties on any person who, *inter alia*, knowingly engages in trafficking of children for the purposes of engaging in “a commercial sex act.” 18 U.S.C. 1591(a)(2). Significantly,

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<sup>1</sup> In 2003, Congress reauthorized the statute, which then became known as the Trafficking Victims Protection Reauthorization Act.

since 2003, the TVPRA has included a civil enforcement provision that allows victims to “bring a civil action against the perpetrator in an appropriate district court of the United States” and to “recover damages and reasonable attorneys fees.” 18 U.S.C. 1595 (2003). The TVPRA does not impose liability for “publishing” information.

In 2008, Congress amended the TVPRA to broaden its reach. The Wilberforce Amendments expanded criminal liability to anyone who “benefits, financially or by receiving anything of value, from participation in [the underlying sex trafficking] venture” that “provides [or] obtains” a child for a commercial sex act either knowingly or in “reckless disregard” of the fact that the victim is a minor. 18 U.S.C. 1591(a)(1) and (2). The statute’s private right of action was also expanded to give victims, like petitioners, the right to pursue a civil claim against any persons who “knowingly benefit[] financially \* \* \* from participation in [the underlying sex trafficking] venture.” See 18 U.S.C. 1595. This private right of action provision makes clear that, to be civilly liable for participating in a child sex trafficking venture, a defendant need not have been the “perpetrator” of the trafficking. *Ibid.* (no longer requiring defendant to be “perpetrator”).

The legislative history of the TVPRA confirms Congress’ intention to expand the reach of the statute. In explaining the need for its amendments, one senator stated, “[I]t is our job to once again be a beacon of progress and hope and no longer allow one man to profit from the suffering of another.” 153 Cong. Rec. H14098, H14120 (daily ed. Dec. 4, 2007). About these expansive amendments, then-Senator Biden stated that they “es-

tablish[ed] some powerful new legal tools, including increasing the jurisdiction of the courts, enhancing penalties for trafficking offenses, punishing those who profit from trafficked labor and ensuring restitution of forfeited assets to victims.” 154 Cong. Rec. S4798, S4799 (daily ed. May 22, 2008).

### 3. MATA

Passed in 2011, the MATA is an example of the sustained national effort to comprehensively address the problem of human trafficking at the state level. See generally Melissa Dess, *Walking the Freedom Trail: An Analysis of the Massachusetts Human Trafficking Statute*, 33 B.C.J.L. & Soc. Just. 147, 151 (2013). Like its federal analogue, the MATA not only includes criminal penalties, but also provides victims with a private right of action. Under the MATA’s private right of action, a victim is entitled to sue not only the individuals who forced her to engage in commercial sex, but also “[a]ny business entity that knowingly aid[ed] \* \* \* [the] joint venture[]” that trafficked her “for sexual servitude.” Mass. Gen. Laws ch. 265 § 50(d).

#### B. Respondents’ Participation In Child Sex Trafficking

Respondents own and operate Backpage.com, a website that hosts more than 80 percent of the online advertising for illegal commercial sex in the United States. Each day, several hundred thousand advertisements are posted on the “Escorts” section of Backpage.com. Respondents charge money for the “Escort” advertisements, reaping more than one million dollars in profits annually from them. A significant portion of

the advertisements on Backpage.com features children that sex traffickers hold out for sale.

As petitioners alleged in their complaint, respondents are not merely passively aware that illegal commercial sex ventures operate over Backpage.com. Rather, respondents have engaged in affirmative conduct designed to support such ventures (including those that exploit children). Petitioners' complaint alleged, among other things, that respondents (1) steer traffickers toward advertising language that will avoid law enforcement detection; (2) accept and indeed encourage non-traditional payment methods that render virtually untraceable the financial transactions between respondents and the traffickers that advertise their victims over Backpage.com; (3) strip metadata, including geolocation information, from photographs that traffickers upload to Backpage.com to entice potential customers, which hinders law enforcement's ability to locate victims and apprehend their traffickers; (4) intentionally delete from Backpage.com "sting ads" that law enforcement places on Backpage.com, which aids trafficking ventures' profitability by eliminating a potential customer deterrent; (5) host and facilitate private communications between traffickers and customers regarding illegal sex transactions; and (6) feign cooperation with law enforcement while refusing to use techniques that could identify and locate children being sold for sex.<sup>2</sup> App., *infra*, 4a-7a. Respondents take all of

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<sup>2</sup> The plausibility of Plaintiffs' allegations of criminal wrongdoing are supported by developments in the ongoing investigation of Backpage.com by the U.S. Senate, including the preliminary conclusions of subcommittee staff, the assertion by the Backpage.com CEO and two of its employees of their Fifth Amendment

these actions in pursuit of their own profit; if the underlying sex trafficking ventures flourish, the traffickers will post more advertisements on Backpage.com and be willing to pay more to post them, which directly translates into more advertising dollars for respondents.

### **C. The Present Litigation**

#### **1. Petitioners**

Beginnings at age 15, petitioners were illegally trafficked for sex through Backpage.com. Jane Doe No. 1 was trafficked across Massachusetts and Rhode Island on Backpage.com in 2012 and 2013. She was sold and raped 10-12 times per day by men responding to the advertisements. Jane Doe No. 2 was trafficked across Massachusetts on Backpage.com from 2010 through 2012. She was advertised an average of 6 times per day and was sold and raped by 5 to 15 customers a day. Jane Doe No. 3 was trafficked on Backpage.com in 2013. She was driven to a hotel in Massachusetts, where she was raped in exchange for payment that went to her trafficker. As a direct result of these sex trafficking ventures, petitioners have suffered severe physical and psychological injuries.

In order to hold respondents responsible for their conduct and the injuries that conduct caused, petition-

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privilege against self-incrimination, and the determination by the Senate to hold Backpage.com's CEO in contempt. See Staff of S. Permanent Subcomm. on Investigations, 114th Cong., Recommendation to Enforce a Subpoena Issued to the CEO of Backpage.com, LLC 1, 10, 30-33 (Nov. 19, 2015), <https://www.hsgac.senate.gov/subcommittees/investigations/reports>; see also Application to Enforce Subpoena, *Senate Permanent Subcomm. on Investigations v. Ferrer*, No. 1:16-mc-621 (D.D.C. Mar. 29, 2016).

ers filed a civil action against respondents in the United States District Court for the District of Massachusetts. Petitioners' complaint included causes of action under the TVPRA and the MATA. Petitioners' complaint included detailed factual allegations about respondents' own knowing, purposeful business conduct that is designed to and does solicit, encourage, promote, and protect the sex trafficking ventures that serve as an engine of Backpage.com's profitability.

## **2. The District Court and First Circuit Proceedings**

Respondents moved to dismiss petitioners' complaint, arguing that Section 230 of the CDA provided them immunity from civil liability. Respondents argued that, because third-party traffickers were the ones who authored and posted the advertisements that shopped petitioners to potential customers, petitioners' lawsuit "treated" respondents "as the publisher or speaker" of "information provided by another" and was therefore barred by Section 230. The district court agreed with respondents and dismissed petitioners' lawsuit. App., *infra*, 67a.

Petitioners timely appealed. On March 14, 2016, the United States Court of Appeals for the First Circuit affirmed the district court's dismissal. The panel acknowledged that the CDA and TVPRA "do not fit together seamlessly, and this case reflects the tension between them." App., *infra*, 3a. The court wrote that Congress enacted the CDA, in part, in response to court cases that had held internet publishers liable for defamatory content posted by third parties on the publishers' message boards. Still, it concluded that there had been "near-universal agreement" that the CDA

should not be construed “grudgingly” and to do otherwise could have a “chilling effect.” *Id.* at 10a.

The First Circuit found that petitioners’ complaint made a “persuasive case” that respondents purposefully tailored Backpage.com to “make sex trafficking easier.” App. *infra*, 32a-33a. The First Circuit concluded, however, that even if petitioners’ complaint plausibly alleged that respondents had violated the federal and state criminal anti-trafficking laws, petitioners’ causes of action “treated” respondents as the “publisher or speaker” of online advertisements that third-party traffickers created, and therefore those claims were barred by Section 230(c)(1). *Id.* at 11a-15a. The court explained that the advertisements that petitioners’ traffickers posted on Backpage.com were what provided a connection between respondents’ own violations of the federal and state anti-trafficking statutes on the one hand and petitioners’ injuries on the other. In other words, “information provided by another” linked the chain of causation that led to petitioners’ injuries. This, the First Circuit reasoned, was sufficient to trigger Section 230(c)(1)’s bar. *Id.* at 11a.

### REASONS FOR GRANTING THE PETITION

The First Circuit’s decision immunizes website owners and operators, such as respondents, from civil liability whenever online content created by a third party was a part of the chain of causation leading to the plaintiff’s injury—even if there are plausible allegations that the website owner and operator’s own criminal conduct contributed to her injury. The First Circuit’s broad construction of Section 230 conflicts with several decisions of the Ninth Circuit that expressly reject the reasoning of the First Circuit, as well as with decisions

of other circuits which align with the Ninth Circuit in carefully confining the CDA to “neutral intermediaries.” The First Circuit’s decision also directly conflicts with a September 2015 decision of the Washington Supreme Court in a case involving a nearly identical set of facts that a nearly identical set of plaintiffs brought against these same respondents.

The conflict between the First Circuit and these other courts follows from a failure to attempt to harmonize the CDA with the criminal statutes underling petitioners’ claims. The consequence is that the federal and state trafficking statutes have been effectively set aside without any effort to determine whether Congress intended that the CDA would undermine its own anti-trafficking efforts in that manner. More careful analysis of the language and context of each statute demonstrates that they can operate together in a manner that fulfills the important purposes of each.

This petition represents an ideal vehicle for this Court to address Section 230 of the CDA and to provide the lower courts guidance on how to construe and apply this provision. First, the court of appeals held below that Section 230 barred petitioners’ lawsuit against respondents, even assuming that petitioners’ complaint stated a plausible claim that respondents have engaged in purposeful and knowing conduct that violates federal and state criminal anti-trafficking laws that include private rights of action. The court of appeals’ construction and application of Section 230 was therefore outcome determinative of petitioners’ appeal. Second, the stakes here are high. The gravamen of petitioners’ complaint is that respondents violated federal and state criminal law—namely, the TVPRA and the MATA.



Congress and the Massachusetts legislature each determined that, in addition to criminal penalties, private rights of action are an essential part of the anti-trafficking enforcement scheme. The First Circuit's decision strips petitioners of their right to hold respondents civilly liable for the injuries that their criminal conduct caused, and thereby impairs the enforcement scheme that Congress and the Massachusetts legislature so carefully crafted.

**I. THE FIRST CIRCUIT'S BROAD CONSTRUCTION OF CDA IMMUNITY CONFLICTS WITH OTHER COURTS AND WITH GUIDANCE FROM THIS COURT ON THE INTERPRETATION OF INTERSECTING STATUTES**

**A. The First Circuit's Broad Reading Of The CDA Conflicts With The More Limited Construction Given It By Other Courts**

**1. The Ninth Circuit Rejects the First Circuit's "causation" construction of the CDA**

The Ninth Circuit, which has the most developed jurisprudence concerning Section 230, construes that provision far more narrowly than the First Circuit does. In particular, the Ninth Circuit has explicitly rejected the First Circuit's view that the mere presence of third-party content in the chain of causation leading to a plaintiff's injury necessarily triggers Section 230. In stark contrast to the First Circuit's approach, the Ninth Circuit has instead looked beyond the presence of third-party content to the particular nature of the claims at issue to determine whether Section 230 applies. Other courts of appeals have agreed with the

Ninth Circuit that liability can lie against an ISP that acts as more than a mere passive intermediary, even where third-party content played some role in the alleged injury.

In *Fair Housing Council v. Roommates.com*, the Ninth Circuit held that a website operator could be held liable for its own conduct that violated a “law[] of general applicability.” 521 F.3d 1157, 1164 n.15 (2008). The court explained that, “even if the [challenged] information originated with a user,” the party “responsible for putting [that] information online may be subject to liability” if, in the process of doing so, the ISP’s own conduct makes it “more than a passive transmitter of information provided by others.” *Id.* at 1165-1166. The court emphasized that the plaintiffs’ allegations sought to hold Roommates.com liable for its “own acts,” which were “entirely its doing.” *Id.* at 1165. In other words, the fact that third-party content appeared in the chain of causation did not decide the matter. If the result were otherwise, the Ninth Circuit noted, such an interpretation of Section 230 would stray far beyond congressional intent: “The Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet.” *Id.* at 1164.

The next year, in *Barnes v. Yahoo!, Inc.*, the Ninth Circuit concluded that a defendant could not rely on Section 230 to defend against a promissory estoppel claim where the defendant had promised the plaintiff that it would remove certain third-party content from its website but then failed to do so. See 570 F.3d 1096, 1099, 1107-1109 (2009). The promissory estoppel claim, the court explained, did not “seek to hold Yahoo liable as a publisher or speaker of third-party content.” *Id.* at

1107. That is, the claim was not based on Yahoo acting as a passive intermediary, nor did it seek to impute the content of the third-party speech to Yahoo. Rather, the claim alleged that Yahoo had acted “as the counterparty to a contract, as a promisor who has breached.” *Ibid.* Even though the plaintiff would not have suffered injury but for the third party’s original act of posting the content, the court held that this fact did not bar the plaintiff’s claim. Instead, what mattered was that the claim sought to hold the ISP liable for its own conduct in violation of contract law.

Most recently, in *Jane Doe No. 14 v. Internet Brands, Inc.*, the Ninth Circuit reaffirmed the reasoning of *Roommates.com* and *Barnes* by explicitly holding that a claim was not barred by Section 230 simply because publication of third-party content on a website was part of the chain of causation leading to the injury. See 824 F.3d 846, 848, 853 (2016) (decision on rehearing). The plaintiff in *Internet Brands* alleged that the defendant website knew that two of the site’s users had been engaging in a scheme to lure, drug, and rape women by responding to postings on the site; the plaintiff claimed that the site’s operators had tortiously failed to warn the plaintiff and others like her about the risk of being victimized. *Id.* at 848-849. Unlike the First Circuit, the Ninth Circuit explained that, although the defendant “acted as the ‘publisher or speaker’ of user content \* \* \* and that action could be described as a ‘but-for’ cause of [plaintiff’s] injuries \* \* \* that does not mean the failure to warn claim seeks to hold [defendant] liable as the ‘publisher or speaker’ of user content.” *Id.* at 853. The court reaffirmed *Barnes*’s holding that “the CDA does not provide a

general immunity against all claims derived from third-party content.” *Ibid.* And it further recognized that any concern about a “chilling effect” on Internet speech—such as the First Circuit expressed here, (App., *infra*, 10a)—is inapplicable in a situation like this: “Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses.” *Internet Brands*, 824 F.3d at 853.

The lynchpin of these decisions is the understanding that Section 230, which was designed to protect ISPs in their capacity as “neutral intermediaries,” does not immunize a defendant from its own alleged violations of “laws of general applicability.” *Room-mates.com*, 521 F.3d at 1164 n.15. The court emphasized that the internet “is no longer a fragile new means of communication that could easily be smothered in the cradle,” but rather “a dominant—perhaps the preeminent—means through which commerce is conducted.” *Id.* at 1164 n.15. In that context, courts must not “exceed the scope of the immunity provided by Congress” by “giv[ing] online businesses an unfair advantage over their real-world counterparts,” who have to obey the same laws as everyone else, *ibid.*—including laws prohibiting participation in child sex trafficking ventures. If a business operator in the brick-and-mortar world had created a marketplace for illegal sex with children, assisted child sex traffickers in connecting with their “customers,” and shielded those traffickers from law enforcement scrutiny—in other words, if it had done exactly what petitioners allege that respondents have done—that business would be subject to civil liability in

the Ninth Circuit for its participation in child sex trafficking. But not so in the First Circuit.

**2. Other circuits agree that Section 230 is limited to protection of ISPs serving as “neutral intermediaries”**

Other courts of appeals have agreed with the Ninth Circuit that Section 230 must have limits, in order to avoid turning the internet into the “lawless no-man’s land” that the *Roommates.com* court warned against. 521 F.3d at 1164; *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009) (“Accusearch’s actions were not ‘neutral’ with respect to generating offensive content; on the contrary, its actions were intended to generate such content. Accusearch is not entitled to immunity under the CDA.”); *Doe v. SexSearch.com*, 551 F.3d 412, 415 (6th Cir. 2008) (refusing to adopt district court’s interpretation of Section 230, “which would read [that section] more broadly than any previous Court of Appeals decision has read it, potentially abrogating all state- or common-law causes of action brought against interactive Internet services”); *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008) (holding that Section 230(c) “as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts”).

Accordingly, the federal courts of appeal are broadly aligned on the principle that Section 230 protects neutral intermediaries, not ISPs that, through their own acts, have committed a wrong against a plaintiff.<sup>3</sup>

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<sup>3</sup> See, e.g., *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014) (a website is immune pursuant to Section 230 if it “mere-

This principle is particularly strong where the ISP’s affirmative conduct is itself against the law. Both the Ninth and Tenth Circuits have explicitly held that Section 230 does not apply to non-neutral ISPs engaged in misconduct that violates federal statutes. See *Accusearch*, 570 F.3d at 1198-99 (Section 230 did not apply where the ISP contributed to the unlawful conduct of its users in violation of the Telecommunications Act of 1996); *Roommates.com*, 521 F.3d at 1166 (ISP was “much more than a passive transmitter of information provided by others,” and was therefore liable under Section 230, where it required users to disclose illicit preferences that violated the Fair Housing Act).

Unlike these other circuits, the First Circuit adopted a “but-for” causation test that does not limit its application to passive intermediaries. The First Circuit goes far beyond those other courts to deem a plaintiff’s cause of action to “treat[]” the defendant “as the publisher or speaker” of third-party content, and to be barred by Section 230(c)(1), wherever “there would [have been] no harm” to the plaintiff “but for [the third-party] content.” App., *infra*, 12a.

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ly provides a neutral means by which third parties can post information of their own independent choosing online”); *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003) (finding that an ISP was entitled to Section 230 immunity where its conduct was “passive”); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (finding that an ISP was a neutral intermediary entitled to Section 230 protection because it did not contribute to the “underlying misinformation”); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 985-986 (10th Cir. 2000) (finding that an ISP was a neutral intermediary entitled to Section 230 protection because it did nothing to encourage the offensive content), cert. denied, 531 U.S. 824 (2000).

Yet petitioners' claims under the TVPRA and the MATA do not "treat" respondents "as a publisher" at all. Petitioners do not assert any claim that sounds in defamation, or that resembles defamation despite being asserted as a different cause of action. These claims do not seek to impute another's speech to Backpage.com. See *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) (claim treated defendant as a publisher because "any liability against [a defendant] must be premised on imputing to it the alleged misinformation" written by message board users). Nor do petitioners' TVPRA and MATA claims seek to hold Backpage.com liable for merely posting the advertisements, or for the act of communicating the advertisements. Compare, *e.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (under plaintiff's claims, an ISP defendant would be "cast \* \* \* in the same position as the party who originally posted the offensive messages"). In other words, plaintiffs do not seek to impose liability because of Backpage.com's role as an intermediary. Rather, petitioners seek to hold respondents liable for their own affirmative conduct—conduct that ranged far beyond the "standard elements of web sites 'with both lawful and unlawful potential.'" *Lycos*, 478 F.3d at 421 (quoting *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005)); see also *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 359 P.3d 714, 718 (Wash. 2015) (en banc) (explaining that Backpage's policies, designed to enable sex trafficking, are "not simply neutral policies prohibiting or limiting certain content").

The First Circuit's interpretation of Section 230 would provide any website operator with an absolute immunity from any civil claim for a limitless range of

illegal conduct, provided solely that third party content appears somewhere in the chain of causation leading to the plaintiff's injury. Any plaintiff bringing a claim against a website operator in the First Circuit will therefore face an insuperable barrier to overcoming a motion to dismiss, whereas if that same claim were brought in a district court in the Ninth Circuit, that same plaintiff, with the same factual allegations and the same claims, would have an opportunity to take discovery to prove her case.

### **3. The Washington Supreme Court rejected a CDA defense to an identical claim to Petitioners'**

The conflict detailed above is not mere speculation—it has already occurred in a state court of last resort within the Ninth Circuit. In September 2015, the Washington Supreme Court confronted a case with nearly identical facts to those alleged here, brought by similarly situated plaintiffs against the exact same defendants, advancing substantively similar claims. The Washington Supreme Court, following the Ninth Circuit's lead, allowed that case to proceed to discovery.

In *J.S.*, as here, plaintiffs who had been trafficked for sex on Backpage.com while they were minors brought a complaint alleging that respondents had facilitated their sexual exploitation. 359 P.3d 714. *J.S.* and her two co-plaintiffs, like the plaintiffs here, were raped multiple times while minors by adults who responded to Backpage.com advertisements. *Id.* at 716. *J.S.* brought suit in Washington state court alleging violations of a variety of state law claims, including sexual exploitation of children. *Ibid.*; see *id.* at 717 n.3. As here, respondents moved to dismiss, arguing that they were



immune from liability under Section 230. *Id.* at 716. And as here, the plaintiffs responded that respondents were not protected from suit because their website was “designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message”—specifically, Backpage.com had intentionally structured its posting requirements in a manner that it knew would allow and encourage the trafficking of children for sex, and respondents’ supposed preventative measures were in reality “a fraud and a ruse” designed to help Backpage.com and the traffickers who use it “evade law enforcement by giving the [false] appearance that Backpage.com does not allow sex trafficking on its website.” *Id.* at 716, 717-718.

The state trial court in *J.S.* denied defendants’ motion to dismiss and allowed the case to proceed to discovery. The defendant took an interlocutory appeal, and in an en banc decision, the Washington Supreme Court affirmed. 359 P.3d at 715-716. Relying on the Ninth Circuit’s decision in *Roommates.com*, the court held that the plaintiffs’ allegations created a plausible inference that respondents were not protected by Section 230 of the CDA: where plaintiffs offered plausible allegations of participation in child sex trafficking, those allegations, if proved, would demonstrate that Backpage.com did more than passively “maintain neutral policies prohibiting or limiting certain content,” as the CDA required for protection from liability. *Id.* at 717. Under these circumstances, the court held that discovery was necessary to “ascertain whether in fact Backpage designed its posting rules to induce sex traf-

ficking,” because, if it had, the CDA would not provide any protection. *Ibid.*

On almost identical allegations in the present case, against the same defendants as in *J.S.*, the First Circuit held the opposite. In stark contrast to the Washington court, the First Circuit failed to examine petitioners’ allegations of respondents’ participation in child sex trafficking. Instead, the court of appeals assumed *arguendo* that plaintiffs had stated a claim under the TVPRA’s private right of action yet did not treat that as determinative. App., *infra*, 12a-14a. Quite the opposite—the First Circuit held that *even if* the petitioners could show that respondents violated a criminal sex trafficking statute, the pertinent question was whether third-party content played any role in the causal chain leading to the plaintiffs’ injuries. See *ibid.*

The court of appeals’ holding in the present case creates a direct conflict with a state court of last resort. It is plain that the Washington Supreme Court, following the Ninth Circuit’s lead, would have permitted petitioners’ claims to survive a motion to dismiss. Petitioners alleged the same conduct by the same defendants as in the *J.S.* case, and they likewise sought to hold respondents liable for their participation in the sex trafficking of children based on this conduct. Yet, if *J.S.* had brought her claim in a federal district court in the First Circuit, that claim would not have survived a motion to dismiss. There is thus a fundamental disagreement on the question of whether a website operator can be held civilly liable for its own illegal conduct, specifically participation in child sex trafficking, where third-party content is a link in the chain of causation leading to a plaintiff’s injuries. This conflict produces the unac-

ceptable result that the forum in which claims against Backpage.com are brought determines their outcome.

### **B. The First Circuit’s Decision Fails To Properly Harmonize Intersecting Statutes**

It is well settled that the “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.” *United States v. Fausto*, 484 U.S. 439, 453 (1988); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. See *Brown & Williamson*, 529 U.S. at 143. The courts below ignored their obligation to parse the relevant statutes and determine if they can coexist. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”); *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 144 (2001) (“Here we can plainly regard each statute as effective because of its different requirements and protections.”).

In *POM Wonderful LLC v. Coca-Cola Co.*, this Court considered the Lanham Act and the Federal Food, Drug, and Cosmetic Act (FDCA) and found that a plaintiff could maintain a private right of action under the Lanham Act in the face of an existing FDCA regulatory regime. 134 S. Ct. 2288, 2238-2239 (2014). Finding that “[n]othing in the text, history, or structure of

the FDCA or the Lanham Act shows the congressional purpose or design to forbid these suits,” *id.* at 2233, this Court concluded that the “best way to harmonize the statutes” was to allow the appellant’s Lanham Act claim to proceed. *Id.* at 2237. *POM Wonderful* teaches that when two statutes are not in conflict with one other, it would “show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.” *Id.* at 2238.

In the present case, three victims of child sex trafficking seek redress against a key participant in the trafficking transactions that caused them grave harm. The relevant claims and defenses invoke, on the one hand, the federal TVPRA, which grants victims of sex trafficking ventures a private right of action, and, on the other hand, the CDA, enacted in 1996, which offers an ISP protection from claims that seek to “treat” it as the “publisher or speaker” of content that was created entirely by “another.” The TVPRA, which was originally enacted in 2000 and was reauthorized in 2003, 2005, 2008, 2011, and 2013, is a subsequent statute that “more specifically address[es] the topic at hand” than the CDA does. See *Brown & Williamson*, 529 U.S. at 143. “Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” *Morton*, 417 U.S. at 550-551. “Nor can it be said that the two statutes ‘cannot mutually coexist.’” *J.E.M.*, 534 U.S. at 143 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, (1976)). In passing the TVPRA, Congress likely “did not intend” that a website operator would be immune from civil liability under the statute’s

private right of action provision simply because, in addition to the website operator's own unlawful conduct, online content created by a third party was also a contributing "but-for" cause of the plaintiff's injuries. See *POM Wonderful*, 134 S. Ct. at 2239. By the same token, there is nothing in the language or context of Section 230 of the CDA that Congress intended to immunize website operators from being held civilly liable for conduct that violates federal criminal law.

In arriving at its decision in *POM*, this Court observed that general preemption principles are "instructive" even in a dispute involving federal statutes. 134 S. Ct. at 2236. This observation informed the careful and deferential attention that the Court applied to discerning Congressional intent in that case. This approach to interpretation is dictated here not only because two federal statutes intersect, but for the additional reason that the CDA expressly preempts state laws that are "inconsistent" with the CDA. See 47 U.S.C. 230(e)(3). The First Circuit, however, declined to apply preemption principles to constrain its interpretation of the "treat as a publisher" language or to evaluate the relationship between the statutes.

The First Circuit acknowledged that there were two intersecting federal statutes at play as well as a parallel state statute. App., *infra*, 12a-17a. However, rather than construing Section 230(c)(1) of the CDA in a manner that would "harmonize" it with the TVPRA and enable the two statutes "to make sense in combination," see *Fausto*, 484 U.S. at 453; *POM Wonderful*, 134 S. Ct. at 2237, the First Circuit prioritized a "broad" interpretation of the CDA at the expense of the TVPRA. Section 230(c)(1)'s plain language, however,

was susceptible to a narrower reading. Indeed, full effect can be given to the “treat as a publisher” language of the CDA by protecting those ISPs that are neutral intermediaries from potential liability related to illegal content by third parties and by exposing to potential liability for their own conduct those ISPs that deliberately use their websites to accomplish criminal purposes. This result would have avoided any conflict between the CDA and the TVPRA (and preserved the “not inconsistent” state statute as well). Under this Court’s precedents, this was the reading of Section 230(c)(1) that the First Circuit was obliged to adopt. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518–520 (1992) (supporting a “narrow reading” of the outer limits of an express statutory preemption provision); see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Had the First Circuit done so, no conflict would have arisen between it and the decisions of the Ninth Circuit and Washington Supreme Court.

## II. THIS IS A CASE OF EXCEPTIONAL IMPORTANCE

This case presents the Court with an opportunity to address the CDA for the first time since *Reno v. ACLU*, and to resolve recurring questions concerning the scope of the protection from liability afforded by Section 230. 521 U.S. 844 (1997). In the twenty years since the passage of the CDA, lower courts frequently have grappled with disputes over the proper interpretation of the language of Section 230(c). Despite approximately five hundred lower court decisions, including almost fifty decisions by federal courts of appeal, Section 230 continues to generate controversy about the language and the proper mode of analysis of the statute. See, *e.g.*, Ryan J.P. Dyer, *The Communication*

*Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 Seattle U. L. Rev. 837 (2014); Joanna Schorr, *Malicious Content on the Internet: Narrowing Immunity under the Communications Decency Act*, 87 St. John's L. Rev. 733, 737 (2013); Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 Harv. J.L. & Pub. Pol'y 863 (2010); Ali Grace Ziegler, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act*, 61 Hastings L.J. 1307 (2010). The First Circuit's decision dramatically sharpens the differences between the lower courts by extending Section 230 further than any other court and highlights the need for definitive guidance from this Court.

#### **A. The First Circuit's Decision Breaks With The Existing Consensus Concerning The Breadth Of Section 230**

In the twenty years since its passage, Section 230(c)(1) has been cited in over 500 state and federal opinions. These cases typically arise in the “heartland” of subject matter that Section 230 was designed to address—that is, cases in which a plaintiff seeks to hold an ISP liable for the passive transmission of defamatory or offensive content authored by third parties.<sup>4</sup> Such cases readily fit into Section 230's framework, because “publishing” is an element of a defamation claim. *See*

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<sup>4</sup> Section 230's specific focus on defamatory statements and publisher liability reflect Congress' goal to incentivize ISPs who acted in good faith to remove or restrict potentially offensive content. *See* H.R. Rep. No. 458, *supra*, at 194.

Restatement (Second) of Torts, *supra*, §§ 577, 581 (1977). To date, all federal circuits have addressed Section 230 at least once, and most of these decisions arise from defamation claims or allegations that sound in defamation against websites acting as neutral intermediaries.<sup>5</sup>

While decisions of the Ninth Circuit and other courts shared a common understanding regarding the limitations inherent in Section 230's scope, the First Circuit's decision breaks with that consensus regarding the scope of the statute. The First Circuit applied the protections of Section 230 where, by the court's own

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<sup>5</sup> See *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (claims against a message board operator for allegedly false and defamatory postings by pseudonymous posters); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25 (2d Cir. 2015) (defamation claim against neutral web hosting service GoDaddy.com); *Green v. Am. Online, Inc.*, 318 F.3d 465 (3d Cir. 2003) (claim against a neutral ISP for failure to prevent the publication of defamatory information), cert denied, 540 U.S. 877 (2003); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (claims against a neutral ISP for delay in removing defamatory messages posted by an unidentified third party); *Jones v. Dirty World Entmt Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014) (defamation claims against an ISP that operated a user-generated online tabloid that published third-party content); *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010) (defamation claims against a neutral ISP for defamatory statements posted by third parties); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (defamation claim against a neutral ISP for publication of a false profile on a dating website submitted by a third party); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 985 (10th Cir. 2000) (claim against a neutral ISP for defamation claims based on third-party postings); *Dowbenko v. Google, Inc.*, 582 Fed. App'x 801 (11th Cir. 2014) (defamation claim against Google, a neutral search engine, for defamatory search results that resulted from content on third-party websites).



reasoning, the ISP at issue was not a neutral intermediary. The First Circuit assumed for the purposes of its decision that respondents' conduct violated the TVPRA, which by definition means it could not have been "neutral" for the purposes of Section 230 immunity. In doing so, the First Circuit expanded Section 230 beyond what any other court of appeals has previously held. This Court's guidance is necessary to assure that the application of Section 230 in cases that fall outside the "heartland" of defamation-like claims is faithful to the limited intentions of Congress and that plaintiffs across the country with claims such as petitioners have equal access to the courts.

**B. The Court Of Appeals' Decision Has Broad Consequences For Internet Crime Generally And Online Child Sex Trafficking In Particular**

The First Circuit's opinion effectively immunizes an array of criminal conduct by ISPs, expanding the already broad reach of Section 230. In a society now dominated by digital technology, criminal activity on the internet has increased markedly, and some portion of that activity involves affirmative wrongdoing by ISPs themselves. As just one example of the Internet serving as a hub for criminal enterprise, the creator of the website "Silk Road," who designed a "sophisticated and extensive [Internet] criminal marketplace" that enabled thousands of individuals to anonymously transact in illegal drugs without detection, was convicted last year of seven criminal charges, including narcotics and money laundering conspiracies. See *United States v. Ulbricht*, 31 F. Supp. 3d 540, 549 (S.D.N.Y. 2014); Jury Verdict, *Ulbricht*, 31 F. Supp. 3d 540 (Feb. 5, 2015)

(No. 14cr68). The indictment alleged that Ulbricht, through the operation of his website, had engaged in “specific and intentional conduct to join with narcotics traffickers or computer hackers to help them sell illegal drugs or hack into computers, and to be involved in enforcing rules (including using murder-for-hire) regarding such sales and taking commissions.” 31 F. Supp. 3d at 568. Yet, under the First Circuit’s interpretation of Section 230, through that provision, Congress immunized Ulbricht, a convicted federal felon, from liability to any person harmed by the illegal activities that took place via Silk Road—even, potentially, the family of a victim of a murder-for-hire—could not maintain a civil claim against Ulbricht, a convicted federal felon.

The consequences of the First Circuit’s broad interpretation are particularly troublesome for efforts to combat child sex trafficking. In its reauthorizations of the TVPRA, Congress has been well aware that sex trafficking has moved from the street corner to the internet, where websites like Backpage.com create virtual red light districts. The TVPRA is a tool that Congress plainly expected that the Department of Justice and private plaintiffs would use to expand the scope of enforcement to create further disincentives to sex trafficking. In particular, the TVPRA’s civil enforcement provision empowers victims to pursue a private right of action against any persons who “knowingly benefit[ ] financially \* \* \* from participation in [the underlying sex trafficking] venture.” 18 U.S.C. 1595. This provision expressly expands the potential defendants beyond mere “perpetrators” under 1591(a)(1)—*i.e.*, traffickers—to participants who provide support for the “[the underlying sex trafficking] venture.” 18 U.S.C.

1591(a)(2). There is nothing in the language or context of the statute that suggests that Congress intended to exclude websites that facilitate the commercial sex business from the reach of the TVPRA. Such an exemption would be akin to an exemption for brick-and-mortar hotels that openly solicit and support illegal commercial sex on their premises, which is directly inconsistent with the interpretation taken by the United States. See, *e.g.*, Dep’t of Justice, *Louisiana Motel Owner Pleads Guilty in Sex Trafficking Case* (July 1, 2015), <https://www.justice.gov/opa/pr/louisiana-motel-owner-pleads-guilty-sex-trafficking-case> (prosecution of motel owner for financially benefiting from sex trafficking ventures).

In this case, the First Circuit’s “but-for” gloss on the “treat as a publisher” language of Section 230 plainly undermines legislative efforts to curtail the sexual exploitation of children. The decision therefore transforms the CDA from a shield for neutral ISPs from defamation suits and analogous forms of civil liability into a dangerous sword wielded by Backpage.com and other criminal enterprises to enable their unlawful conduct. Indeed, the First Circuit’s interpretation essentially rejects the common sense proposition that Section 230 does not relieve websites of the obligation to “comply with laws of general applicability,” including those prohibiting the sale of children for sex. *Roommates.com*, 521 F.3d at 1164 n.15. This is a stunning proposition that bears careful examination and analysis. This case presents an opportunity to correct and reconcile the boundaries of Section 230 with the TVPRA and its goal of protecting children from sex trafficking.

### C. The First Circuit’s Reasoning Extends To Other Statutory Private Rights Of Action

The First Circuit’s treatment of the TVPRA and the MATA could have ramifications in other contexts where Congress or the States have created private rights of action that are integral to the enforcement of criminal or civil statutes. This Court has often recognized the value and importance of private civil remedies in statutory enforcement schemes. See, *e.g.*, *Rotella v. Wood*, 528 U.S. 549, 557-558 (2000) (holding the object of the RICO civil enforcement provision “is thus not merely to compensate victims but to turn them into prosecutors \* \* \* dedicated to eliminating racketeering activity”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634-635 (1985) (“Without doubt, the private cause of action plays a central role in enforcing [the Sherman Act antitrust] regime.”).

Congress has frequently included such private rights of action to enhance statutory enforcement schemes. For example, the Anti-Terrorism Act contains a civil liability provision, 18 U.S.C. 2333(a), that allows victims of “act[s] of international terrorism” to recover damages for their injuries. Numerous statutes similarly afford private rights of actions that are integral to enforcement goals. See, *e.g.*, 18 U.S.C. 1964(c) (authorizing private plaintiffs to sue for violations of the Racketeer Influenced and Corrupt Organizations Act); 18 U.S.C. 2252A (authorizing private plaintiffs to sue for violations of the Child Pornography Prevention Act of 1996); 18 U.S.C. 1030(g) (authorizing private plaintiffs to sue for violations of the Computer Fraud and Abuse Act); 18 U.S.C. 1836(b)(1) (authorizing pri-

vate plaintiffs to sue for violations of the Defend Trade Secrets Act of 2016).<sup>6</sup>

Nothing in the language of the CDA, the TVPRA, or these other specialized enforcement statutes suggests that an ISP that participates in terrorism, racketeering, or sex trafficking ought to be shielded against statutory civil liability for their own aid to and participation in that illegal conduct. Yet the First Circuit’s reasoning in this sex trafficking case, applied to these other statutes, likely will foreclose a civil action against a website operator for its affirmative conduct so long as third-party content appearing on the internet forms some part of the chain of events that leads to liability. This case provides this Court with an opportunity to resolve whether, as petitioners contend, this is a result that Congress “did not intend.” *POM Wonderful v. Coca Cola Co.*, 134 S. Ct. 2228, 2239 (2014).

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<sup>6</sup> In addition, the civil code contains numerous statutory provisions creating private rights of action. See 42 U.S.C. 2000e-2(a) (authorizing private plaintiffs to sue for violations of Title VII of the Civil Rights Act); 15 U.S.C. 1125(a)(1) (authorizing private plaintiffs to sue for violations of the Lanham Act); 15 U.S.C. 1691e(a) (authorizing private plaintiffs to sue for violations of the Equal Credit Opportunity Act); 15 U.S.C. 1640(a) (authorizing private plaintiffs to sue for violations of the Truth in Lending Act); 15 U.S.C. 15(a) (authorizing private plaintiffs to sue for violations of the Clayton Antitrust Act).

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 2016

## **APPENDIX**

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 15-1724

JANE DOE NO. 1 ET AL.,  
Plaintiffs, Appellants,  
v.

BACKPAGE.COM, LLC ET AL.,  
Defendants, Appellees.

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Appeal from the United States District Court for the  
District of Massachusetts

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[Hon. Richard G. Stearns, U.S. District Judge]

Before

Barron, Circuit Judge,  
Souter, \* Associate Justice,  
and Selya, Circuit Judge.

John T. Montgomery, with whom Ching-Lee Fuku-  
kuda, Aaron M. Katz, Christine Ezzell Singer, Jessica  
L. Soto, Rebecca C. Ellis, and Ropes & Gray LLP were  
on brief, for appellants.

Maura Healey, Attorney General of Massachu-  
setts, and Genevieve C. Nadeau, Deputy Chief, Civil  
Rights Division, on brief for Commonwealth of Massa-  
chusetts, amicus curiae.

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\* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme  
Court of the United States, sitting by designation.



Dennis J. Herrera, City Attorney, Victoria Wong, Mollie Lee, Elizabeth Pederson, and Mark D. Lipton, Deputy City Attorneys, on brief for City and County of San Francisco, amici curiae.

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Shelley R. Smith, City Solicitor, on brief for Michael A. Nutter, Mayor of Philadelphia, amicus curiae.

Jeffrey Dana, City Solicitor, on brief for City of Providence and Mayor Jorge O. Elorza, amicus curiae.

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Jenna A. Hudson, Kami E. Quinn, Gilbert LLP, and Andrea Powell, Executive Director, on brief for FAIR Girls, amicus curiae.

Michael Rogoff, Robert Barnes, Oscar Ramallo, and Kaye Scholer LLP, on brief for National Center

for Missing and Exploited Children, amicus curiae.

Jeffrey J. Pyle, with whom Robert A. Bertsche, Prince Lobel Tye LLP, James C. Grant, Ambika K. Doran, and Davis Wright Tremaine LLP were on brief, for appellees.

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March 14, 2016

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**SELYA, Circuit Judge.** This is a hard case — hard not in the sense that the legal issues defy resolution, but hard in the sense that the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage. The result we must reach is rooted in positive law. Congress addressed the right to publish the speech of others in the Information Age when it enacted the Communications Decency Act of 1996 (CDA). See 47 U.S.C. § 230. Congress later addressed the need to guard against the evils of sex trafficking when it enacted the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), codified as relevant here at 18 U.S.C. §§ 1591, 1595. These laudable legislative efforts do not fit together seamlessly, and this case reflects the tension between them. Striking the balance in a way that we believe is consistent with both congressional intent and the teachings of precedent, we affirm the district court’s order of dismissal. The tale follows.

## **I. BACKGROUND**

In reviewing the grant or denial of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we draw upon the well-pleaded facts as they appear in the operative pleading (here, the second amended com-

plaint). See SEC v. Tambone, 597 F.3d 436, 438 (1st Cir. 2010) (en banc).

Backpage.com provides online classified advertising, allowing users to post advertisements in a range of categories based on the product or service being sold.<sup>1</sup> Among the categories provided is one for “Adult Entertainment,” which includes a subcategory labeled “Escorts.” The site is differentiated by geographic area, enabling users to target their advertisements and permitting potential customers to see local postings.

This suit involves advertisements posted in the “Escorts” section for three young women — all minors at the relevant times — who claim to have been victims of sex trafficking. Suing pseudonymously, the women allege that Backpage, with an eye to maximizing its profits, engaged in a course of conduct designed to facilitate sex traffickers’ efforts to advertise their victims on the website. This strategy, the appellants say, led to their victimization.

Past is prologue. In 2010, a competing website (Craigslist) shuttered its adult advertising section due to concerns about sex trafficking. Spying an opportunity, Backpage expanded its marketing footprint in the adult advertising arena. According to the appellants, the expansion had two aspects. First, Backpage engaged in a campaign to distract attention from its role in sex trafficking by, for example, meeting on various occasions with hierarchs of the National Center for Missing and Exploited Children (NCMEC) and making

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<sup>1</sup> The appellants sued Backpage.com, LLC, Camarillo Holdings, LLC, and New Times Media, LLC. For ease in exposition, we refer to these three affiliated companies, collectively, as “Backpage.”

“false and misleading representations” to the NCMEC and law enforcement regarding its efforts to combat sex trafficking. But this campaign, the appellants suggest, was merely a ruse.

The second aspect of Backpage’s expansion strategy involved the deliberate structuring of its website to facilitate sex trafficking. The appellants aver that Backpage selectively removed certain postings made in the “Escorts” section (such as postings made by victim support organizations and law enforcement “sting” advertisements) and tailored its posting requirements to make sex trafficking easier.<sup>2</sup>

In addition, the appellants allege that Backpage’s rules and processes governing the content of advertisements are designed to encourage sex trafficking. For example, Backpage does not require phone number verification and permits the posting of phone numbers in alternative formats. There is likewise no e-mail verification, and Backpage provides users with the option to “hide” their e-mail addresses in postings, because Backpage provides message forwarding services and auto-replies on behalf of the advertiser. Photographs uploaded for use in advertisements are shorn of their metadata, thus removing from scrutiny information

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<sup>2</sup> The appellants note that (among other things) the process of posting an advertisement in the “Escorts” section does not require the poster to provide either identifying information or the subject of the advertisement. And even though the website does require that posters verify that they are 18 years of age or older to post in that section, entering an age below 18 on the first (or any successive) attempt does not block a poster from entering a different age on a subsequent attempt. Backpage also allows users to pay posting fees anonymously through prepaid credit cards or digital currencies.

such as the date, time, and location the photograph was taken. While Backpage's automated filtering system screens out advertisements containing certain prohibited terms, such as "barely legal" and "high school," a failed attempt to enter one of these terms does not prevent the poster from substituting workarounds, such as "brly legal" or "high schl."

The appellants suggest that Backpage profits from having its thumb on the scale in two ways. First, advertisements in the "Adult Entertainment" section are the only ones for which Backpage charges a posting fee. Second, users may pay an additional fee for "Sponsored Ads," which appear on the right-hand side of every page of the "Escorts" section. A "Sponsored Ad" includes a smaller version of the image from the posted advertisement and information about the location and availability of the advertised individual.

Beginning at age 15, each of the appellants was trafficked through advertisements posted on Backpage. Jane Doe #1 was advertised on Backpage during two periods in 2012 and 2013. She estimates that, as a result, she was raped over 1,000 times. Jane Doe #2 was advertised on Backpage between 2010 and 2012. She estimates that, as a result, she was raped over 900 times. Jane Doe #3 was advertised on Backpage from December of 2013 until some unspecified future date. As a result, she was raped on numerous occasions.<sup>3</sup> All of the rapes occurred either in Massachusetts or Rhode

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<sup>3</sup> Once the parents of Doe #3 located some of the Backpage advertisements featuring their daughter, they demanded that the advertisements be removed from the website. A week later (after at least one other entreaty to Backpage), the postings remained on the website.

Island. Sometimes the sex traffickers posted the advertisements directly and sometimes they forced the victims to post the advertisements.

Typically, each posted advertisement included images of the particular appellant, usually taken by the traffickers (but advertisements for Doe #3 included some pictures that she herself had taken). Many of the advertisements embodied challenged practices such as anonymous payment for postings, coded terminology meant to refer to underage girls, and altered telephone numbers.

The appellants filed suit against Backpage in October of 2014. The operative pleading is the appellants' second amended complaint, which limns three sets of claims. The first set consists of claims that Backpage engaged in sex trafficking of minors as defined by the TVPRA and its Massachusetts counterpart, the Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010 (MATA), Mass. Gen. Laws ch. 265, § 50(a). The second set consists of claims under a Massachusetts consumer protection statute, which forbids "unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws ch. 93A, § 2(a). The last set consists of claims alleging abridgements of intellectual property rights.

In due season, Backpage moved to dismiss the second amended complaint for failure to state claims upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6). Although the appellants vigorously opposed the motion, the district court dismissed the action in its entirety. See Doe ex rel. Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149, 165 (D. Mass. 2015). This timely appeal ensued.

## II. ANALYSIS

The appellants, ably represented, have constructed a series of arguments. Those arguments are buttressed by a legion of amici (whose helpful briefs we appreciate). We review the district court's dismissal of the appellants' complaint for failure to state any actionable claim *de novo*, taking as true the well-pleaded facts and drawing all reasonable inferences in the appellants' favor. See Tambone, 597 F.3d at 441. In undertaking this canvass, we are not bound by the district court's ratiocination but may affirm the dismissal on any ground apparent from the record. See Santiago v. Puerto Rico, 655 F.3d 61, 72 (1st Cir. 2011). It is through this prism that we evaluate the appellants' as-severational array.

### A. Trafficking Claims.

The appellants challenge the district court's conclusion that section 230 of the CDA shields Backpage from liability for a course of conduct that allegedly amounts to participation in sex trafficking. We begin our consideration of this challenge with the text of section 230(c), which provides:

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

## (2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of —

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in [subparagraph (A)].

47 U.S.C. § 230(c). Congress enacted this statute partially in response to court cases that held internet publishers liable for defamatory statements posted by third parties on message boards maintained by the publishers. See, e.g., Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at \*1, \*5 (N.Y. Sup. Ct. May 24, 1995) (explaining that Prodigy was liable because, unlike some other website operators, it had taken steps to screen or edit content posted on its message board). Section 230(c) limits this sort of liability in two ways. Principally, it shields website operators from being



“treated as the publisher or speaker” of material posted by users of the site, 47 U.S.C. § 230(c)(1), which means that “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred,” Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). Relatedly, it allows website operators to engage in blocking and screening of third-party content, free from liability for such good-faith efforts. See 47 U.S.C. § 230(c)(2)(A).

There has been near-universal agreement that section 230 should not be construed grudgingly. See, e.g., Doe v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir. 2008); Universal Commc’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 419 (1st Cir. 2007); Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321-22 (11th Cir. 2006); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003). This preference for broad construction recognizes that websites that display third-party content may have an infinite number of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content “would have an obvious chilling effect” in light of the difficulty of screening posts for potential issues. Zeran, 129 F.3d at 331. The obverse of this proposition is equally salient: Congress sought to encourage websites to make efforts to screen content without fear of liability. See 47 U.S.C. § 230(b)(3)-(4); Zeran, 129 F.3d at 331; see also Lycos, 478 F.3d at 418-19. Such a hands-off approach is fully consistent with Congress’s avowed desire to permit the continued development of the internet with minimal regulatory interference. See 47 U.S.C. § 230(a)(4), (b)(2).

In holding Backpage harmless here, the district court found section 230(c)(1) controlling. See Backpage.com, 104 F. Supp. 3d at 154-56. Section 230(c)(1) can be broken down into three component parts. It shields conduct if the defendant (1) "is a 'provider or user of an interactive computer service'; (2) the claim is based on 'information provided by another information content provider'; and (3) the claim would treat [the defendant] 'as the publisher or speaker' of that information." Lycos, 478 F.3d at 418 (quoting 47 U.S.C. § 230(c)(1)). The appellants do not allege that Backpage fails to satisfy either of the first two elements.<sup>4</sup> Instead, they confine themselves to the argument that their asserted causes of action do not treat Backpage as the publisher or speaker of the contents of the advertisements through which they were trafficked. It is to this argument that we now turn.

The broad construction accorded to section 230 as a whole has resulted in a capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party. Courts have recognized that "many causes of action might be premised on the publication or speaking of what one might call 'information content.'" Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009). The ultimate question, though, does not depend on the form of the asserted cause of action; rather, it depends on

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<sup>4</sup> Certain amici advance an argument forsworn by the appellants in the district court: that Backpage's activities amount to creating the content of the advertisements. It is, however, clear beyond hope of contradiction that amici cannot "interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore." Lane v. First Nat'l Bank of Bos., 871 F.2d 166, 175 (1st Cir. 1989).

whether the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another. See id. at 1101-02. Thus, courts have invoked the prophylaxis of section 230(c)(1) in connection with a wide variety of causes of action, including housing discrimination, see Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671-72 (7<sup>th</sup> Cir. 2008), negligence, see Doe, 528 F.3d at 418, Green v. Am. Online (AOL), 318 F.3d 465, 470-71 (3d Cir. 2003); and securities fraud and cyberstalking, see Lycos, 478 F.3d at 421-22.

The appellants have an uphill climb: the TVPRA claims that they appear to treat Backpage as the publisher or speaker of the content of the challenged advertisements. After all, the appellants acknowledge in their complaint that the contents of all of the relevant advertisements were provided either by their traffickers or by the appellants themselves (under orders from their traffickers). Since the appellants were trafficked by means of these advertisements, there would be no harm to them but for the content of the postings.

The appellants nonetheless insist that their allegations do not treat Backpage as a publisher or speaker of third-party content. They rest this hypothesis largely on the text of the TVPRA's civil remedy provision, which provides that victims may bring a civil suit against a perpetrator "or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act" of sex trafficking. 18 U.S.C. § 1595(a); see id. § 1591. Characterizing their allegations as describing "an affirmative course of conduct" by Backpage distinct from the exer-

cise of the “traditional publishing or editorial functions” protected under the CDA, the appellants contend that this course of conduct amounts to participation in sex trafficking and, thus, can ground liability without treating Backpage as the publisher or speaker of any of the underlying content. This contention comprises more cry than wool.

We begin with the appellants’ assertion that Backpage’s activities do not involve traditional publishing or editorial functions, and are therefore outside the protective carapace of section 230(c)(1). In support, the complaint describes choices that Backpage has made about the posting standards for advertisements — for example, rules about which terms are permitted or not permitted in a posting, the lack of controls on the display of phone numbers, the option to anonymize e-mail addresses, the stripping of metadata from photographs uploaded to the website, the website’s reaction after a forbidden term is entered into an advertisement, and Backpage’s acceptance of anonymous payments. The appellants submit that these choices are distinguishable from publisher functions. We disagree.

As an initial matter, some of the challenged practices — most obviously, the choice of what words or phrases can be displayed on the site — are traditional publisher functions under any coherent definition of the term. See Zeran, 129 F.3d at 330 (describing decisions about “whether to publish, withdraw, postpone or alter content” as “traditional editorial functions”). And after careful consideration, we are convinced that the “publisher or speaker” language of section 230(c)(1) extends to the formulation of precisely the sort of website policies and practices that the appellants assail.

Precedent cinches the matter. In Lycos, we considered the argument that the prophylaxis of section 230 (c) did not encompass “decisions regarding the ‘construct and operation’” of a defendant’s websites. 478 F.3d at 422. There, the plaintiffs alleged that Lycos permitted users to register under multiple screen names and provided links to “objective financial information” from a finance-related message board, thus enabling “individuals to spread misinformation more credibly.” Id. at 420. We noted that, at bottom, the plaintiffs were “ultimately alleging that the construct and operation of Lycos’s web sites contributed to the proliferation of misinformation” and held that as long as “the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider’s decisions with respect to that posting, but also for its inherent decisions about how to treat postings generally.” Id. at 422. In short, “Lycos’s decision not to reduce misinformation by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting.” Id.

The case at hand fits comfortably within this construct. Without exception, the appellants’ well-pleaded claims address the structure and operation of the Backpage website, that is, Backpage’s decisions about how to treat postings. Those claims challenge features that are part and parcel of the overall design and operation of the website (such as the lack of phone number verification, the rules about whether a person may post after attempting to enter a forbidden term, and the procedure for uploading photographs). Features such as these, which reflect choices about what content can

appear on the website and in what form, are editorial choices that fall within the purview of traditional publisher functions.<sup>5</sup>

At oral argument in this court, the appellants placed particular emphasis on Backpage’s provision of e-mail anonymization, forwarding, auto-reply, and storage services to posters. In the last analysis, however, the decision to provide such services and the parallel decision not to impose the same conditions on messaging services as are applied to “Escorts” section postings are no less publisher choices, entitled to the protections of section 230(c)(1).

We add, moreover, that applying section 230(c)(1) to shield Backpage from liability here is congruent with the case law elsewhere. Relying on that provision, courts have rejected claims that attempt to hold website operators liable for failing to provide sufficient protections to users from harmful content created by others. For instance, where a minor claimed to have been sexually assaulted by someone she met through the defendant’s website and her suit alleged that the website operator “fail[ed] to implement basic safety measures to protect minors,” the Fifth Circuit rejected the suit on the basis that the claims were “merely another way of claiming that [the website operator] was liable for publishing the communications and they speak to [the website operator’s] role as a publisher of online third-party-generated content.” Doe, 528 F.3d at 419-20.

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<sup>5</sup> The appellants argue that a concurring opinion in J.S. v. Village Voice Media Holdings, L.L.C., 359 P.3d 714, 718-24 (Wash. 2015) (en banc) (Wiggins, J., concurring), points to a different conclusion. But our reasoning in Lycos — which the J.S. concurrence failed to address — defeats this argument.

Although the appellants try to distinguish Doe by claiming Backpage’s decisions about what measures to implement deliberately attempt to make sex trafficking easier, this is a distinction without a difference. Whatever Backpage’s motivations, those motivations do not alter the fact that the complaint premises liability on the decisions that Backpage is making as a publisher with respect to third-party content.

Nor does the text of the TVPRA’s civil remedy provision change this result. Though a website conceivably might display a degree of involvement sufficient to render its operator both a publisher and a participant in a sex trafficking venture (say, that the website operator helped to procure the underaged youths who were being trafficked), the facts pleaded in the second amended complaint do not appear to achieve this duality. But even if we assume, for argument’s sake, that Backpage’s conduct amounts to “participation in a [sex trafficking] venture” — a phrase that no published opinion has yet interpreted — the TVPRA claims as pleaded premise that participation on Backpage’s actions as a publisher or speaker of third-party content. The strictures of section 230(c) foreclose such suits.<sup>6</sup>

Contrary to the appellants’ importunings, the decision in Barnes does not demand a different outcome. There, the Ninth Circuit concluded that a promissory estoppel claim based on a Yahoo executive’s statements that the company would remove explicit photographs

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<sup>6</sup> To be sure, the complaint contains a few allegations that do not involve the publication of third-party content. Yet those allegations, treated in detail in Part II(B) *infra*, rely on sententious rhetoric rather than well-pleaded facts. Thus, they cannot suffice to alter our conclusion here.

that had been posted online without the consent of the person depicted was not barred by section 230(c)(1). See Barnes, 570 F.3d at 1098-99, 1109. Withal, this promissory estoppel claim did not attempt to treat Yahoo as the publisher or speaker of the photograph's content but, instead, the claim sought to hold Yahoo liable for its "manifest intention to be legally obligated to do something" (that is, to delete the photographs). Id. at 1107. No comparable promise has been alleged here.

That ends this aspect of the matter. We hold that claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1). This holding is consistent with, and reaffirms, the principle that a website operator's decisions in structuring its website and posting requirements are publisher functions entitled to section 230(c)(1) protection.

In this case, third-party content is like Banquo's ghost: it appears as an essential component of each and all of the appellants' TVPRA claims. Because the appellants' claims under the TVPRA necessarily treat Backpage as the publisher or speaker of content supplied by third parties, the district court did not err in dismissing those claims.<sup>7</sup>

In an effort to shift the trajectory of the debate, the appellants try a pair of end runs. First, the appel-

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<sup>7</sup> Although the parties do not separately parse the text of the MATA, those claims fail for essentially the same reasons: they treat Backpage as the publisher or speaker of content provided by third parties. As a result, the MATA — at least in this application — is necessarily inconsistent with the protections provided by section 230(c)(1) and, therefore, preempted. See 47 U.S.C. § 230(e)(3).



lants call our attention to section 230(c)(2), which provides that decisions made by website operators to block or remove content are protected from liability as long as they are made in good faith. Building on this foundation, the appellants assert that the district court relied on Backpage's descriptions of its efforts to block and screen the postings in the "Escorts" section of its website, and that those descriptions amount to an implicit invocation of section 230(c)(2). So, the appellants say, the district court should have allowed discovery into Backpage's good faith (or lack of it) in blocking and screening content. The district court's refusal to allow them to pursue this course, they charge, eviscerates section 230(c)(2) and renders it superfluous.

The appellants start from a faulty premise: we do not read the district court's opinion as relying on Backpage's assertions about its behavior. That Backpage sought to respond to allegations of misconduct by (among other things) touting its efforts to combat sex trafficking does not, without more, invoke section 230(c)(2) as a defense.

The appellants' suggestion of superfluity is likewise misplaced. Courts routinely have recognized that section 230(c)(2) provides a set of independent protections for websites, see, e.g., Barnes, 570 F.3d at 1105; Chi. Lawyers' Comm., 519 F.3d at 670-71; Batzel v. Smith, 333 F.3d 1018, 1030 n.14 (9th Cir., and nothing about the district court's analysis is at odds with that conclusion.

Next, the appellants suggest that their TVPRA claims are saved by the operation of section 230(e)(1). That provision declares that section 230 should not "be construed to impair the enforcement of . . . any . . . Fed-

eral criminal statute.” The appellants posit that the TVPRA’s civil suit provision is part of the “enforcement” of a federal criminal statute under the plain meaning of that term and, thus, outside the protections afforded by section 230(c)(1). This argument, though creative, does not withstand scrutiny.

We start with the uncontroversial premise that, where feasible, “a statute should be construed in a way that conforms to the plain meaning of its text.” In re Jarvis, 53 F.3d 416, 419 (1st Cir. 1995). The plain-language reading of section 230(e)(1)’s reference to “the enforcement of . . . any . . . Federal criminal statute” dictates a meaning opposite to that ascribed by the appellants: such a reading excludes civil suits. See Backpage.com, 104 F. Supp. 3d at 159 (pointing out that “the common definition of the term ‘criminal,’ as well as its use in the context of Section 230(e)(1), specifically excludes and is distinguished from civil claims” (quoting Doe v. Bates, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at \*21 (E.D. Tex. Dec. 27, 2006))). Other traditional tools of statutory construction reinforce this conclusion. Although titles or captions may not be used to contradict a statute’s text, they can be useful to resolve textual ambiguities. See Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co., 331 U.S. 519, 528-29 (1947); Berniger v. Meadow Green-Wildcat Corp., 945 F.2d 4, 9 (1st Cir. 1991). Here, the subsection’s title, “[n]o effect on criminal law,” quite clearly indicates that the provision is limited to criminal prosecutions.

It is equally telling that where Congress wanted to include both civil and criminal remedies in CDA provisions, it did so through broader language. For instance, section 230(e)(4) states that the protections of section

230 should not “be construed to limit the application of the Electronic Communications Privacy Act of 1986,” a statute that contains both criminal penalties and civil remedies. See 18 U.S.C. §§ 2511, 2520. Preserving the “application” of this Act contrasts with Congress’s significantly narrower word choice in safeguarding the “enforcement” of federal criminal statutes. The normal presumption is that the employment of different words within the same statutory scheme is deliberate, so the terms ordinarily should be given differing meanings. See Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004).

This holding is entirely in keeping with the policies animating section 230(e)(1). Congress made pellucid that it sought “to ensure vigorous enforcement of Federal criminal laws to deter and punish” illicit activities online, 47 U.S.C. § 230(b)(5); and this policy coexists comfortably with Congress’s choice “not to deter harmful online speech through the . . . route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages,” Lycos, 478 F.3d at 418 (omission in original) (quoting Zeran, 129 F.3d at 330-31). Seen in this light, the distinctions between civil and criminal actions — including the disparities in the standard of proof and the availability of prosecutorial discretion — reflect a legislative judgment that it is best to avoid the potential chilling effects that private civil actions might have on internet free speech.

To say more about these attempted end runs would be pointless. They are futile, and do not cast the slightest doubt on our conclusion that the district court ap-

propriately dismissed the appellants' sex trafficking claims as barred by section 230(c)(1).

### **B. Chapter 93A Claims.**

We turn next to the appellants' state-law unfair trade practices claims. A Massachusetts statute, familiarly known as Chapter 93A, creates a private right of action in favor of any individual "who has been injured by another person's use or employment" of unfair or deceptive business practices. See Mass. Gen. Laws ch. 93A, § 9(1). The appellants' Chapter 93A claims (as framed on appeal) target misrepresentations allegedly made by Backpage to law enforcement and the NCMEC regarding Backpage's efforts at self-regulation. The district court jettisoned these claims, concluding that the causal chain alleged by the appellants was "too speculative to fall as a matter of law within the penumbra of reasonabl[e] foreseeability." Backpage.com, 104 F. Supp. 3d at 162.

As this ruling hinges on the plausibility of the appellants' allegations of causation, we first rehearse the plausibility standard. It is, of course, apodictic that a plaintiff must supply "a short and plain statement of the claim showing that [she] is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although this requirement does not call for the pleading of exquisite factual detail, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

Evaluating the plausibility of a complaint is a two-step process. First, "the court must separate the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Morales-Cruz v. Univ. of P.R., 676

F.3d 220, 224 (1st Cir. 2012). Second, the court must determine whether the remaining facts allow it “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). In carrying out this evaluation, the court must view the claim as a whole, instead of demanding “a one-to-one relationship between any single allegation and a necessary element of the cause of action.” Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 55 (1st Cir. 2013).

With this standard in mind, we proceed to the appellants’ assignment of error. To prevail on a Chapter 93A claim of this sort, the “plaintiff must prove causation — that is, the plaintiff is required to prove that the defendant’s unfair or deceptive act caused an adverse consequence or loss.” Rhodes v. AIG Domestic Claims, Inc., 961 N.E.2d 1067, 1076 (Mass. 2012). This requirement entails showing both “a causal connection between the deception and the loss and that the loss was foreseeable as a result of the deception.” Smith v. Jenkins, 732 F.3d 51, 71 (1st Cir. 2013) (quoting Casavant v. Norwegian Cruise Line Ltd., 952 N.E.2d 908, 912 (Mass. 2011)). In other words, the plaintiff must lay the groundwork for findings of both actual and proximate causation. If an examination of the claim leads to the conclusion that it fails plausibly to allege a causal chain sufficient to ground an entitlement to relief, that claim is susceptible to dismissal under Rule 12(b)(6). See A.G. ex rel. Maddox v. Elsevier, Inc., 732 F.3d 77, 82 & n.2 (1st Cir. 2013).

Here, the second amended complaint attempts to forge the causal chain as follows: Backpage made a series of disingenuous representations to law enforce-

ment officers and the NCMEC regarding its supposed commitment to combating sex trafficking, including representations about technical changes to its website and its efforts to screen and monitor postings; Backpage neither kept these commitments nor made the technical changes that had been discussed; instead, Backpage engaged in a series of pretextual actions to generate the appearance of combating sex trafficking (though it knew that these actions would not actually eliminate sex trafficking from the website); this amalgam of misrepresentations and deceptive practices “minimized and delayed” any real scrutiny of what Backpage was actually doing, thus allowing Backpage to gain a dominant market share in the online advertising of sex trafficking; and this sequence of events harmed the appellants by increasing their risk of being trafficked.

This causal chain is shot through with conjecture: it pyramids speculative inference upon speculative inference. This rampant guesswork extends to the effect of the alleged misrepresentations on an indeterminate number of third parties, the real impact of Backpage’s behavior on the overall marketplace for sex trafficking, and the odds that the appellants would not have been victimized had Backpage been more forthright.

When all is said and done, it is apparent that the attenuated causal chain proposed by the appellants is forged entirely out of surmise. Put another way, the causation element is backed only by “the type of conclusory statement[s] that need not be credited at the Rule 12(b)(6) stage.” Maddox, 732 F.3d at 80. Charges hinting at Machiavellian manipulation (such as the charge that Backpage’s “communications with NCMEC

were simply an effort to create a diversion as Backpage.com solidified its market position” or the charge that Backpage’s posting review program “appears to be merely superficial”) cannot serve as surrogates for well-pleaded facts.

To be sure, the complaint does plead a few hard facts. For example, it indicates that some meetings occurred involving Backpage and the NCMEC. It also indicates that Backpage made some efforts (albeit not the ones that the NCMEC recommended) to address sex trafficking. But beyond these scanty assertions, the complaint does not offer factual support for its attenuated causal analysis.

In an effort to plug this gaping hole, the appellants argue that in a Chapter 93A case the plausibility of causation should be tested at the pleading stage not by looking at facts but, rather, by employing “common economic sense.” Bos. Cab Dispatch, Inc. v. Uber Techs., Inc., No. 13-10769, 2015 WL 314131, at \*4 (D. Mass. Jan. 26, 2015); accord Katin v. Nat’l Real Estate Info. Servs., Inc., No. 07-10882, 2009 WL 929554, at \*7, \*10 (D. Mass. Mar. 31, 2009). Yet, facts are the linchpin of plausibility; and the cases that the appellants cite are inapposite. Those cases involve competitors suing each other pursuant to section 11 of Chapter 93A. This distinction is significant because although causation in section 11 cases between competitors turns on the decisions of third parties (customers), the causal chain between the unfair act and the harm to the plaintiff is much shorter and more direct than the chain that the appellants so laboriously attempt to construct.

The short of it is that the pertinent allegations in the second amended complaint are insufficient “to re-

move the possibility of relief from the realm of mere conjecture.” Tambone, 597 F.3d at 442. It follows inexorably that the district court did not err in dismissing the appellants’ Chapter 93A claims.<sup>8</sup>

### C. Intellectual Property Claims.

This brings us to the appellants’ intellectual property claims. Section 230 provides that “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2). We assume, without deciding, that the appellants’ remaining claims come within the compass of this exception.<sup>9</sup>

**1. Unauthorized Use of Pictures of a Person.** All of the appellants brought claims under state laws (Massachusetts and/or Rhode Island) guarding against the unauthorized use of a person’s picture. See Mass. Gen. Laws ch. 214, § 3A; R.I. Gen. Laws § 9-1-28. These nearly identical statutes, reprinted in relevant part in

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<sup>8</sup> For the sake of completeness, we note that the court below held, in the alternative, that the appellants’ Chapter 93A claims were barred by section 230(c)(1). See Backpage.com, 104 F. Supp. 3d at 162-63. We express no opinion on this alternative holding.

<sup>9</sup> The application of the exemption to the appellants’ state law claims for the unauthorized use of pictures is not free from doubt. At least one court of appeals has suggested that state law intellectual property claims are not covered by this exemption. See Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118-19, 1119 n.5 (9th Cir. 2007); but cf. Lycos, 478 F.3d at 422-23, 423 n.7 (applying section 230(e)(2) to a claim under state trademark law, albeit without detailed analysis). To make a muddled matter even murkier, Backpage argues that the unauthorized use of pictures claims do not involve intellectual property but, rather, stem from privacy rights protected by tort law. We need not reach either of these issues.



the margin,<sup>10</sup> confer private rights of action upon individuals whose images are used for commercial purposes without their consent. The appellants insist that Backpage, by garnering advertising revenues from their traffickers, profited from the unauthorized use of their photographs. This fusillade is wide of the mark: the statutes in question impose liability only upon persons or entities who deliberately use another's image for commercial gain. As we explain below, Backpage (on the facts alleged here) is not such an entity.

Neither the Massachusetts Supreme Judicial Court (SJC) nor the Rhode Island Supreme Court has confronted the exact scenario that is presented here. Our

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<sup>10</sup> Mass. Gen. Laws ch. 214, § 3A provides in relevant part that:

Any person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action . . . against the person so using his name, portrait or picture, to prevent and restrain the use thereof; and may recover damages for any injuries sustained by reason of such use.

R.I. Gen. Laws § 9-1-28(a) provides, as pertinent here, that:

Any person whose name, portrait, or picture is used within the state for commercial purposes without his or her written consent may bring an action . . . against the person so using his or her name, portrait, or picture to prevent and restrain the use thereof, and may recover damages for any injuries sustained by reason of such use.

To the modest extent that the wording of these statutes differs, neither the appellants nor Backpage suggests that the differences affect our analysis in any way. We therefore treat the statutes interchangeably.

task, then, is to make an informed determination of how each court would rule if it faced the question, taking into account analogous state decisions, cases from other jurisdictions, learned treatises, and relevant policy rationales. See Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co., 547 F.3d 48, 51-52 (1st Cir. 2008). Here, the tea leaves are easy to read.

The SJC has articulated the key point in the following way: “the crucial distinction . . . must be between situations in which the defendant makes an incidental use of the plaintiff’s name, portrait or picture and those in which the defendant uses the plaintiff’s name, portrait or picture deliberately to exploit its value for advertising or trade purposes.” Tropeano v. Atl. Monthly Co., 400 N.E.2d 847, 850 (Mass. 1980). Exploitation for advertising or trade purposes requires that the use of the image be “for the purpose of appropriating to the defendant’s benefit the commercial or other values associated with the name or likeness.” Id. (quoting Nelson v. Me. Times, 373 A.2d 1221, 1224 (Me. 1977)). So, too, the nearly identical Rhode Island statute requires a showing that by using the image “the defendant commercially exploited [the plaintiff] without his permission.” Leddy v. Narragansett Television, L.P., 843 A.2d 481, 490 (R.I. 2004); accord Mendonsa v. Time Inc., 678 F. Supp. 967, 971 (D.R.I. 1988).

The appellants argue that the use of their images cannot be written off as incidental because their pictures were “the centerpieces of commercial advertisements.” But this argument misapprehends both the case law and the rationale that animates the underlying right. Tropeano exemplifies the point. That case involved the publication of the plaintiff’s image to illus-

trate a magazine article in which she was not even mentioned. See 400 N.E.2d at 848. The SJC concluded that this was an incidental use of the image, notwithstanding that the article and accompanying picture could be said to benefit the publisher. See id. at 851. The fact that the publisher was a for-profit business did “not by itself transform the incidental publication of the plaintiff’s picture into an appropriation for advertising or trade purposes.” Id.

In our view, Tropeano establishes that even a use leading to some profit for the publisher is not a use for advertising or trade purposes unless the use is designed to “appropriat[e] to the defendant’s benefit the commercial or other values associated with the name or likeness.” Id. at 850 (quoting Nelson, 373 A.2d at 1224). That is the rule in Massachusetts, and we are confident that essentially the same rule prevails in Rhode Island.

Here, there is no basis for an inference that Backpage appropriated the commercial value of the appellants’ images. Although Backpage does profit from the sale of advertisements, it is not the entity that benefits from the misappropriation. A publisher like Backpage is “merely the conduit through which the advertising and publicity matter of customers” is conveyed, Cabaniss v. Hipsley, 151 S.E.2d 496, 506 (Ga. Ct. App. 1966), and the party who actually benefits from the misappropriation is the advertiser. Matters might be different if Backpage had used the pictures to advertise its own services, see id., but the appellants proffer no such claim.

Basic policy considerations reinforce this result. There would be obviously deleterious consequences to a rule placing advertising media, such as newspapers,

television stations, or websites, at risk of liability every time they sell an advertisement to a party who engages in misappropriation of another person's likeness. Given this verity, it is hardly surprising that the appellants have identified no case in which a publisher of an advertisement furnished by a third party has been held liable for a misappropriation present within it. The proper target of any suit for damages in such a situation must be the advertiser who increases his own business through the misappropriation (in this case, the traffickers).<sup>11</sup>

We need not tarry. On this understanding, we uphold the district court's dismissal of the appellants' claims under the aforementioned state statutes.

**2. Copyright.** The last leg of our journey takes us to a singular claim of copyright infringement. Shortly after the institution of suit, Doe #3 registered a copyright in one of the photographs used by her traffickers. In the second amended complaint, she included a claim for copyright infringement. The court below dismissed this claim, reasoning that it identified no redressable injury. *See Backpage.com*, 104 F. Supp. 3d at 165. Doe #3 challenges this ruling.

Assuming (without deciding) that Backpage could be held liable for copyright infringement, the scope of Doe #3's potential recovery is limited by the fact that she did not register her copyright until December of 2014 — after the instant action had been filed. By then,

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<sup>11</sup> This is precisely the situation reflected in the earliest right of privacy cases, *see, e.g., Henry v. Cherry & Webb*, 73 A. 97 (R.I. 1909), and the state statutes in this case are designed to codify liability for that sort of commercial conduct, *see Mendonsa*, 678 F. Supp. at 969-70; *Tropeano*, 400 N.E.2d at 850-51.

Backpage was no longer displaying the copyrighted image. Given the timing of these events, Doe #3 cannot recover either statutory damages or attorneys' fees under the Copyright Act. See 17 U.S.C. § 412; Johnson v. Gordon, 409 F.3d 12, 20 (1st Cir. 2005). Any recovery would be restricted to compensatory damages under 17 U.S.C. § 504(b), which permits a successful suitor to recover "the actual damages suffered by . . . her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages."

The prospect of such a recovery, however, is purely theoretical: nothing in the complaint raises a plausible inference that Doe #3 can recover any damages, or that discovery would reveal such an entitlement. See Twombly, 550 U.S. at 556 (stating that factual allegations must at least "raise a reasonable expectation that discovery will reveal evidence" to suffice as plausible). A showing of actual damages requires a plaintiff to prove "that the infringement was the cause of [her] loss of revenue." Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1170 (1st Cir. 1994). Such a loss is typically measured by assessing the diminution in a copyrighted work's market value (say, by calculating lost licensing fees). See Bruce v. Weekly World News, Inc., 310 F.3d 25, 28-29 (1st Cir. 2002); Data Gen., 36 F.3d at 1170. No facts set forth in the second amended complaint suggest that the market value of Doe #3's image has been affected in any way by the alleged infringement, and Doe #3 points to nothing that might plausibly support such an inference.

By the same token, nothing in the complaint plausibly suggests a basis for a finding that Doe #3 would be

entitled to profits attributable to the infringement. The closest that the complaint comes is an optimistic assertion that because photographs “enhance the effectiveness of advertisements,” Backpage necessarily reaps a financial benefit from these images (including, presumably, Doe #3’s photograph). But a generalized assertion that a publisher/infringer profits from providing customers with the option to display photographs in advertisements, standing alone, cannot plausibly be said to link the display of a particular image to some discrete portion of the publisher/infringer’s profits. Cf. Mackie v. Rieser, 296 F.3d 909, 914-16 (9th Cir. 2002) (concluding, at summary judgment, that the effect of including a photograph in an advertising brochure was too speculative to make out a triable issue on advertiser’s profits attributable to infringement). In short, the link that Doe #3 attempts to fashion between the copyrighted photograph and Backpage’s revenues is wholly speculative and, thus, does not cross the plausibility threshold. After all, “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555.

In a last ditch effort to bell the cat, Doe #3 contends that the district court erred in failing to determine whether she was entitled to injunctive relief under 17 U.S.C. § 502(a), which permits such relief “to prevent or restrain infringement of a copyright.” She says, in effect, that Backpage may still possess the copyrighted photograph and that, therefore, she remains at risk of future infringement. We reject this contention.

To begin, the mere fact of past infringement does not entitle a plaintiff to permanent injunctive relief: the plaintiff must also show “a substantial likelihood of in-

fringement in the future.” Harolds Stores, Inc. v. Dillard Dep’t Stores, Inc., 82 F.3d 1533, 1555 (10th Cir. 1996); see 5 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 14.06[B][1][a] (2015). Nothing in the complaint suggests that there is any substantial likelihood of future infringement by Backpage with respect to the copyrighted photograph. The known facts strongly suggest that no such risk exists: the photograph was posted by a third party who no longer has any sway over Doe #3, and Backpage is not alleged to post material or create advertisements entirely of its own accord. Thus, any fears of future infringement would appear to be unfounded.

Viewing the complaint as a whole, see Twombly, 550 U.S. at 569 n.14, we conclude that the distinctive facts alleged here simply do not suffice to ground a finding that Doe #3 is plausibly entitled to any relief on her copyright claim. Consequently, we discern no error in the district court’s dismissal of this claim.

### III. CONCLUSION

As a final matter, we add a coda. The appellants’ core argument is that Backpage has tailored its website to make sex trafficking easier. Aided by the amici, the appellants have made a persuasive case for that proposition. But Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers. Showing that a website operates through a meretricious business model is not enough to strip away those protections. If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation.

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We need go no further. For the reasons elucidated above, the judgment of the district court is affirmed. All parties shall bear their own costs.

**Affirmed.**



APPENDIX B

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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Civil Action No. 14-13870-RGS

JANE DOE NO. 1, a minor child,  
by her parent and next friend MARY ROE;  
JANE DOE NO. 2; and JANE DOE NO. 3, a minor  
child, by her parents and next friends SAM LOE AND  
SARA LOE

v.

BACKPAGE.COM, LLC, CAMARILLO HOLDINGS,  
LLC (f/k/a VILLAGE VOICE MEDIA HOLDINGS,  
LLC), and NEW TIMES MEDIA, LLC

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MEMORANDUM AND ORDER  
ON DEFENDANTS' MOTION TO DISMISS

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May 15, 2015

STEARNS, D.J.

In this litigation, two important public policies collide head on – the suppression of child sex trafficking and the promotion of a free and open Internet. Plaintiffs Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3 (the Doe plaintiffs) seek redress in the form of money damages from defendants Backpage.com, LLC; Camarillo Holdings, LLC (f/k/a Village Voice Media Holdings, LLC); and New Times Media, LLC. The Doe

plaintiffs allege that they were molested and repeatedly raped after being advertised as sexual wares on defendants' website, backpage.com (Backpage). Defendants contend that most of the Doe plaintiffs' claims are preempted by the Communications Decency Act (CDA), 47 U.S.C. § 230, and that the remaining intellectual property claims (unauthorized use of a person's image and copyright infringement) fail to state claims upon which relief may be granted.

#### BACKGROUND<sup>12</sup>

Backpage is an online classifieds forum that groups goods and services advertised for sale by geographic location and subject matter. At issue in this case is the forum's adult entertainment section and its subcategory offering the services of "escorts." The Doe plaintiffs allege that in the scungy world of adult entertainment, this section of Backpage is a notorious haven for promoters of the illicit sex trade, and even more troubling, the trafficking of children for sex. The Doe plaintiffs contend that Backpage's business model depends in large part on the revenues it earns from its involvement in the trafficking of children. To this end, Backpage is alleged to have structured its adult entertainment section to lightly camouflage its illegal content to divert the attention of law enforcement. In support, the Second Amended Complaint (SAC) marshals the following facts:

- Backpage charges a fee for posting advertisements in the adult entertainment section (and not in most other licit areas of the web-

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<sup>12</sup> On a motion to dismiss, the court accepts as true the well-pleaded facts of a complaint.

site). The fee for the “adult” ads ranges from \$12.00 to \$17.00 per posting. Backpage charges an additional fee for each reposting of an adult ad, and for featuring the ad (with a selection of text and photos) prominently on the right side of the website.

- Backpage does not require posters in the adult entertainment section to verify their identity. The website also does not require that the poster use a registered credit card linked with a name and address, and accepts anonymous payments in the form of prepaid credit cards, or pseudo-currencies, such as Bitcoin.
- Backpage does not require a poster to verify the age of an “escort” whose services are offered on the website. Although the website will not accept an ad when the poster enters an age of less than 18, it will permit the poster to immediately re-enter an assumed age.
- Backpage does not require any verification of the telephone numbers posted in its adult entertainment section. It also permits users to enter telephone numbers using any combination of character strokes rather than in the more traceable (by law enforcement) nominal numbers required in other sections of the website (such as “two013fourFive678niNe” rather than “201-345-6789”). Backpage does not require posters in the adult entertainment section to use their actual email addresses, but provides an email forwarding service that protects a poster’s anonymity.

- Backpage strips out metadata associated with photographs (such as date, time, geolocation and other identifying information) before publishing the photographs on its website. This prevents law enforcement from effectively searching for repostings of the same photograph.
- While Backpage bars the use of certain words and phrases through its “automatic filtering” system, such as “barely legal,” “high school,” “innocent,” “sex,” “blow job,” “hand job,” “schoolgirl,” “teen”, and “teenage,” it readily permits the use of suggestive circumlocutions like “girl,” “young,” “underage,” and “fresh.” It also does not filter out easily recognizable abbreviations of forbidden words, such as “brly legal” or “high schl.”

The Doe plaintiffs further allege that defendants have waged a phony war against sex traffickers to divert attention from their illegal activities. While Backpage claims that its adult entertainment advertisements are screened by trained moderators, it has refused to install readily available technology that would far more accurately detect the trafficking of children. According to the Second Amended Complaint, Backpage’s highly touted claim to make regular referrals to the National Center of Missing & Exploited Children has led to few instances of identification or rescue. Although Backpage will on request remove an offending ad in the geographic location in which it is posted, it does nothing to report or remove the identical ad posted in other geographical areas, or other ads involving the same child. The overall effect, the Doe plaintiffs

contend, is to create a Potemkin-like “façade of concern” that obscures the shady source of its filthy lucre. SAC ¶ 34.

Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3 aver that they have been each personally harmed by defendants’ unsavory business practices. Jane Doe No. 1 was first trafficked by pimps on Backpage after running away from home in February of 2012, when she was 15 years old. She was again sold on Backpage in March of 2013, after she ran away a second time. Between June of 2013 and September 10, 2013, her “services” were advertised on Backpage each and every day. As a result of the ads, she engaged in 10 to 12 sex transactions daily with adult men in Massachusetts and Rhode Island. Her pimp moved her from town to town every two days to avoid detection. Jane Doe No. 1 appeared on some 300 ads on Backpage and was raped over 1,000 times.

Backpage listed each ad featuring Jane Doe No. 1 as an offer of “escort” services, a common euphemism for prostitution. The Jane Doe No. 1 ads included known signifiers for child prostitution such as “young,” “girl,” “fresh,” “tiny,” “roses,” and “party.” Jane Doe No. 1’s pimp provided a prepaid mobile phone and a prepaid credit card to conceal Jane Doe No. 1’s identity when Jane Doe No. 1 placed ads on Backpage. When Jane Doe No. 1 attempted to enter her true age (which was under 18) during the purchase of an ad, Backpage would instruct her to enter her age as 18 or older. Photographs of Jane Doe No. 1 (with her facial features obscured, but at least on one occasion displaying a unique tattoo) accompanied all of her ads.

Jane Doe No. 2 was trafficked on Backpage by her pimp during various periods between 2010 and 2012 at different locations in Massachusetts. She first appeared on Backpage when she was 15 years old, after she had absconded from a residential program. Ads featuring Jane Doe No. 2 were posted either by her pimp or an older woman who worked with him (his “bottom”). The ads would appear on Backpage on average six times a day. Jane Doe No. 2 was given a prepaid mobile phone to answer calls from would-be customers generated by the Backpage ads. As a result of the ads, she was coerced into 5-15 sex transactions every day. Like the ads of Jane Doe No. 1, those of Jane Doe No. 2 featured her photograph. The ads were placed using a prepaid credit card. Altogether, Jane Doe No. 2 was raped over 900 times while in the thrall of her pimp.

Jane Doe No. 3 was trafficked on Backpage in December of 2013 by her pimp and one or more of his associates. The Backpage solicitations for the underage Jane Doe No. 3 described her as “new,” “sweet,” and “playful.” As with the other Jane Does, the ads were paid for with a prepaid credit card. Jane Doe No. 3 was also given a mobile phone to take calls and texts from customers. She was taken to a hotel in Foxborough, Massachusetts, where she was raped by men who responded to the ads. Photos of Jane Doe No. 3, including one that she had taken of herself, appeared with the ads on Backpage.<sup>13</sup>

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<sup>13</sup> At some point, Jane Doe No. 3’s parents became aware of the ads featuring their daughter on Backpage and demanded that they be taken down. A week later, the illicit ads still appeared on the website.

The Doe plaintiffs brought this lawsuit in October of 2014. In their Second Amended Complaint, they allege that defendants’ business practices violate the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), 18 U.S.C. § 1595 (Count I); the Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010 (MATA), Mass. Gen. Laws ch. 265, § 50 (Count II); and constitute unfair and deceptive business practices under the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, § 9 (Count III). The Doe plaintiffs also bring claims for unauthorized use of pictures of a person, Mass. Gen. Laws ch. 214, § 3A and R.I. Gen. Laws § 9-1-28 (Count IV), and copyright infringement (specific to the photograph taken by Jane Doe No. 3 of herself) (Count V). In January of 2015, defendants moved to dismiss the Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). The parties and several amici curiae<sup>14</sup> filed helpful briefs. The court heard oral argument on April 15, 2015.

## DISCUSSION

To survive a Rule 12(b)(6) motion to dismiss, the factual allegations of a complaint must “possess enough heft” to set forth “a plausible entitlement to relief.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 559 (2007); *see also Thomas v. Rhode Island*, 542 F.3d 944,

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<sup>14</sup> The City and County of San Francisco, the City of Atlanta, the City and County of Denver, the City of Houston, the City of Philadelphia, and the City of Portland (Oregon) (collectively the local government amici) and the Commonwealth of Massachusetts submitted two amicus briefs in support of plaintiffs. The Electronic Frontier Foundation, the Center for Democracy & Technology, and Professor Eric Goldman (of Santa Clara University School of Law) (collectively EFF) submitted an amicus brief in support of defendants.

948 (1st Cir. 2008). As the Supreme Court has emphasized, this standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted).

Defendants rely primarily on the immunity provided by Congress in enacting 47 U.S.C. § 230, that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” *id.* § 230(c)(1), and the concomitant preemption of “cause[s] of action . . . brought . . . under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3).<sup>15</sup> There is no dispute that defendants are, as the operators of Backpage, providers of an interactive computer service. Defendants contend that because the Doe plaintiffs allege they were harmed by the contents of postings that defendants had no part in

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<sup>15</sup> The Doe plaintiffs argue that the court should first assess the plausibility and sufficiency of the factual allegations relevant to each claim before reaching the immunity issue. However, the entitlement to immunity under section 230 is not only an affirmative defense, but also the right to be immune from being sued. *See, e.g., Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003); accord *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (Section 230 “can [] support a motion to dismiss if the statute’s barrier to suit is evident from the face of the complaint.”); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (same). As the Supreme Court counsels, a claim of entitlement to immunity should be “resolv[ed] . . . at the earliest possible stage in litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).



creating, the claims fall squarely within Congress's exemption of interactive computer service providers from liability for third-party Internet content.

Congress enacted section 230 in 1996, while the Internet was still in its infancy. Congress explained the purposes of the law in five pertinent findings:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

47 U.S.C. § 230(a). Consistent with these findings, section 230 reflects the “policy of the United States”

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

*Id.* § 230(b).

The Doe plaintiffs argue that because the Internet has matured since the enactment of section 230, the principal policy consideration that animated Congress

(promoting the growth of the Internet by insulating it from regulatory restrictions and lawsuits) no longer has the assuasive force that it may once have had. They cite the characterization of section 230's immunity guarantee as an affirmative defense in cases like *Klayman* and *Ricci* as evidence that the courts have been whittling back the scope of section 230 immunity as the Internet has shed its training wheels. *See Klayman*, 753 F.3d at 1357; *Ricci*, 781 F.3d at 28. The argument, however, does not bear scrutiny. Both the *Klayman* and *Ricci* courts, whatever the label they used to describe section 230's effect, found the interactive computer service providers at issue to be immune from any imputation of liability for third-party speech. *Klayman*, 753 F.3d at 1357-1359; *Ricci*, 781 F.3d at 27-28. Moreover, Congress, far from lowering the immunity bar, ratcheted it up in 2010 by expanding the scope of section 230 immunity to preempt the enforcement of inconsistent foreign judgments. *See* 28 U.S.C. § 4102(c)(1).<sup>16</sup>

The local government amici attempt to repackage Backpage as an “information content provider,” an entity that section 230 defines as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47

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<sup>16</sup> Section 4102(c)(1) reads as follows: “Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation against the provider of an interactive computer service, as defined in section 230 of the Communications Act of 1934 (47 U.S.C. 230) unless the domestic court determines that the judgment would be consistent with section 230 if the information that is the subject of such judgment had been provided in the United States.”

U.S.C. § 230(f)(3). Their ultimate point is that information content providers are excluded from the immunity granted by section 230. The amici contend that Backpage generates content by: (1) posting illegal materials in sponsored ads; (2) stripping metadata from posted photos; (3) coaching the crafting of ads by allowing misspellings of suggestive terms; and (4) designing the escorts section of the website in such a way as to signal to readers that sex with children is sold here. The amici argument relies heavily on *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008). In that case, the Ninth Circuit determined Roommates.com, a roommate matching service, to be an “information content provider” shorn of section 230 immunity because it elicited information about personal characteristics of users that is forbidden by the Fair Housing Act. *Id.* at 1169-1170. The Court reasoned that

Roommate’s connection to the discriminatory filtering process is direct and palpable: Roommate designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children. Roommate selected the criteria used to hide listings, and Councils allege that the act of hiding certain listings is itself unlawful under the Fair Housing Act, which prohibits brokers from steering clients in accordance with discriminatory preferences.

*Id.*

To get to its result, the Court in *Roommates* attempted to draw a line between active control of the content of a web posting and the provision of a neutral interactive service that simply replicates offending third-party matter.<sup>17</sup>

If an individual uses an ordinary search engine to query for a “white roommate,” the search engine has not contributed to any alleged unlawfulness in the individual’s conduct; providing *neutral* tools to carry out what may be unlawful or illicit searches does not amount to “development” for purposes of the immunity exception. . . . Similarly, a housing website that allows users to specify whether they will or will not receive emails by means of *user-defined* criteria might help some users exclude email from other users of a particular race or sex. However, that website would be immune, so long as it does not **require** the use of discriminatory criteria. A website operator who edits user-created content – such as by correcting spelling, removing obscenity or trimming for length – retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality.

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<sup>17</sup> *Roommates* is one of the few sentinels denying section 230 immunity left standing among some 300 cases (as of 2012) that have decided the issue. See *Hill v. StubHub, Inc.*, 219 N.C. App. 227, 239 (2012).

*Id.* at 1169 (bold emphasis added). This latter passage lays out the distinction that afforded immunity to craigslist.com, an online classifieds forum that also published discriminatory housing ads. “Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination; for example, craigslist does not offer a lower price to people who include discriminatory statements in their postings.” *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-672 (7th Cir. 2008).

Singly or in the aggregate, the allegedly sordid practices of Backpage identified by amici amount to neither affirmative participation in an illegal venture nor active web content creation. Nothing in the escorts section of Backpage requires users to offer or search for commercial sex with children. The existence of an escorts section in a classified ad service, whatever its social merits, is not illegal. The creation of sponsored ads with excerpts taken from the original posts reflects the illegality (or legality) of the original posts and nothing more. Similarly, the automatic generation of navigational path names that identify the ads as falling within the “escorts” category is not content creation. *See Seldon v. Magedson*, 2014 WL 1456316, at \*5-6 (D. Ariz. April 15, 2014). The stripping of metadata from photographs is a standard practice among Internet service providers. Hosting anonymous users and accepting payments from anonymous sources in Bitcoins, peppercorns, or whatever, might have been made illegal by Congress, but it was not. Backpage’s passivity and imperfect filtering system may be appropriate targets for criticism, but they do not transform Backpage into an information content provider.

Although the Doe plaintiffs recognize that defendants did not author the content of the offending ads, *see* Opp’n at 16 (“Plaintiffs’ trafficking claims do not seek to ‘impute’ to [d]efendants any advertisements created by others”), they challenge the breadth of the immunity sought by defendants. Count I alleges a violation of a section of the TVPRA, a federal statute that criminalizes sex trafficking. As the Doe plaintiffs note, section 230 expressly states that “[n]othing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or *any other Federal criminal statute*.” 47 U.S.C. § 230(e)(1) (emphasis added). Plaintiffs contend that defendants’ business practices, “even if the advertisements had never been posted,” Opp’n at 16, are sufficient to make out a violation of the TVPRA. Furthermore, according to the Doe plaintiffs, section 230 only immunizes “action voluntarily taken in *good faith* to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” 47 U.S.C. § 230(c)(2)(A) (emphasis added). The Doe plaintiffs argue that their claims are of a different sort – they allege that defendants have intentionally and in bad faith hidden behind ineffectual counter-trafficking measures to deflect the scrutiny of law enforcement and social services agencies. Count II alleges a violation of the MATA, the Massachusetts analog to the TVPRA. The Doe plaintiffs argue that, because claims under the TVPRA are exempt from the scope of section 230’s immunity, the claim under MATA does not depend on “*inconsistent state law*” preempted

by section 230. Count III, which presses a claim of unfair and deceptive businesses practices under Massachusetts law, is alleged to arise not from the posted ads and their contents, but from the architecture of Backpage itself, which the Doe plaintiffs contend is constructed to conceal illegal activity from law enforcement. Finally, the Doe plaintiffs rely on Congress's stricture that section 230 "shall not be construed to limit or expand any law pertaining to intellectual property," *id.* § 230(e)(2), as preserving the intellectual property claims (unauthorized publicity and copyright infringement).<sup>18</sup> I will examine the viability of each count in turn.

### *Civil Remedy under the TVPRA*

18 U.S.C. § 1595 provides victims of trafficking the right to bring a private civil action for restitution against "whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter." The parties dispute whether a civil action authorized by a criminal statute can be construed as "enforcement of . . . a Federal criminal statute" exempt from the immunity provided by section 230(e)(1).<sup>19</sup>

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<sup>18</sup> Defendants do not rely on section 230 immunity with respect to the copyright infringement claim, but contend, to be discussed *infra*, that it should be dismissed on other grounds.

<sup>19</sup> The Doe plaintiffs, citing *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009), also contend that their TVPRA claim falls outside of the protections of section 230 immunity because section 1595 imposes a duty of care on defendants wholly independent of their role as publishers of speech. In *Barnes*, the Ninth Circuit barred a negligent undertaking claim under Oregon law that sought to hold Yahoo



The Doe plaintiffs maintain that the statutory language, “enforce[ing] . . . a Federal criminal statute,” implies more than a dependence on criminal prosecution alone. *See* Black’s Law Dictionary (10th ed. 2014) (to “enforce” is “[t]o give force or effect to” or “[l]oosely, to compel a person to pay damages for not complying with . . .”). Further, plaintiffs contend that civil actions are frequently authorized as part and parcel of the enforcement regime behind criminal statutes. *See Luka v. Procter & Gamble Co.*, 785 F. Supp. 2d 712, 719 (N.D. Ill. 2011) (“[C]ivil enforcement mechanisms [] permit private parties to sue *to enforce* statutory prohibitions.” (emphasis added)). Plaintiffs also rely on

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liable for an alleged failure to remove indecent profiles of a plaintiff that had been posted by her ex-boyfriend because the claim attempted to impose publisher liability on Yahoo for content created by a third party. *Id.* at 1102-1105 (“The word ‘undertaking,’ after all, is meaningless without the following verb. That is, one does not merely undertake; one undertakes *to do* something. And what is the undertaking that Barnes alleges Yahoo failed to perform with due care? The removal of the indecent profiles that her former boyfriend posted on Yahoo’s website. But removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove.”).

The Court did, however, allow a claim of promissory estoppel to stand on the allegation that a Director of Communications at Yahoo had contacted plaintiff and promised to remove the offending ads, but failed to do so in a timely manner. *Id.* at 1107-1109. “Contract liability here would come not from Yahoo’s publishing conduct, but from Yahoo’s manifest intention to be legally obligated to do something, which happens to be removal of material from publication.” *Id.* at 1107. There is no claim by the Doe plaintiffs that any such assurance was given to them by Backpage. As *Barnes* illustrates, the existence of a statutory remedy without more does not give rise *mirabile dictu* to a tort duty. If it did, there would no need to create such a remedy in the first place.

*dicta* in *Nieman v. Versuslaw, Inc.*, 2012 WL 3201931, at \*9 (C.D. Ill. Aug. 3, 2012), surmising that section 230 “arguably . . . may not be used to bar a civil RICO claim because that would impair the enforcement of a Federal criminal statute.”

Defendants, for their part, point out that courts have consistently rejected this argument in a section 230 immunity context. In *Doe v. Bates*, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006), the court held that Yahoo could not be held civilly liable for allegedly knowingly hosting child pornography on a user site styled as the Candyman e-group. The Magistrate Judge examined “th[is] issue of first impression” in scholarly detail that is worth quoting at length. *Id.*, at \*3.

The plain text of the statute establishes that the 230(e)(1) exception does not encompass private civil claims. As argued by Defendant, the common definition of the term “criminal,” as well as its use in the context of Section 230(e)(1), specifically excludes and is distinguished from civil claims. The term “criminal” is defined as “[c]onnected with the administration of penal justice.” Black’s Law Dictionary 302; *see also* American Heritage Dictionary of the English Language 430 (4th ed. 2000) (defining “criminal” as “[r]elating to the administration of penal law”). The term “civil” is defined as follows: “[o]f or relating to private rights and remedies that are sought by action or suit, *as distinct from*

*criminal proceedings.*” Black’s Law Dictionary 262 (emphasis added). In addition, Congress’ use of the word “enforcement” in Section 230(e)(1) again confirms that the exception refers to governmental action, not civil actions by a private litigant.

Congress did not bifurcate any statutes as asserted by Plaintiffs. Rather, as noted by Defendant, it preserved the ability of law enforcement officials to enforce the federal criminal laws to their fullest extent while at the same time eliminating the ability of private plaintiffs to pursue service-provider defendants. Given the complexity of Title 18 and the availability of civil remedies in statutes throughout the criminal code, Congress achieved its intended result using simple language making it clear that Section 230’s limits on civil liability would not affect governmental enforcement of federal criminal laws.

As noted by Defendant, Plaintiffs’ invocation of Section 230(e)(1) rests on their generalized policy arguments rather than the text of the statute. Plaintiffs’ core argument appears to be that Section 230(e)(1) must exempt civil claims under the child pornography statutes because child pornography is “not to be tolerated” and “[i]f the prospect of civil liability provides a disincentive for en-

gaging in child pornography over and above that provided by the prospect of fines and jail time, then that is a good thing.”

Child pornography obviously is intolerable, but civil immunity for interactive service providers does not constitute “tolerance” of child pornography any more than civil immunity from the numerous other forms of harmful content that third parties may create constitutes approval of that content. Section 230 does not limit anyone’s ability to bring criminal or civil actions against the actual wrongdoers, the individuals who actually create and consume the child pornography. Here, both the neighbor [who created the child pornography] and the moderator of the Candyman web site have been prosecuted and are serving sentences in federal prison. Further, the section 230(e)(1) exemption permits law enforcement authorities to bring criminal charges against even interactive service providers in the event that they themselves actually violate federal criminal laws.

Regarding civil liability, however, Congress decided not to allow private litigants to bring civil claims based on their own beliefs that a service provider’s actions violated the criminal laws. As Defendant explained in its briefing, the

reason is evident. If civil liability were possible, the incentive to bring a civil claim for the settlement value could be immense, even if a plaintiff's claim was without merit. Even if it ultimately prevailed, the service provider would face intense public scrutiny and substantial expense. Given the millions of communications that a service provider such as Defendant enables, the service provider could find itself a defendant in numerous such cases. Congress determined that it wanted to eliminate the resulting disincentives to the development of vibrant and diverse services involving third-party communication, while maintaining the ability of criminal prosecutions by the government for violations of federal criminal law. In sum, Congress did intend to treat civil and criminal claims differently and carefully crafted Section 230(e)(1) to achieve exactly that result. Plaintiffs' claim, although novel, is untenable and without merit.

*Id.*, at \*21-22.

The District Judge adopted the Magistrate Judge's opinion, also noting that

[t]he legislative history [] buttresses the Congressional policy against civil liability for internet service providers. One key proponent of an amendment containing the language of § 230 at issue

explained that “the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.” 141 Cong. Rec. H8469. Several legislators identified “obscenity” in particular as material that could be more freely regulated as a result of the immunity provided by the statute. Another proponent noted that “[t]here is no way that any of [the internet service providers], like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. . . . We are talking about . . . thousands of pages of information every day, and to have that imposition imposed on them is wrong.” *Id.* at H8471. The House approved the amendment by a vote of 410 to 4. *Id.* at H8478.

*Id.*, at \*4. The court concluded that on the basis of this legislative history, “Congress decided not to allow private litigants to bring civil claims based on their own beliefs that a service provider’s actions violated the criminal laws.” *Id.*, at \*5.

In *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), the court adopted the reasoning of *Bates* and rejected the *identical* argument from plaintiff, a victim of child sex trafficking, that section 230 carved out an exemption for the civil claim that she had brought against Backpage under 18 U.S.C. § 1595. *Id.* at 1055-1056. Similarly, in

*Obado v. Magedson*, 2014 WL 3778261 (D.N.J. July 31, 2014), the court rejected plaintiff's effort to claim private redress for defendants' alleged criminal conspiracy to violate his rights. *Id.*, at \*8. "Even if Plaintiff had alleged any facts to sustain this claim, the CDA exception for federal criminal statutes applies to government prosecutions, not to civil private rights of action under stat[utes] with criminal aspects." *Id.*

Although the Doe plaintiffs challenge this line of cases as "flawed," the court is persuaded that criminal and civil actions differ in kind and that section 230 exempts only criminal prosecutions. Section 1595 itself recognizes that although a private right of action may be complementary to government interests in combating trafficking, a civil action primarily vindicates private interests and must take a back seat to a criminal prosecution. *See* 18 U.S.C. § 1595(b)(1) ("Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim."). The court also finds persuasive amici EFF's argument that only criminal prosecutions are exempted from section 230's immunity because they are subject to the filter of prosecutorial discretion and a heightened standard of proof, making them less likely to have a chilling effect on the freedom of online speech.<sup>20</sup>

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<sup>20</sup> Defendants also contend that plaintiffs fail to make out a case under 18 U.S.C. § 1595 because they do not allege that defendants shared the traffickers' criminal intent. Plaintiffs counter that section 1595 imposes liability not only for aiding and abetting, but more broadly for "*participation* in a venture which that person knew or should have known has engaged in an act in violation of this chapter." *Id.* § 1595(a) (emphasis added). The court need not

The Doe plaintiffs' next argument, that section 230 only immunizes "good faith" efforts to restrict access to offensive materials, has also failed to find support in the decided cases. Section 203(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230(c)(2) further provides that

[n]o provider or user of an interactive computer service shall be held liable on account of –

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Where section 230(c)(1) exempts an interactive service provider from liability for publishing third-party content, section 230(c)(2) also immunizes these providers from liability for actions taken in good faith to restrict offensive content.

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decide this issue because it holds that this claim is preempted by section 230 immunity.



[Section] 230(c)(1) contains no explicit exception for impermissible editorial motive, whereas § 230(c)(2) does contain a “good faith” requirement for the immunity provided therein. That § 230(c)(2) expressly provides for a good faith element omitted from § 230(c)(1) indicates that Congress intended not to import a subjective intent/good faith limitation into § 230(c)(1). “[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Keene Corp. v. United States*, 508 U.S. 200, 208 [] (1993). Accordingly, the text of the two subsections of § 230(c) indicates that (c)(1)’s immunity applies regardless of whether the publisher acts in good faith.

*Levitt v. Yelp! Inc.*, 2011 WL 5079526, at \*7 (N.D. Cal. Oct. 26, 2011), *aff’d*, 765 F.3d 1123 (9th Cir. 2014).<sup>21</sup>

### ***Unfair and Deceptive Business Practices***

The Doe plaintiffs contend that the claim for unfair and deceptive business practices under the Massachusetts Consumer Protection Act, Gen. Laws ch. 93, § 9, survives section 230 immunity because it does not de-

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<sup>21</sup> Because the CDA immunizes Backpage from private litigants seeking redress under civil law, the parallel state law claim under the MATA is necessarily inconsistent with, and therefore preempted by, the CDA.

pend on the content of the advertisements themselves, but rather on the “deceptive” design of Backpage. Without the offending ads, however, no nexus would exist between Backpage and the harms suffered by the Doe plaintiffs. Their theory – that absent the permissive website design and imperfect filtering, their pimps would not have trafficked them or, if they had attempted to do so, law enforcement would have scrutinized Backpage more closely and would possibly have intervened to prevent their injuries – is too speculative to fall as a matter of law within the penumbra of reasonably foreseeability.

Moreover, courts have repeatedly rejected this “entire website” theory as inconsistent with the substance and policy of section 230. In *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007), the First Circuit refused to hold Lycos (a search engine) liable for the “construct and operation” of its website. *Id.* at 422. “Lycos’s decision not to reduce misinformation by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting. Section 230 immunity does not depend on the form that decision takes.” *Id.*; see also *StubHub, Inc.*, 219 N.C. App. at 245 (rejecting the “entire website” approach in determining whether the Internet ticket marketplace may be held responsible for scalpers’ unfair or deceptive trade practices); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (finding a “structure and design” approach inapplicable where, unlike in *Roommates*, the

design of website did not “require[] users to input illegal content as a necessary condition of use.”<sup>22</sup>

Also problematic is the suggestion that either knowledge or tacit encouragement of illegal content (but not the content itself) can be the basis for interactive web services liability. “It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider’s own speech.” *Lycos*, 478 F.3d at 420; *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (“The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law.”). Moreover,

there is simply no authority for the proposition that [encouraging the publication of defamatory content] makes the website operator responsible, in whole or in part, for the ‘creation or development’ of every post on the site. . . . Unless Congress amends the [CDA], it is legally (although perhaps not ethically) beside the point whether defendants refuse to remove the ma-

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<sup>22</sup> Court have also rejected consumer protection claims under section 230(c)(1) that seek to hold interactive service providers liable for third-party content. *See, e.g., Lycos*, 478 F.3d at 421-422 (Florida securities and cyberstalking laws); *Hinton v. Amazon.com*, 2014 WL 6982628, at \*1 (S.D. Miss. Dec. 9, 2014) (Mississippi Consumer Protection Act); *Obado*, 2014 WL 3778261, at \*1 (New Jersey Consumer Fraud Act); *Goddard v. Google*, 2008 WL 5245490, at \*1 (N.D. Cal. Dec. 17, 2008) (California Unfair Competition Law).

terial, or how they might use it to their advantage.

*Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011) (internal quotation marks omitted, ellipsis in original). Indeed,

an encouragement test would inflate the meaning of “development” to the point of eclipsing the immunity from publisher-liability that Congress established. Many websites not only allow but also actively invite and encourage users to post particular types of content. Some of this content will be unwelcome to others – *e.g.*, unfavorable reviews of consumer products and services, allegations of price gouging, complaints of fraud on consumers, reports of bed bugs, collections of cease-and-desist notices relating to online speech. And much of this content is commented upon by the website operators who make the forum available. Indeed, much of it is “adopted” by website operators, gathered into reports, and republished online. Under an encouragement test of development, these websites would lose the immunity under the CDA and be subject to hecklers’ suits aimed at the publisher. Moreover, under the district court’s rule, courts would then have to decide what constitutes “encouragement” in order to determine immunity under the CDA – a concept that is certainly more

difficult to define and apply than the Ninth Circuit’s material contribution test. *See Zeran*, 129 F.3d at 333. Congress envisioned an uninhibited, robust, and wide-open internet, *see* § 230(a)(1)-(5), but the muddiness of an encouragement rule would cloud that vision. Accordingly, other courts have declined to hold that websites were not entitled to the immunity furnished by the CDA because they selected and edited content for display, thereby encouraging the posting of similar content.

*Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 414-415 (6th Cir. 2014).<sup>23</sup>

#### Right of Publicity

Mass. Gen. Laws ch. 214, § 3A, provides that

[a]ny person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action in the superior court against the person so using his name, portrait or picture, to prevent and restrain the use thereof;

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<sup>23</sup> Defendants also argue that the Chapter 93A claim, in so far as it is based on alleged misrepresentations to law enforcement and social services agencies, lacks an essential foundational element because law enforcement and social services agencies have no connection in a commercial context to defendants as “consumers” of goods and services.

and may recover damages for any injuries sustained by reason of such use.

R.I. Gen. Laws § 9-1-28 provides in almost identical language that

[a]ny person whose name, portrait, or picture is used within the state for commercial purposes without his or her written consent may bring an action in the superior court against the person so using his or her name, portrait, or picture to prevent and restrain the use thereof, and may recover damages for any injuries sustained by reason of such use.

Accepting, *dubitante*, the Doe plaintiffs' assertion that the right to publicity constitutes an intellectual property claim exempt from immunity under section 230,<sup>24</sup> the

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<sup>24</sup> Although certain publicity rights are akin to "intellectual property" rights, a person's image is not a "product of the human intellect." Black's Law Dictionary (10th ed. 2014). "[T]he right of publicity flows from the right to privacy," *Alvarez Guedes v. Marciano Martinez*, 131 F. Supp. 2d 272, 278 (D.P.R. 2001) (citing numerous cases), which is an intangible right of a different nature. Despite the Doe plaintiffs' attorney's contention at oral argument that a photograph may be copyrightable, it does not follow that the underlying image is *ipso facto* protectable under intellectual property law. See *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1264 (10th Cir. 2008) ("Recognizing that Oscar Wilde's inimitable visage does not belong, or 'owe its origins' to any photographer, the Supreme Court noted that photographs may well sometimes lack originality and are thus not *per se* copyrightable. . . . [P]hotographs are copyrightable, if only to the extent of their *original* depiction of the subject. Wilde's image is not copyrightable; but to the extent a photograph reflects the photographer's decisions regarding pose, positioning, background, light-

court agrees with defendants that plaintiffs have not pled plausible claims for unauthorized use of their images. Plaintiffs do not allege that defendants used their images to extract any direct benefit (such as featuring plaintiffs on advertisements *for* Backpage). Rather, the allegation is that defendants benefitted incidentally from the fee charged for posting advertisements with the Doe plaintiffs' pictures in the escorts section of the website. The argument, however, has been explicitly rejected by the Massachusetts Supreme Judicial Court.<sup>25</sup>

[T]he crucial distinction under G.L. c. 214, s 3A, must be between situations in which the defendant makes an incidental use of the plaintiff's name, portrait or picture and those in which the defendant uses the plaintiff's name, portrait or

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ing, shading, and the like, those elements can be said to 'owe their origins' to the photographer, making the photograph copyrightable, at least to that extent."), *citing Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884). Courts also disagree as to whether state law intellectual property claims are exempted under section 230. *Compare Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007) ("In the absence of a definition from Congress, we construe the term 'intellectual property' to mean 'federal intellectual property.'") *with Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302 (D.N.H. 2008) ("[Section] 230(e)(2) applies simply to 'any law pertaining to intellectual property,' not just federal law.").

<sup>25</sup> "[A]s a federal court considering state law claims, we must apply the state's law on substantive issues and 'we are bound by the teachings of the state's highest court.'" *Phoung Luc v. Wyndham Mgmt. Corp.*, 496 F.3d 85, 88 (1st Cir. 2007), *citing N. Am. Specialty Ins. Co. v. Lapalme*, 258 F.3d 35, 37-38 (1st Cir. 2001).

picture deliberately to exploit its value for advertising or trade purposes.

*Tropeano v. Atl. Monthly Co.*, 379 Mass. 745, 749 (1980). “The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness.” *Id.*, quoting *Nelson v. Maine Times*, 373 A.2d 1221, 1224 (Me. 1977) (in turn quoting Restatement (Second) of Torts § 652C, cmt. d (1977)); see also *Intercity Maint. Co. v. Local 254 Serv. Employees Int’l Union*, 62 F. Supp. 2d 483, 506 (D.R.I. 1999), *aff’d in part, vacated in part on other grounds, remanded sub nom. Intercity Maint. Co. v. Local 254, Serv. Employees Int’l Union AFL-CIO*, 241 F.3d 82 (1st Cir. 2001) (“The Rhode Island legislature borrowed the Privacy Act’s scheme of four privacy torts, including the tort of false light, from the doctrine of privacy torts promulgated by the *Restatement (Second) of Torts*. See *Liu v. Striuli*, 36 F. Supp. 2d 452, 479 (D.R.I. 1999); *Restatement (Second) of Torts* §§ 652B-E (establishing the four privacy torts). Accordingly, Rhode Island courts have often turned to the *Restatement* as an authority on the matter of privacy torts.”).

### *Copyright Infringement*

Jane Doe No. 3 obtained a registration for her photograph on December 18, 2014, after this lawsuit was filed. Although registration is not a jurisdictional prerequisite of bringing a suit for copyright infringement, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010), it is a “condition precedent for obtaining certain remedies, such as statutory damages and attorneys’ fees.” *Johnson v. Gordon*, 409 F.3d 12, 20 (1st Cir.



2005); *see also* 17 U.S.C § 412 (“[N]o award of statutory damages or of attorney’s fees . . . shall be made for – (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration.”).

The only recovery remaining open to Jane Doe No. 3 is compensatory damages under 17 U.S.C. § 504. Section 504 permits recovery of “the actual damages suffered by [] her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.” With respect to the latter, Jane Doe No. 3 alleges that “[t]he Backpage Defendants derive a financial benefit directly attributable to the public display of such photographs by virtue of the payment of fees by the pimps and traffickers to Backpage.com.” SAC ¶ 139. However, she may only recover profits from defendants that are causally linked to specific acts of infringement. *See On Davis v. The Gap, Inc.*, 246 F.3d 152, 159-161 (2d Cir. 2001). Here no plausible link exists between defendants’ generalized profits and any common-law copyright vesting in Jane Doe No. 3’s photo for the simple reason that the fee for posting an ad is the same whether or not it includes a photograph. Jane Doe No. 3 does not allege that she suffered any loss of revenues or licensing fees for her photo as a result of the infringement (nor does she allege that the protectable elements of the photo, *see* n.12 *supra*, have any market value).

Because she does not plead any redressable damages, Jane Doe No. 3’s copyright infringement claim must also be dismissed.

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To avoid any misunderstanding, let me make it clear that the court is not unsympathetic to the tragic plight described by Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3. Nor does it regard the sexual trafficking of children as anything other than an abhorrent evil. Finally, the court is not naïve – I am fully aware that sex traffickers and other purveyors of illegal wares ranging from drugs to pornography exploit the vulnerabilities of the Internet as a marketing tool. Whether one agrees with its stated policy or not (a policy driven not simply by economic concerns, but also by technological and constitutional considerations), Congress has made the determination that the balance between suppression of trafficking and freedom of expression should be struck in favor of the latter in so far as the Internet is concerned. Putting aside the moral judgment that one might pass on Backpage’s business practices, this court has no choice but to adhere to the law that Congress has seen fit to enact.

#### ORDER

For the foregoing reasons, defendants’ motion to dismiss the Second Amended Complaint is ALLOWED. The Clerk is directed to enter judgment accordingly and close this case.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT  
JUDGE

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APPENDIX C

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 15-1724

JANE DOE (1); JANE DOE (2); JANE DOE (3), A  
MINOR CHILD, BY HER PARENTS AND NEXT  
FRIENDS, SAM LOE AND SARA LOE

Plaintiffs - Appellants

v.

BACKPAGE.COM, LLC; CAMARILLO HOLDINGS,  
LLC, f/k/a Village Voice Media Holding, LLC; NEW  
TIMES MEDIA, LLC

Defendants – Appellees

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Before

Howard, Chief Judge,  
Souter, \* Associate Justice,  
Torruella, Selya, Lynch, Thompson,  
Kayatta and Barron, Circuit Judges.

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ORDER OF COURT

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Entered: May 3, 2016

Pursuant to First Circuit Internal Operating Pro-  
cedure X(C), the petition for rehearing en banc has also

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\* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme  
Court of the United States, sitting by designation.

been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:

John T. Montgomery  
Dara Ann Reppucci  
Ching-Lee Fukuda  
Aaron M. Katz  
Christine Ezzell Singer  
Jessica Lucia Soto  
Rebecca C. Ellis  
Robert A. Bertsche  
Jeffrey J. Pyle  
James C. Grant  
Ambika Kumar Doran  
Genevieve C. Nadeau  
Mark David Lipton  
Stacey J. Rappaport  
Michael A. Rogoff  
Jenna A. Hudson

APPENDIX D

18 U.S.C. § 1591

§ 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at

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the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term “coercion” means—

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person.

(4) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(5) The term “venture” means any group of two or more individuals associated in fact, whether or not a legal entity.

APPENDIX E

18 U.S.C. § 1595

§ 1595. Civil remedy

(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(b)(1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a “criminal action” includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under this section unless it is commenced not later than 10 years after the cause of action arose.



## APPENDIX F

### 47 U.S.C. § 230

#### § 230. Protection for private blocking and screening of offensive material

##### (a) Findings The Congress finds the following:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

##### (b) Policy It is the policy of the United States—

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
  - (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
  - (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
  - (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.
- (c) Protection for "Good Samaritan" blocking and screening of offensive material
- (1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
  - (2) Civil liability No provider or user of an interactive computer service shall be held liable on account of—
    - (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene,

lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

- (A) filter, screen, allow, or disallow content;
- (B) pick, choose, analyze, or digest content; or
- (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

## APPENDIX G

## Mass. Gen. Laws ch. 265, § 50

§ 50. Trafficking of persons for sexual servitude; trafficking of persons under 18 years for sexual servitude; trafficking by business entities; penalties; tort actions brought by victims

(a) Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude and shall be punished by imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than \$25,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence. No prosecution commenced under this section shall be continued without a finding or placed on file.

(b) Whoever commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than

5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

(c) A business entity that commits trafficking of persons for sexual servitude shall be punished by a fine of not more than \$1,000,000.

(d) A victim of subsection (a) may bring an action in tort in the superior court in any county wherein a violation of subsection (a) occurred, where the plaintiff resides or where the defendant resides or has a place of business. Any business entity that knowingly aids or is a joint venturer in trafficking of persons for sexual servitude shall be civilly liable for an offense under this section.

**United States Court of Appeals**  
**For the Eighth Circuit**

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No. 14-2988

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Craig Keefe

*Plaintiff - Appellant*

v.

Beth Adams; Connie Frisch; Kelly McCalla

*Defendants - Appellees*

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Foundation for Individual Rights in Education; Alliance Defending Freedom;  
Student Press Law Center; Electronic Frontier Foundation; American Booksellers  
Foundation for Free Expression; National Coalition Against Censorship;  
American Civil Liberties Union of Minnesota

*Amici on Behalf of Appellant*

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Appeal from United States District Court  
for the District of Minnesota - Minneapolis

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Submitted: June 10, 2015  
Filed: October 26, 2016

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Before LOKEN, SHEPHERD,<sup>1</sup> and KELLY, Circuit Judges.

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LOKEN, Circuit Judge.

After Central Lakes College (CLC) received student complaints about posts on Craig Keefe's Facebook page, he was removed from the Associate Degree Nursing Program for behavior unbecoming of the profession and transgression of professional boundaries. Keefe filed suit against several CLC administrators, alleging violations of his First Amendment and due process rights. After some defendants were dismissed, the district court<sup>2</sup> granted the remaining defendants summary judgment. Keefe v. Adams, Civ. No. 13-326, Order (D. Minn. Aug. 26, 2014). Keefe appeals. Reviewing the grant of summary judgment *de novo*, we affirm. See Richmond v. Fowlkes, 228 F.3d 854, 857 (8th Cir. 2000) (standard of review).

## **I. Background**

A. The Events Leading to Removal. Keefe completed the practical nursing program at CLC and became a licensed practical nurse in June 2011. He enrolled in the Associate Degree Nursing Program in the fall of 2011, seeking to become a registered nurse. He was dismissed at the end of that semester for failing to maintain the required grade levels in all nursing courses. He reapplied, was admitted to the Program, and again began classes in the fall of 2012.

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<sup>1</sup>Judge Kermit E. Bye was initially assigned to this panel when the case was submitted but has resigned from active participation. Judge Bobby E. Shepherd was randomly selected to replace Judge Bye on the panel.

<sup>2</sup>The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

In late November, a student complained to Keefe's instructor, Kim Scott, about several posts Keefe had made on his public Facebook page. She provided Scott printouts of five posts she felt were threatening and related to the classroom. A few days later, a second student approached Scott at the start of a clinical class in which she was enrolled with Keefe. She told Scott that Keefe made statements on Facebook that "made her feel extremely uncomfortable and nervous," and that "she didn't feel she could function in the same physical space with Craig at the clinical site." Concerned about patient care and safety in the clinic, Scott separated Keefe and the student during the shift. The student forwarded the posts to Scott later that day.

After receiving the two complaints, Scott forwarded the posts to her supervisor, Connie Frisch, CLC's Director of Nursing. Frisch read the posts and verified they came from Keefe and were accessible to anyone on the internet. Frisch then contacted the Vice President of Academic Affairs, Kelly McCalla, who told her to meet with Keefe. Frisch contacted Keefe and set up a meeting, without explaining its purpose. Keefe sent Frisch an email asking for more detail about the meeting. Frisch responded that she would prefer to review the topic in person rather than via phone or email, advising Keefe he did not need to prepare for the meeting and noting that "the topic of professional boundary is central to the role of the nurse and I am sure that you appreciate the delicacy of the topic."

Frisch then received an email from Kim Scott relaying a student's concern that Keefe had told someone there would be "hell to pay for whoever complained about me." Frisch called Keefe and moved the meeting up one day, so that he would not be in his next clinical class with the concerned student. Keefe again asked what the meeting was about. Frisch again said she would prefer to discuss it in person but that due process would be followed.

On the agreed day, Keefe met with Frisch and Beth Adams, CLC's Dean of Students. McCalla did not attend because he would be responsible for reviewing any

academic appeal. Frisch began the meeting by reviewing the steps of the Due Process Policy from the Student Handbook. She told Keefe that his Facebook posts raised concerns about his professionalism and boundary issues. She did not give him copies of the posts, but she read aloud portions of the posts that she considered most significant. We will reproduce only the posts that Frisch and Adams testified gave them particular concern. A more extensive recital of the offensive posts that Scott forwarded to Frisch can be found at pages 5-6 of the district court's Order:

Glad group projects are group projects. I give her a big fat F for changing the group power point at eleven last night and resubmitting. Not enough whiskey to control that anger.

Doesnt anyone know or have heard of mechanical pencils. Im going to take this electric pencil sharpener in this class and give someone a hemopneumothorax<sup>3</sup> with it before to long. I might need some anger management.

LMAO [a classmate], you keep reporting my post and get me banded. I don't really care. If thats the smartest thing you can come up with than I completely understand why your going to fail out of the RN program you stupid bitch....And quite creeping on my page. Your not a friend of mine for a reason. If you don't like what I have to say than don't come and ask me, thats basically what creeping is isn't it. Stay off my page...

Frisch, who testified she was most disturbed by the statement about giving someone a hemopneumothorax, then gave Keefe an opportunity to respond. He told her there were a lot of jokes on his page, his page had been hacked, and he did not know it was public. Frisch testified that Keefe was not receptive to her concern that the posts were unprofessional. Based on Keefe's "lack of remorse, lack of concern,

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<sup>3</sup>Keefe testified that a hemopneumothorax is a "trauma" where the lung is punctured and air and blood flood the lung cavity; it is not a medical procedure.

not recognizing, not saying he wanted to change,” Frisch decided to remove him from the Associate Degree Program:

Clearly there was a lot of confusion about the professionalism . . . I didn’t believe I could teach him. He was not responsive to what I said. You know, nursing programs have an obligation to graduate students who are not just able to pass the classes, but to be safe and to have all of the soft skills, including professionalism . . . . I could not see that he had it. In fact he convinced me that I wasn’t going to be able to teach him that.

At the end of the meeting, Frisch told Keefe he could finish the semester and his credits would transfer as electives to a different course of study within CLC. She also advised Keefe he could appeal the decision to Vice President McCalla. Beth Adams testified that Keefe appeared not to understand the seriousness of the problem; he was defensive and did not seem to feel responsible or remorseful. She was concerned about the “whiskey for anger management” post because Keefe became argumentative during the discussion.

Keefe testified he asked Frisch which posts she was referring to, and she mentioned the comment about using whiskey for anger management, the swearing, and calling a fellow student a “stupid bitch.” When she gave him an opportunity to respond, Keefe told her that his Facebook page had been hacked, but he confirmed in his deposition that he wrote each of the posts in question. He also told Frisch that many of his comments were jokes. She responded that his comments were quite disturbing and that she felt he had anger issues. Keefe testified that, when he mentioned his First Amendment rights, Frisch said that she understood his rights but this was about professionalism.

B. The Relevant Nursing Program Standards. As part of enrolling in the Associate Degree Program, Keefe acknowledged receipt, review, and understanding

of the Nursing Program Student Handbook. The handbook states that “all current and future students are expected to adhere to the policies and procedures of this student handbook.” Following the meeting, Frisch wrote a letter to Keefe, stating: “As we discussed, the decision has been made to remove you from the Associate Degree Nursing Program at CLC as a consequence of behavior unbecoming of the profession and transgression of professional boundaries” based on the contents of his Facebook page. The letter reviewed the appeal process and stated he was being removed pursuant to the following section of the Nursing Program’s handbook:

### **Student Removal from Nursing Program**

Integral to the profession of nursing is a concern for the welfare of the sick, injured, and vulnerable and for social justice; therefore students enrolled in the Associate Degree (AD) Nursing Program and Central Lakes College (CLC) accept the moral and ethical responsibilities that have been credited to the profession of nursing and are obligated to uphold and adhere to the professional Code of Ethics. The *American Nurses Association (2001) Code for Nurses with Interpretive Statements* outlines the goals, values, and ethical principles that direct the profession of nursing and is the standard by which ethical conduct is guided and evaluated by the profession. The AD Nursing Program at Central Lakes College has an obligation to graduate students who will provide safe, competent nursing care and uphold the moral and ethical principles of the profession of nursing. Therefore, students who fail to meet the moral, ethical, or professional behavioral standards of the nursing program are not eligible to progress in the nursing program. Students who do not meet academic or clinical standards and/or who violate the student Code of Conduct as described in the Central Lakes College catalog and the AD Nursing Student Handbook are also ineligible to progress in the AD Nursing Program. Behaviors that violate academic, moral, and ethical standards include, but are not limited to, behaviors described in the College Catalog Student Code of Conduct as well as:

- . . .  
● transgression of professional boundaries;

- breaching of confidentiality/HIPAA (including any type of social media breach);
- behavior unbecoming of the Nursing Profession.

Students who fail to adhere to the CLC Student Code of Conduct and the moral and ethical standards outlined in the handbook are ineligible to progress in the Nursing Program.

The Nurses Association Code of Ethics, which the Handbook states students are “obligated to uphold and adhere to,” emphasizes professionalism and personal and professional boundaries:

**1.5 Relationships with colleagues and others** -- The principle of respect for persons extends to all individuals with whom the nurse interacts. The nurse maintains compassionate and caring relationships with colleagues and others with a commitment to the fair treatment of individuals, to integrity-preserving compromise, and to resolving conflict. Nurses function in many roles, including direct care provider, administrator, educator, researcher, and consultant. In each of these roles, the nurse treats colleagues, employees, assistants, and students with respect and compassion. This standard of conduct precludes any and all forms of prejudicial actions, any form of harassment or threatening behavior, or disregard for the effect of one’s actions on others.

**2.4 Professional Boundaries** -- When acting within one’s role as a professional, the nurse recognizes and maintains boundaries that establish appropriate limits to relationships. . . . In this way, nurse-patient and nurse-colleague relationships differ from those that are purely personal and unstructured, such as friendship. . . . In all encounters, nurses are responsible for retaining their professional boundaries.

**5.3 Wholeness of character** -- Nurses have both personal and professional identities that are neither entirely separate, nor entirely

merged, but are integrated. In the process of becoming a professional, the nurse embraces the values of the profession, integrating them with personal values.<sup>4</sup>

C. Keefe's Administrative Appeal. Keefe spoke with Vice President McCalla the next day to discuss the appeal process. McCalla reviewed the substance of the posts with Keefe and referred him to a student advocate, who helped write the appeal. Before filing the appeal, Keefe sent Frisch a lengthy email identifying procedures in CLC's Due Process Policy he had not been provided. Frisch forwarded the email to McCalla, who then emailed Keefe that his appeal had been received and warned Keefe that he should not contact the nursing faculty, the Dean of Nursing, or his former nursing classmates. Keefe testified that he did not attend further classes or take the exams because he believed McCalla meant that he was to have no contact with anyone in the Nursing Program. As a result, he failed his classes.

On December 11, 2012, Keefe submitted a lengthy "Due Process Appeal" letter, stating he had removed offensive comments from his Facebook page and "removed myself from the social media network." Keefe petitioned that he be allowed to finish the Associate Degree Nursing Program because "I don't believe the punishment fits the crime." The letter concluded:

I took a huge risk participating in the social media network as a nursing student and nurse, both professionally and unethically and have learned a valuable lesson and will not participate in such activity in the future to risk my professional image as well as CLC's professional image. I would like to Thank You for this opportunity to express my sincere

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<sup>4</sup>American Nurses Association, Code of Ethics for Nurses with Interpretive Statements 4-6, 10 (2001), [https://courseweb.pitt.edu/bbcswebdav/institution/Pitt%20Online/Nursing/NUR%202008/Module%2001/Readings/ANA\\_ethics.pdf](https://courseweb.pitt.edu/bbcswebdav/institution/Pitt%20Online/Nursing/NUR%202008/Module%2001/Readings/ANA_ethics.pdf).

apology for my unethical and unprofessional behavior and giving me the opportunity to possibly finish . . . my education.

McCalla left a phone message in early January informing Keefe that his appeal was being denied. Keefe emailed McCalla requesting a contested case hearing. McCalla responded that a contested case hearing was only available for a student disciplinary action, whereas Keefe had been removed for an academic program violation. This lawsuit followed.

## **II. First Amendment Issues**

Keefe argues that defendants violated his First Amendment right to free speech by removing him from the Nursing Program at a public college “for comments on the internet which were done outside of class and unrelated to any course assignments or requirements, and did not violate any specific rules.” Keefe’s Reply Brief frames this contention categorically -- a college student may not be punished for off-campus speech, he contends, unless it is speech that is unprotected by the First Amendment, such as obscenity. To our knowledge, no court has adopted this extreme position, and we decline to do so.

A. The first question raised by Keefe’s claim is significant -- whether the First Amendment precludes a public university from adopting, as part of its curriculum for obtaining a graduate degree in a health care profession, the Code of Ethics adopted by a nationally recognized association of practicing professionals. Without question, the Supreme Court does not favor creating new First Amendment exceptions that could be used to restrict protected speech. *See, e.g., United States v. Stevens*, 559 U.S. 460, 468 (2010). But these decisions involved a question not at issue here -- whether to recognize new categories of *unprotected* speech. To paraphrase Chief Justice Roberts, writing for the Court in *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1657 (2015), “nobody argues that [Keefe’s Facebook postings are] a category



of unprotected speech. . . . [T]he First Amendment fully applies to [that] speech. The question is instead whether that Amendment permits the particular regulation of speech at issue here.”

Many courts have upheld enforcement of academic requirements of professionalism and fitness, particularly for a program training licensed medical professionals. See Oyama v. Univ. of Hawaii, 813 F.3d 850, 866-68 (9th Cir. 2015); Ward v. Polite, 667 F.3d 727, 733-34 (6th Cir. 2012); Keeton v. Anderson-Wiley, 664 F.3d 865, 875-76 (11th Cir. 2011); Hosty v. Carter, 412 F.3d 731, 734-35 (7th Cir. 2005), cert. denied, 546 U.S. 1169 (2006); Axson-Flynn v. Johnson, 356 F.3d 1277, 1286-90 (10th Cir. 2004); Brown v. Li, 308 F.3d 939, 947-49 (9th Cir. 2002) (opinion of Graber, J.), cert. denied, 538 U.S. 908 (2003). Fitness to practice as a health care professional goes beyond satisfactory performance of academic course work. As the Supreme Court said in Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 91 n.6 (1978), “Personal hygiene and timeliness may be as important factors in a school’s determination of whether a student will make a good medical doctor as the student’s ability to take a case history or diagnose an illness.”

Given the strong state interest in regulating health professions, teaching and enforcing viewpoint-neutral professional codes of ethics are a legitimate part of a professional school’s curriculum that do not, at least on their face, run afoul of the First Amendment. See Al-Dabagh v. Case W. Reserve Univ., 777 F.3d 355, 359-60 (6th Cir.), cert. denied, 135 S. Ct. 2817 (2015); Ward, 667 F.3d at 732; Keeton, 664 F.3d at 876.<sup>5</sup> Because professional codes of ethics are broadly worded, they can be cited to restrict protected speech. For example, a university may violate the First

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<sup>5</sup>Courts have long recognized that the state has a particular interest in regulating health care to protect the public health. States may insist that practitioners demonstrate that they possess not only the requisite skills and knowledge, but also the requisite character. See Hawker v. N.Y., 170 U.S. 189, 192 (1898); State ex rel Powell v. State Med. Examining Bd., 20 N.W. 238, 240 (Minn. 1884).

Amendment if it invokes a curriculum-based code of ethics as a pretext to punish a student's religious views and speech. See Ward, 667 F.3d at 735; Axson-Flynn, 356 F.3d at 1292-93. But that is an as-applied inquiry. Here, Keefe made no allegation, and presented no evidence, that defendants' reliance on the Nurses Association Code of Ethics was a pretext for viewpoint, or any other kind of discrimination.

**B.** If compliance with professional ethical standards is a permissible academic requirement, then determinations of non-compliance will almost always be based at least in part on a student's speech. See, e.g., Oyama, 813 F.3d at 870 ("the University could look to what Oyama *said* as an indication of what he would *do* once certified") (emphasis in original). That a graduate student's unprofessional speech leads to academic disadvantage does not "prohibit" that speech, or render it unprotected; the university simply imposes an adverse consequence on the student for exercising his right to speak at the wrong place and time, like the student who receives a failing grade for submitting a paper on the wrong subject.

A serious question raised by Keefe in this case is whether the First Amendment protected his unprofessional speech from academic disadvantage because it was made in on-line, off-campus Facebook postings. On appeal, Keefe framed this contention categorically, arguing that a college student may not be punished for off-campus speech unless it is speech that is unprotected by the First Amendment, such as obscenity. We reject this categorical contention. A student may demonstrate an unacceptable lack of professionalism off campus, as well as in the classroom, and by speech as well as conduct. See Yoder v. Univ. of Louisville, 526 F. App'x 537, 545-46 (6th Cir.), cert. denied, 134 S. Ct. 790 (2013); Tatro v. Univ. of Minn., 816 N.W.2d 509, 521 (Minn. 2012). Therefore, college administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession, both on and off campus, "so long as their actions are reasonably related to legitimate pedagogical concerns." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

As the issue in Hazelwood was censorship of a school-sponsored campus newspaper, the Court's reference to "legitimate pedagogical concerns" was made in the context of school-sponsored speech. But the concept has broader relevance to student speech. The Hazelwood dissenters noted that an "educator may, under Tinker,<sup>6</sup> constitutionally 'censor' poor grammar, writing, or research because to reward such expression would 'materially disrupt' the [student] newspaper's curricular purpose." 484 U.S. at 284 (Brennan, J., dissenting). Likewise, because compliance with the Nurses Association Code of Ethics is a legitimate part of the Associate Degree Nursing Program's curriculum, speech reflecting non-compliance with that Code that is related to academic activities "materially disrupts" the Program's "legitimate pedagogical concerns." See Keeton, 664 F.3d at 876 ("under the Hazelwood framework, we find that ASU has a legitimate pedagogical concern in teaching its students to comply with the ACA Code of Ethics").

As our sister circuits have recognized, a college or university may have an even stronger interest in the content of its curriculum and imposing academic discipline than did the high school at issue in Hazelwood. See Ward v. Polite, 667 F.3d 727, 733-34 (6th Cir. 2012); Keeton v. Anderson-Wiley, 664 F.3d 865, 875-76 (11th Cir. 2011); Hosty v. Carter, 412 F.3d 731, 734-35 (7th Cir. 2005), cert. denied, 546 U.S. 1169 (2006); Axson-Flynn v. Johnson, 356 F.3d 1277, 1286-90 (10th Cir. 2004); Brown v. Li, 308 F.3d 939, 947-49 (9th Cir. 2002) (opinion of Graber, J.), cert. denied, 538 U.S. 908 (2003). "When a university lays out a program's curriculum or

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<sup>6</sup>A reference to the landmark school speech case, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 504 (1969). This court, like other circuits, has held that Tinker permits disciplining public school students for off-campus postings "where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting." S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 777 (8th Cir. 2012), citing Kowalski v. Berkeley Cnty. Schools, 652 F.3d 565, 573 (4th Cir. 2011), and Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008).

class's requirements for all to see, it is the rare day when a student can exercise a First Amendment veto over them." Ward, 667 F.3d at 734.

**C.** In addition to urging an overbroad categorical standard, Keefe's contention is factually flawed in asserting that his offensive Facebook posts were "unrelated to any course assignments or requirements." The summary judgment record conclusively established that the posts were directed at classmates, involved their conduct in the Nursing Program, and included a physical threat related to their medical studies -- "Im going to . . . give someone a hemopneumothorax." Two victims of Keefe's tirades complained to instructor Kim Scott, one saying she could not function in the same clinical space with Keefe. Keefe's disrespectful and threatening statements toward his colleagues had a direct impact on the students' educational experience. They also had the potential to impact patient care. As Scott testified, "when [students] are in the clinical setting taking care of patients, if we are creating [a] situation where they are not obviously communicating and collaborating, that can result in poor outcomes for the patients."

**D.** Keefe's threats could have prompted a disciplinary proceeding. Instead, CLC's administrators concluded that the posts, combined with Keefe's failure to appreciate the seriousness of the problem when given an opportunity to respond, reflected a lack of professionalism that warranted his removal from the Associate Degree Nursing Program. That decision can of course be questioned, but the First Amendment did not bar educator Frisch from making the determination that Keefe was unable to meet the professional demands of being a nurse. Keefe argues that defendants violated his First Amendment rights by failing to cite specific professional standards that he violated. The district court expressly rejected this contention:

Part of the program is devoted to instilling in students the standards of the nursing profession. The associate degree nursing program incorporated nationally established nursing standards. Its ability to

discipline students for “behavior unbecoming of the Nursing Profession” or “transgression of professional boundaries” reflects the ability of the Minnesota Board of Nursing to “deny, revoke, suspend, limit, or condition the license and registration of any person to practice professional, advanced practice registered, or practical nursing” for “[e]ngaging in unprofessional conduct.” Greater specificity is not required.

Order at 23 (statute and regulation citations omitted). We agree. Students in the CLC Nursing Program consent in writing to be bound by the national Nursing Code of Ethics, and the Program Handbook states that a violation of moral, ethical, or professional standards may result in dismissal from the program. These standards are necessarily quite general, but they are widely recognized and followed.

“[F]oremost among a school’s speech is its selection and implementation of a curriculum -- the lessons students need to understand and the best way to impart those lessons -- and public schools have broad discretion in making these choices.” Ward, 667 F.3d at 732. The decision to dismiss Keefe occurred only after Frisch met with Keefe and determined, not only that he had crossed the professional boundaries line, but that he had no understanding of what he did or why it was wrong, and he evidenced no remorse for his actions. The First Amendment did not bar educator Frisch from making the determination that Keefe was unable to meet the professional demands of being a nurse. See Oyama, 813 F.3d at 866-68; Keeton, 664 F.3d at 875. “Considerations of profound importance counsel restrained judicial review of the substance of academic decisions.” Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225-26 (1985); see Keeton, 664 F.3d at 875-76, and cases cited. Courts should be particularly cautious before interfering with the “degree requirements in the health care field when the conferral of a degree places the school’s imprimatur upon the student as qualified to pursue his chosen profession.” Doherty v. S. Coll. of Optometry, 862 F.2d 570, 576 (6th Cir. 1988), cert. denied, 493 U.S. 810 (1989).

For these reasons, we affirm the district court’s grant of summary judgment to Defendants on Keefe’s First Amendment claims.

### **III. Due Process Issues**

A. Keefe argues that Defendants violated his Fourteenth Amendment right to due process when they removed him from the Associate Degree Nursing Program. He first argues that his removal from the Nursing Program was arbitrary and capricious. This is a substantive due process claim seeking federal court review of the *merits* of defendants’ removal decision. The claim is without merit.

In two decisions, the Supreme Court has “assumed, without deciding, that federal courts can review an academic decision of a public educational institution under a substantive due process standard.” Ewing, 474 U.S. at 222, citing Horowitz, 435 U.S. at 91-92. In Horowitz, the Court agreed with the district court that “no showing of arbitrariness or capriciousness has been made,” noting that “[c]ourts are particularly ill-equipped to evaluate academic performance.” 435 U.S. at 92. In Ewing, the Court was even more deferential to educators, rejecting the dismissed student’s substantive due process claim because “his dismissal from the [university] program rested on an academic judgment that is not beyond the pale of reasoned academic decision-making.” 474 U.S. at 227-28. Following the Supreme Court’s lead, we have repeatedly assumed without deciding that an academic dismissal may be challenged on substantive due process grounds but upheld the summary rejection of those claims, applying the Supreme Court’s deferential standard. See Monroe v. Ark. State Univ., 495 F.3d 591, 594-97 (8th Cir. 2007); Richmond v. Fowlkes, 228 F.3d 854, 859 (8th Cir. 2000); Schuler v. Univ. of Minn., 788 F.2d 510, 515-16 (8th Cir. 1986), cert. denied, 479 U.S. 1056 (1987).

In this case, we doubt there is a cause of action because, though Keefe was removed from the Nursing Program, he was allowed to remain at CLC and transfer

his credits to another academic program. But even if a substantive due process claim is cognizable in these circumstances, there is no violation of substantive due process unless misconduct of government officials that violates a fundamental right is “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience” of federal judges. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998) (quotation omitted).

In our view, it is clear that defendants’ decision to remove Keefe from the Nursing Program “rested on an academic judgment that is not beyond the pale of reasoned academic decision-making.” Defendants’ action in quietly removing Keefe from Central Lakes’ Nursing Program for behavior he admitted was “unethical and unprofessional,” while allowing him to remain in school, was far from conscience shocking. Cf. Singleton v. Cecil, 176 F.3d 419, 426 n.8 (8th Cir.) (en banc), cert. denied, 528 U.S. 966 (1999). “When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty’s professional judgement.” Ewing, 474 U.S. at 225. We affirm the dismissal of Keefe’s substantive due process claim.

**B.** Keefe further argues that Defendants violated his right to procedural due process, a more difficult issue. In Goss v. Lopez, 419 U.S. 565, 581 (1975), the Supreme Court held that even a short disciplinary suspension requires that the student “be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.” In Horowitz, 435 U.S. at 80-82, a student was dismissed from medical school following extensive review by a Council on Evaluation in accordance with established university procedures that did not include a pre-dismissal hearing. The Supreme Court granted certiorari to review our decision that the dismissal was “effected without the hearing required by the fourteenth amendment.” The student argued that procedural due process also required “the fundamental safeguards of representation by counsel, confrontation, and cross examination of witnesses.” Id.

at 86 n.2. All Justices agreed that the university's elaborate procedures had complied with the procedural requirements of Goss. The Court further noted that "far less stringent procedural requirements" apply to an "academic" dismissal. Id. at 86. This dicta addressed a reality that did not affect the Court's procedural due process decision in Horowitz -- that academic dismissals, though accompanied by extensive procedural safeguards, often do not include a pre-dismissal face-to-face hearing between the student and academic decision-makers.

In this case, Keefe argues that he was removed from the Nursing Program for disciplinary reasons. Defendants respond, and the district court agreed, that the removal is properly characterized as academic, and therefore that "less stringent procedural requirements" apply -- namely, that due process was satisfied because CLC "fully informed [Keefe] of the faculty's dissatisfaction" and the ultimate academic decision was "careful and deliberate." Horowitz, 435 U.S. at 85; see Monroe, 495 F.3d at 595. In our view, while the distinction is important, as in Horowitz it has no bearing on whether Keefe was afforded procedural due process. He was removed from the Program for conduct that could have been the subject of a disciplinary proceeding, the kind of inquiry where "requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action." Goss v. Lopez, 419 U.S. at 583; see Horowitz, 435 U.S. at 88-89. Thus, there is merit in Keefe's contention that procedural due process required more than the "careful and deliberate" decision-making Horowitz mandates for a strictly academic decision. However, Defendants afforded him a pre-removal, informal, face-to-face hearing that included an opportunity to respond. Whether that hearing led to an academic or a disciplinary removal is *procedurally* irrelevant.

"Due process is flexible and calls for such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quotation omitted). When conduct that leads to an adverse academic decision is of



a disciplinary nature, due process *may* require the procedural protections of Goss v. Lopez in determining whether the student was guilty of the misconduct in question. Goss involved ten-day suspensions of public high school students. The Court’s focus was necessarily on determining what *pre-suspension* process was due. 419 U.S. at 581 n.10. But where a public school provides additional, post-removal procedures, as here, the due process requisites for the pre-removal hearing “can vary, depending upon . . . the nature of the subsequent proceedings.” Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985) (quotation omitted). Where post-removal proceedings are available, a timely pre-removal meeting that affords the student an opportunity to be heard “serve[s] as the initial check against mistaken decisions that Loudermill requires.” Sutton v. Bailey, 702 F.3d 444, 448 (8th Cir. 2012).

Viewed from this perspective, we conclude that Keefe, like the student in Horowitz, was “awarded at least as much due process as the Fourteenth Amendment requires.” 435 U.S. at 85. Even if this was a purely disciplinary decision, as Keefe contends, he was entitled to “oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.” Loudermill, 470 U.S. at 546. Keefe complains that Frisch did not inform him of her concerns before the meeting and did not let him read the posts at the meeting. But the constitutional requirement of procedural due process does not turn on such formalities. See Larson v. City of Fergus Falls, 229 F.3d 692, 697 (8th Cir. 2000). Due process does not require “a delay between the ‘notice’ and the ‘opportunity to respond.’” Sutton, 702 F.3d at 448 (quotation omitted). Here, as in Sutton, Frisch met with Keefe, informed him that there were concerns regarding his Facebook, read from the posts of greatest concern, explained that his posts implicated the professionalism and professional boundary requirements of the Nursing Program, and gave him an opportunity to respond.

What is important is that Keefe admitted for summary judgment purposes that he authored the offensive posts -- meaning there were no material fact disputes -- and

was given an opportunity to respond -- which provided the predicate for Frisch's academic decision to dismiss him from the Program. Moreover, the notion that Keefe had inadequate notice of what the meeting would concern does not withstand scrutiny. After Keefe sent Frisch an email asking for more detail about the meeting, Frisch responded that "the topic of professional boundary is central to the role of the nurse and I am sure that you appreciate the delicacy of the topic." Keefe then made known to his clinical classmates there would be "hell to pay for whoever complained about me." When Frisch called Keefe and moved the meeting up one day, so that he would not be in his next clinical class with a student concerned about this threat, Keefe again asked what the meeting was about. Frisch again said she would prefer to discuss it in person but that due process would be followed. This was adequate informal notice.

Keefe also complains that he was not informed of the specific academic rules or standards the CLC administrators believed he had violated. This contention is factually without merit. Frisch explained at the meeting that his posts raised concerns about professionalism and professional boundaries that were clearly laid out in the student handbook, with cross-references to the Nurses' Code of Ethics -- codes and rules Keefe acknowledged receiving. Frisch knew that Keefe was entitled to appeal her initial decision; indeed, she advised Keefe of his appeal rights at the meeting. Frisch could reasonably assume that an appeal would include complete disclosure of the Facebook posts, if that became important to a procedurally adequate appeal process. See Sutton, 702 F.3d at 449. In these circumstances, the meeting at which Frisch advised Keefe there were concerns regarding specific Facebook posts that implicated professionalism and professional boundary requirements of the Nursing Program, and gave him an opportunity to respond, provided Keefe the "initial [pre-removal] check against mistaken decisions" that due process requires. Loudermill, 470 U.S. at 545.

After the meeting, Keefe filed an appeal in which he admitted “unethical and unprofessional behavior” without claiming he did not know the standards he had violated. On appeal, Keefe argues only that the pre-removal meeting with Frisch and Adams afforded him procedurally inadequate due process. Therefore, he failed to preserve any separate due process claim that his post-removal appeal to Vice President McCalla was procedurally inadequate. See Sutton, 702 F.3d at 449. Moreover, a claim of insufficient appeal procedures was foreclosed when Keefe admitted during the appeal that Frisch had properly found him guilty of “unethical and unprofessional behavior.” See Morrissey v. Brewer, 408 U.S. 471, 490 (1972) (“If it is determined that petitioner admitted parole violations to the Parole Board . . . and if those violations are found to be reasonable grounds for revoking parole under state standards, that would end the [procedural due process] matter.”).

Viewing the summary judgment record as a whole, we conclude that Keefe was provided sufficient notice of the faculty’s dissatisfaction, an explanation of why his behavior fell short of the professionalism requirements of the Program, an opportunity to respond to the initial decision-maker, and an opportunity to appeal her adverse decision. Nothing in the record suggests that Keefe’s removal from the Nursing Program was not a careful and deliberate, genuinely academic decision. Numerous prior decisions confirm that due process requires no more. See, e.g., Fenje v. Feld, 398 F.3d 620, 623 (7th Cir. 2005) (student dismissed from anesthesiology residency program for failing to disclose prior program dismissal after being “given the opportunity to respond and state his position”); Ku v. Tenn., 322 F.3d 431, 437 (6th Cir.) (student “was given -- and he took -- every opportunity to appeal the [academic] decision to the highest authorities at the College”), cert. denied, 540 U.S. 880 (2003); Richmond, 228 F.3d at 856-57 (same); Schuler, 788 F.2d at 514 (student had “prior notice of faculty dissatisfaction” and informal hearing before departmental grievance committee).

Finally, we reject Keefe's contention that "CLC's policies create an expectation" that he was entitled to a formal hearing process. If true, that expectation is an issue of state law, not of federal constitutional due process. See Horowitz, 435 U.S. at 92 n.8; Schuler, 788 F.2d at 516. Even if CLC's policies required a formal, contested case hearing under state law, "All that Goss required was an 'informal give-and-take' between the student and the administrative body dismissing him that would, at least, give the student the opportunity to characterize his conduct and put it in what he deems the proper context." Horowitz, 435 U.S. at 85-86 (quotation omitted).

The judgment of the district court is affirmed. Because we reject Keefe's constitutional claims on the merits, we need not address Defendants' alternative claim that they are entitled to a qualified immunity defense.

KELLY, Circuit Judge, concurring in part and dissenting in part.

This case highlights the evolving nature of students' First Amendment protection for speech on social media. While I disagree with the court's determination that Keefe was afforded procedural due process, I would affirm the district court on that issue because defendants are entitled to qualified immunity. However, because I think there is a genuine issue of material fact as to whether the school could constitutionally regulate Keefe's off-campus, non-academic speech, I would reverse the district court's grant of summary judgment in favor of defendants on Keefe's First Amendment claim.

## **I. Due Process Claim**

### **A. Academic v. Disciplinary Dismissals**

The court declines to characterize Keefe's dismissal as either academic or disciplinary, explaining that the distinction is procedurally irrelevant because Keefe received due process under either standard. I disagree. The Supreme Court has

explained that “[t]here is a clear dichotomy between a student’s due process rights in disciplinary dismissals and in academic dismissals.” Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 87 n.4 (1978) (quoting Mahavongsanan v. Hall, 529 F.3d 448, 450 (5th Cir. 1976)). The Due Process Clause imposes “less stringent procedural requirements in the case of an academic dismissal,” id. at 86, recognizing that judges are ill-equipped to second-guess the academic judgment of school administrators.

But this hands-off approach is appropriate only when the school’s decision is, in fact, academic. If, as the administrators contend, the reason for the dismissal was “the violation by a student of valid rules of conduct”—here, the College’s Code of Conduct—the Supreme Court has said the dismissal is properly characterized as disciplinary, not academic. Id. at 86–90 (characterizing sanctions for “disruptive or insubordinate behavior” as disciplinary); see also Monroe v. Ark. State Univ., 495 F.3d 591, 595 (8th Cir. 2007) (recognizing that a dismissal for “alleged, but not conceded drug use, might constitute a disciplinary dismissal”); Pugel v. Bd. of Trs. of Univ. of Ill., 378 F.3d 659, 663–64 & n.4 (7th Cir. 2004) (collecting cases analyzing dismissals for academic dishonesty as disciplinary and assuming the same); Henson v. Honor Comm. of U. Va., 719 F.2d 69, 73–74 (4th Cir. 1983) (analyzing investigation of law student for alleged Honor Code violations as disciplinary). Both Frisch and the College’s Dean of Students, Beth Adams, characterized a prior incident involving a verbal threat by another student against an instructor as non-academic. See Horowitz, 435 U.S. at 90.

The cases where we have characterized a dismissal as academic illustrate why Keefe’s dismissal was not. The students in those cases were dismissed based at least in part on issues related to the school’s curriculum, like failing to complete coursework, Monroe, 495 F.3d at 592–93; failing exams, lack of preparation, and absenteeism, Richmond v. Fowlkes, 228 F.3d 854, 858 (8th Cir. 2000); or cheating on an exam and then lying about it, Corso v. Creighton Univ., 731 F.2d 529, 532 (8th

Cir. 1984). These cases are consistent with Horowitz, which described an academic dismissal as one based on “failure to attain a standard of scholarship.” Horowitz, 435 U.S. at 87 n.4 (quoting Mahavongsanan, 529 F.2d at 449–50). Keefe was dismissed as a result of a conflict with classmates on Facebook. Case law does not support classifying as “academic” dismissals based on off-campus speech that merely happened to be about the school or its students.

Furthermore, administrators treated Keefe’s dismissal like a disciplinary one: They dismissed him immediately after learning of his Facebook posts, with no attempt to work with him to improve his conduct. Academic dismissals receive less stringent procedural protections in part because they involve an educational process that is “not by nature adversary.” Horowitz, 435 U.S. at 90. In Horowitz, the decision to expel a medical student “rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal,” based on the fact that faculty had for two years expressed dissatisfaction with her clinical performance. Id. at 89–90. In contrast, Frisch reported that she was unaware of any prior professionalism problems involving Keefe. There is nothing in the record to suggest he had been told to improve his relations with his classmates or was reprimanded for previous behavior that his instructors thought unbecoming of a nurse. Rather than a cooperative, non-adversarial effort to improve Keefe’s professionalism that proved unsuccessful over time, the dismissal was an immediate imposition of discipline for misbehavior.

The College’s Code of Conduct sets forth such ostensibly academic goals as “Human Flourishing, Nursing Judgment, Professional Identity, and Spirit of Inquiry.” It goes on to state that the College aims to instill in its graduates qualities like “evidence-based practice, life-long learning, service learning/civic engagement, caring, advocacy, excellence, and safe quality care for diverse patients within a family and community context.” The Code of Conduct also requires students to uphold the

American Nurses Association Code of Ethics, which sets forth similar requirements. These goals are admirable, and describe commendable traits for a person entering the nursing profession. Yet with such general requirements of character, excellence, and virtue, it is difficult to imagine any type of misconduct that would not, in some way, violate one or more of these requirements. The court’s holding allows the school to treat any action it deems violative of the Code of Conduct as an academic problem rather than a disciplinary problem. This interpretation collapses the distinction between academic and disciplinary dismissals, and I am not inclined to signal the end of the latter as a meaningful category.<sup>7</sup>

No doubt Keefe’s attitudes toward his classmates left something to be desired. And no doubt all educational institutions, perhaps professional degree programs in particular, want to make sure that their future alumni treat their colleagues, clients, and the general public with respect. But a public college cannot transform a punishment for “disruptive or insubordinate behavior,” Horowitz, 435 U.S. at 90, into an academic decision simply by declaring it an academic goal of the school to cultivate civility in its students. I would categorize Keefe’s dismissal disciplinary, rather than academic, and therefore turn to the question of whether Keefe received sufficient process throughout his disciplinary expulsion proceedings.

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<sup>7</sup>To be sure, I do not suggest that a dismissal must be based on poor grades or other objective indicia of subpar scholarship in order to qualify as “academic.” As the Supreme Court has noted, “[p]ersonal hygiene and timeliness may be as important . . . in a school’s determination of whether a student will make a good medical doctor as the student’s ability to take a case history or diagnose an illness.” Horowitz, 435 U.S. at 91 n.6. The concept of “professionalism” as a program requirement muddies the distinction between academic and disciplinary decisions. See, e.g., Al-Dabagh v. Case W. Reserve Univ., 777 F.3d 355, 359–60 (6th Cir. 2015); Ku v. Tenn., 322 F.3d 431, 436 (6th Cir. 2003); Hennessy v. City of Melrose, 194 F.3d 237, 250–51 (1st Cir. 1999). Therefore, the basis for a school’s dismissal must have some connection to the qualities traditionally regarded as scholastic—not simply moral—before the laxer protections afforded to academic dismissals will apply.

## **B. Process Required for Disciplinary Dismissal**

In Goss v. Lopez, the Supreme Court held that even a short disciplinary suspension requires that the student “be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.” 419 U.S. 565, 581 (1975). Looking at the facts in the light most favorable to Keefe—as we must on an appeal from a grant of summary judgment against him—I think the notice he received was inadequate.

Timely and clear notice is a fundamental guarantee of the Due Process Clause, which “requires that some kind of prior notice be given.” Navato v. Sletten, 560 F.2d 340, 345 (8th Cir. 1977). Even in the context of academic dismissals, which have less stringent procedural requirements than disciplinary dismissals, a student must have “prior notice of faculty dissatisfaction with his or her performance and of the possibility of dismissal.” Schuler v. Univ. of Minn., 788 F.2d 510, 514 (8th Cir. 1986). Consistent with this principle, the College’s Code of Conduct states that even for informal hearings, “[p]rior to th[e] meeting, the student shall be given written notice of the specific complaint against him/her and the nature of the evidence available to support the complaint and provided with a copy of the code of conduct.” (emphasis added.) Formal hearings carry with them even more extensive requirements.

Keefe did not receive sufficient prior notice. He was not told the purpose of his meeting with Frisch prior to the time of meeting, much less the evidence against him. The decision to dismiss him was made at the meeting itself—if not before—without giving him time to review the posts and formulate a considered defense. Frisch did not allow Keefe to read copies of the offending Facebook posts at the meeting. And McCalla conceded that he provided Keefe with printed copies



of the Facebook posts only after Keefe had appealed his dismissal. Since those present at the initial disciplinary meeting disagree as to which posts were discussed there,<sup>8</sup> it is possible that Keefe went through the entire disciplinary process without knowing exactly which Facebook posts led to his dismissal. Finally, the undisputed facts do not establish that anyone told Keefe which specific rule or Code provision he allegedly violated.

It is true that in Goss the Supreme Court stated that “[t]here need be no delay between the time ‘notice’ is given and the time of the hearing.” 419 U.S. at 582. But, it also cautioned that it was addressing itself “solely to the short suspension, not exceeding 10 days” and that “the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved.” Id. at 579, 584. It went on to elaborate that “[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.” Id. at 584. Here, Keefe faced expulsion from the nursing program, and he was entitled to adequate notice before the hearing<sup>9</sup> unless the school

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<sup>8</sup>Indeed, the parties dispute whether Frisch brought up the post she later testified she was “most disturbed by” during the meeting—the post referencing a hemopneumothorax.

<sup>9</sup>The court cites Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545 (1985), and Sutton v. Bailey, 702 F.3d 444, 448 (8th Cir. 2012), for the proposition that Goss’s procedural protections *may* be required in the event of “an academic decision of a disciplinary nature,” but that the extent of the pre-dismissal procedure required depends on whether additional, post-dismissal procedure is provided. However, Loudermill and Sutton do not address due process in the context of school disciplinary action, and do not abrogate the “clear dichotomy between a student’s due process rights in disciplinary dismissals and in academic dismissals,” Horowitz, 435 U.S. at 87 n.4 (quoting Mahavongsanan, 529 F.2d at 450)—a distinction that made a significant difference in the process available to Keefe. Specifically, Keefe was not afforded a formal appeal hearing precisely because the school deemed his dismissal “academic” rather than “disciplinary.” Loudermill and

can provide good reasons why that would have been inadvisable.<sup>10</sup> See Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (holding that “the fiscal and administrative burdens that the additional or substitute procedural requirement would entail” must be considered in determining what due process requires).

These flaws in the disciplinary process were not rendered harmless by Keefe’s admission on appeal that he wrote at least some of the Facebook posts in question and concession that they were unprofessional. Keefe asserts he only knew about the administration’s concerns with two of his posts at the time he appealed; he may well have declined to make similar concessions with respect to any other posts on which Frisch based her decision. Also, the fact that Keefe admitted wrongdoing on appeal does not necessarily mean he would have done the same at the initial meeting, had he been given adequate notice and time to deliberate. With sufficient opportunity to prepare, he might have presented evidence in support of another defense: for example, that it was clear from the context that his Facebook posts were meant to be humorous, that other students had made similar posts without being disciplined, or that the printouts used by Frisch and McCalla did not accurately reflect what he had written. But more fundamentally, the idea that the problems with the constitutionally inadequate process Keefe received are excusable simply because it happened to arrive

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Sutton do not affect the “rudimentary procedures” mandated by Goss. Goss, 419 U.S. at 584. Defendants were obligated to provide Keefe with pre-removal notice and opportunity to be heard. Here, in a case involving a punishment more severe than the suspensions in Goss, they failed to provide that notice.

<sup>10</sup>The only reasons Frisch gave for not telling Keefe the purpose of the meeting beforehand were that she had never done so with other students—which, of course, simply raises the question of why not—and that she was concerned that Keefe would change his Facebook page before the meeting. Yet Frisch had already received printed copies of the posts from Scott (who got them from one of the students who complained about Keefe) and accessed the Facebook page to verify that the posts did in fact exist.

at the correct result mistakes the right that the Due Process Clause protects. “[T]he right to procedural due process is ‘absolute’ in the sense that it does not depend upon the merits of a claimant’s substantive assertions . . . .” Carey v. Piphus, 435 U.S. 247, 266 (1978). It is the fairness of the process that was deficient here, even if the substantive outcome of the process was correct.

### **C. Qualified Immunity**

Nevertheless, I would hold that the administrators are entitled to qualified immunity on Keefe’s due process claim, and are thus shielded from Keefe’s claim to money damages, though not his request for an injunction. See Burnham v. Ianni, 119 F.3d 668, 673 n.7 (8th Cir. 1997) (en banc). A government official “is entitled to qualified immunity unless (1) the evidence, viewed in the light most favorable to the nonmoving party, establishes a violation of a federal constitutional or statutory right, and (2) the right was clearly established at the time of the violation.” Robinson v. Payton, 791 F.3d 824, 828 (8th Cir. 2015). In order to be “clearly established,” a right’s contours must have been “sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.” Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014). While there need not be a prior case finding a constitutional or statutory violation on identical facts in order for the right to be clearly established, Williams v. Jackson, 600 F.3d 1007, 1013 (8th Cir. 2010), the Supreme Court has enjoined us not to “define clearly established law at a high level of generality,” but rather to ask whether “existing precedent . . . placed the statutory or constitutional question beyond debate,” Ashcroft v. al-Kidd, 563 U.S. 731, 741–42 (2011).

What precludes a finding that the administrators violated clearly established due process rights is the dearth of prior decisions classifying expulsions of professional students as academic or disciplinary, and the lack of uniformity in the decisions that do exist. As the preceding discussion and the cases cited therein

suggest, student dismissals are not self-categorizing, and there was no controlling authority in this jurisdiction or a “consensus of cases of persuasive authority” in others on which the administrators could have relied to determine whether they should be held to the standards of disciplinary, as opposed to academic, dismissals. Wilson v. Layne, 526 U.S. 603, 617 (1999). “Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.” Scott v. Baldwin, 720 F.3d 1034, 1036 (8th Cir. 2013) (quoting Davis v. Hall, 375 F.3d 703, 712 (8th Cir. 2004)).

Accordingly, I would hold that the administrators are not entitled to summary judgment on the merits of Keefe’s due process claim, but that they are entitled to summary judgment on their qualified immunity defense.

## **II. First Amendment Claim**

Colleges and universities are free to encourage professionalism by adopting codes of conduct that impose restrictions on student speech, provided those restrictions do not run afoul of the First Amendment. “[T]he precedents of [the Supreme] Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.” Healy v. James, 408 U.S. 169, 180 (1972); see also Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–30 (1995); Widmar v. Vincent, 454 U.S. 263, 269–70 (1981); Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 669–70 (1973) (per curiam).

Restrictions on student speech do not violate the First Amendment when educators exercise “editorial control over the style and content of student speech” that is “school-sponsored,” provided “their actions are reasonably related to legitimate pedagogical concerns.” Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). Here, Keefe’s speech was off-campus, was not school-sponsored, and cannot

be reasonably attributed to the school.<sup>11</sup> Hazelwood's "reasonably related to legitimate pedagogical concerns" test is therefore inapplicable in this case. See Morse v. Frederick, 551 U.S. 393, 405 (2007) (holding that Hazelwood "does not control this case because no one would reasonably believe that [a student's] banner bore the school's imprimatur"); Keeton v. Anderson-Wiley, 664 F.3d 865, 882 (11th Cir. 2011) (Pryor, J., concurring) ("Hazelwood does not allow retaliation against disfavored speech that occurs outside the classroom."); Morgan v. Swanson, 659 F.3d 359, 408–09 (5th Cir. 2011) (en banc) ("Like all exceptions to the First Amendment's protections, the Hazelwood exception should be construed narrowly."); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 213–14 (3d Cir. 2001) (Alito, J.) ("Hazelwood's permissive 'legitimate pedagogical concern' test governs only when a student's school-sponsored speech could reasonably be viewed as speech of the school itself[.]").

However, even when speech is not school-sponsored or reasonably attributable to the school, institutions may regulate some student speech that occurs in class or on campus without violating the First Amendment. See Morse, 551 U.S. at 405 (distinguishing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)) ("Had Fraser delivered the same [offensively lewd and indecent] speech in a public forum outside the school context, he would have been protected."); Oyama, 813 F.3d at 872

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<sup>11</sup>The fact that Keefe was a college student also cautions against too lenient an interpretation of his First Amendment protections. Restrictions permissible in secondary schools may be impermissible at post-secondary institutions because "[f]ew college students are minors, and colleges are traditionally places of virtually unlimited free expression." Bystrom ex rel. Bystrom v. Fridley High Sch., 822 F.2d 747, 750 (8th Cir. 1987); see also Hazelwood, 484 U.S. at 273 n.7 (reserving question of whether greater deference is appropriate at the college and university level); Oyama v. Univ. of Haw., 813 F.3d 850, 871–72 (9th Cir. 2015); McCauley v. Univ. of the V.I., 618 F.3d 232, 242, 242–47 (3d Cir. 2010); Kincaid v. Gibson, 236 F.3d 342, 346 n.5, 352 (6th Cir. 2001) (en banc); Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass., 868 F.2d 473, 480 n.6 (1st Cir. 1989).

(permitting denial of student’s application “based . . . only upon statements [the student] made in the context of the certification program—in the classroom, in written assignments, and directly to the instructors responsible for evaluating his suitability for teaching”).<sup>12</sup>

The court relies heavily on the school’s ability to impose a code of ethics as an “academic” requirement, and explains that, “because compliance with the Nurses Association Code of Ethics is a legitimate part of the Associate Nursing Program’s curriculum, speech reflecting non-compliance with that Code that is related to academic activities ‘materially disrupts’ the Program’s ‘legitimate pedagogical concerns.’” Supra at 12 (citing Keeton, 664 F.3d at 876, for reliance on Hazelwood’s framework).<sup>13</sup> However, we are not faced with a situation where the school is punishing a student’s failure to abide by rules of conduct akin to a professor’s marking down a student for what he says as part of an academic assignment. Cf. Healy, 408 U.S. at 191–94 (permitting college to withhold recognition from groups unwilling “to be bound by reasonable school rules governing conduct”); C.H. ex rel. Z.H. v. Oliva, 226 F.3d 198, 211 (3d Cir. 2000) (Alito, J., dissenting) (explaining that because a classroom can be thought of as a government-owned forum, “if a student is asked to solve a problem in mathematics or to write an essay on a great American poet, the student clearly does not have a right to speak or write about the Bible instead”). Keefe’s Facebook posts were not made as part of fulfilling a program requirement and did not express an intention to break specific curricular rules. See

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<sup>12</sup>The Ninth Circuit’s opinion in Oyama was issued after this appeal was taken.

<sup>13</sup>While I agree Keefe could have been disciplined for speech that qualified as a “true threat” or a “substantial disruption,” the district court made no findings with respect to whether Keefe’s Facebook posts qualified for these categorical exceptions to the First Amendment. See, e.g., Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (true threat); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 504, 514 (1969) (substantial disruption of school activities or invasion of the rights of others).

Keeton, 664 F.3d at 868–71, 873–75 (permitting university to require student to complete remediation plan before participating in clinical practicum because she told classmates and professors she planned to violate practicum rules); Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004) (finding Hazelwood’s framework “applicable in a university setting for speech that occurs in a classroom *as part of a class curriculum*.” (emphasis added)); Brown v. Li, 308 F.3d 939, 947–52 (9th Cir. 2002) (opinion of Graber, J.) (concluding in an opinion not joined by other panel members that Hazelwood permits an educator to “require that a student comply with the terms of an academic assignment” while acknowledging that courts “have held that Hazelwood deference does not apply” to extracurricular activities). Furthermore, Oyama affirmatively rejects the notion that students can be disciplined based on speech unrelated to the fulfillment of a curricular requirement. See Oyama, 813 F.3d at 872 (emphasizing the fact that “[t]here [was] no evidence that the University relied upon any statements Oyama may have made outside [the context of his certification program] or communicated to a broader audience” in denying his student teaching application).

The Supreme Court’s decisions in Morse and Fraser foreclose the court’s contention that Keefe’s posts are equivalent to curricular speech simply because they were directed at classmates and involved their conduct in the Nursing Program. Fraser involved a speech by a high school student nominating a fellow student for student elective office, during which he “referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.” Fraser, 478 U.S. at 677–78. Although this speech was clearly directed at classmates and school-related, the Supreme Court went out of its way in Morse to underscore that Fraser’s speech would have been protected if it had been delivered outside of school. Morse, 551 U.S. at 405; see also J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 925–33 (3d Cir. 2011) (en banc) (holding that First Amendment barred school from punishing student for vulgar MySpace post concerning principal because it was off-campus speech); Layshock ex rel. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 211–19

(3d Cir. 2011) (en banc) (same). Similarly, Keefe’s mere use of a word we associate with medical training does not make his post equivalent to curricular speech—such a finding would sweep far too broadly.

The College and the district court felt that Keefe’s Facebook posts constituted “behavior unbecoming of the profession and transgression of professional boundaries,” in violation of the Code of Conduct. Keefe’s statements may indeed violate the administrators’ interpretation of certain provisions of the College’s professionalism Code, but that does not answer the question of whether that interpretation is consistent with the First Amendment. See United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (plurality opinion) (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)) (The Supreme Court “has rejected as ‘startling and dangerous’ a ‘free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.’”) (alteration in original). Quite simply, Code requirements that nurses treat others with “respect and compassion” and avoid “any and all forms of prejudicial actions” or “disregard for the effect of one’s actions on others” could easily be used to restrict protected speech. See, e.g., McCauley, 618 F.3d at 247–52 (concluding that provisions of university’s Code of Conduct that prohibited “conduct which causes emotional distress” and “offensive signs” were unconstitutionally overbroad); DeJohn v. Temple Univ., 537 F.3d 301, 317–20 (3d Cir. 2008) (public university’s policy that sought to forbid “gender-motivated” conduct that had the purpose of “creating an intimidating, hostile, or offensive environment” held unconstitutional); Papish, 410 U.S. at 667–70 & n.2 (holding that university violated First Amendment by expelling student for printing indecent newspaper despite student code prohibiting “indecent conduct or speech”). In addition, when a college applies a generalized Code of Conduct to speech after the fact, I question whether students like Keefe are provided sufficient notice of what the Code prohibited and what it allowed. Cf. Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 723–24 (8th Cir. 1998).



A number of long-standing First Amendment doctrines leave public schools and universities ample room to discipline students based on what they say on campus or in academic assignments. See Morse, 551 U.S. at 422–23 (Alito, J., concurring) (listing these doctrines).<sup>14</sup> The majority of the cases relied on by the court involve discipline of this sort. See Oyama, 813 F.3d at 872; Ward v. Polite, 667 F.3d 727, 733 (6th Cir. 2012); Keeton, 664 F.3d at 876. But see Tatro v. Univ. of Minn., 816 N.W.2d 509, 521 (Minn. 2012).<sup>15</sup> But these traditional exceptions do not apply to off-campus speech unrelated to academic assignments, like Keefe’s Facebook posts. See Bystrom, 822 F.2d at 750 (explaining that in comparison with regulating speech on school grounds, the burden to justify restrictions on off-campus speech “would be much greater, perhaps even insurmountable”).

Based on the record before us, I think that summary judgment was improperly granted to the administrators on Keefe’s First Amendment claim. Genuine issues of

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<sup>14</sup>The votes of Justices Alito and Kennedy were necessary to the majority opinion and expressly conditioned on the understanding of the majority opinion laid out in Justice Alito’s concurrence, so the concurrence is controlling. See Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that when “no single rationale explaining the result [of a case] enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’”) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

<sup>15</sup>While Tatro is factually similar to this case in some ways, I question whether it is consistent with binding Supreme Court precedent. See Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1666–67 (2015) (“[A] history and tradition of regulation are important factors in determining whether to recognize ‘new categories of unprotected speech.’”) (quoting Brown v. Entm’t Merchs. Assn., 564 U.S. 786, 791 (2011)); Reed v. Town of Gilbert, 135 S. Ct. 2218, 2229 (2015) (rejecting notion that more permissive First Amendment standard was justified by state’s interest in the “regulation of professional conduct”) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

material fact remain concerning whether the administrators could permissibly restrict the speech at issue in this case in the manner that they did.

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## **In the Future, Will We All Be Limited-Purpose Public Figures?\***

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\*To be published in Volume 30, Issue 4 of the American Bar Association's *Communications Lawyer*.

Andy Warhol said, “In the future, everybody will be world-famous for 15 minutes.”<sup>1</sup> Warhol’s comment, made decades ago, appears to be truer than ever. With the rise of social networking and viral video, it’s easier to achieve notoriety than ever before. But for libel lawyers, the question is whether being “Internet famous” is famous enough to be deemed a public figure.<sup>2</sup>

In a libel lawsuit, the court will be asked to classify the plaintiff as a public official, an all-purpose public figure, a limited-purpose public figure, or a private figure. Defendants have greater constitutional protection when the plaintiff is a public official or public figure of some sort than when the plaintiff is deemed a private figure.<sup>3</sup> Access to the media and the ability to inject oneself into a controversy has been a factor in determining whether a plaintiff is a public or private figure. Naturally, this raises the question of whether the use of Facebook or Twitter or other social media—especially if material has “gone viral”—will turn otherwise private plaintiffs into public figures.

This article will evaluate the circumstances under which Internet users can become limited-purpose public figures. In other words, although we all may be world famous someday, we seek to clarify whether we will all be limited-purpose public figures.

### **Defining a Limited-Purpose Public Figure**

In a libel suit, a plaintiff deemed by a court to be a public figure must prove that the defendant published defamatory content with “actual malice.”<sup>4</sup> To prove actual malice, the plaintiff must show that the defendant published with knowledge of falsity or with reckless disregard for whether the content was false or not.<sup>5</sup> Private plaintiffs, in contrast, typically have to prove the far less rigorous standard of negligence.<sup>6</sup> *Negligence* is usually defined as “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.”<sup>7</sup>

In *Gertz v. Robert Welch, Inc.*,<sup>8</sup> the U.S. Supreme Court identified two categories of public figures. The first category constitutes individuals defined as all-purpose public figures. All-purpose public figures are individuals who “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”<sup>9</sup> Johnny Carson,<sup>10</sup> Carol Burnett,<sup>11</sup> and William Buckley, Jr.<sup>12</sup> have been deemed all-purpose public figures by the courts. The second category constitutes individuals classified as limited-purpose public figures. The Court wrote in *Gertz*, “[T]hose classed as [limited-purpose] public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. . . . [T]hey invite attention and comment.”<sup>13</sup> Accordingly, to be a limited-purpose public figure, a court must determine “whether the plaintiff voluntarily assumed a prominent role in a public controversy and the attendant risk of enhanced public scrutiny that accompanies it.”<sup>14</sup> Limited-purpose public figures are public figures only for defamation related to the controversies they have entered.<sup>15</sup>

As stated in *Gertz*, the existence of a public controversy is necessary for a plaintiff to be classified as a limited-purpose public figure. However, the courts have struggled to determine what constitutes a public controversy. As one commenter has observed, some courts are reluctant to act as editors and have held that “courts have no business evaluating what issues are and are not of legitimate public interest. These courts have concluded that a public controversy is present merely if the events in question have generated widespread public interest.”<sup>16</sup> On the other hand,

some courts “have held that newsworthiness alone is insufficient to establish a public controversy. These courts hold that a public controversy is a real dispute which affects members of the public other than the litigants in the instant case.”<sup>17</sup>

Access to effective channels of communication serves as an additional characteristic of both all-purpose and limited-purpose public figures. In *Curtis Publishing Co. v. Butts*,<sup>18</sup> Chief Justice Warren specifically mentioned access to the media as a justification for requiring public figures to prove actual malice in libel cases. He observed that those classed as “‘public figures’ have as ready access as ‘public officials’ to mass media of communication, both to influence policy and to counter criticism of their views and activities.”<sup>19</sup>

With access to effective channels of communication, a plaintiff can engage in self-help and restore some of the harm caused to his reputation. In *Gertz*, the Court wrote:

The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.<sup>20</sup>

Engaging in self-help is preferable to turning to the court system for relief, according to the court in *Reuber v. Food Chemical News, Inc.*: “The inquiry into access to channels of communication proceeds on the assumption that public controversy can be aired without the need for litigation and that rebuttal of offending speech is preferable to recourse to the courts.”<sup>21</sup> In other words, there is no need for the court system to compensate a plaintiff for harm caused by libel if he can repair the damage on his own, and libel protections are only necessary if the aggrieved is unable to remedy the harm independently:

According to Justice Lewis Powell, writing for the majority [in *Gertz*], the preferred response to a defamation problem is to fix it yourself. But since private individuals supposedly don’t have the kind of access to mass media it takes to correct the record, the First Amendment allows the states to use libel law to level the playing field, making it easier for private individuals to counter the damage done to their reputations by mass media.<sup>22</sup>

In spite of Supreme Court precedent, many lower courts do not evaluate the access requirement when determining who is a limited-purpose public figure. It is common to see courts apply a version of the three-part test dictated in *Waldbaum v. Fairchild Publications Inc.*,<sup>23</sup> which does not evaluate whether the plaintiff had access to effective channels of communication. Step one of the *Waldbaum* test requires the court to isolate the public controversy.<sup>24</sup> Step two requires the court to analyze the plaintiff’s role in the controversy.<sup>25</sup> The court wrote, “The language of *Gertz* is clear that plaintiffs must have ‘thrust themselves to the forefront’ of the controversies so as to become factors in their ultimate resolution.”<sup>26</sup> Step three requires the court to determine whether the alleged defamation was “germane to the plaintiff’s participation in the controversy.”<sup>27</sup>

Despite the fact that *Waldbaum* does not explicitly consider access to media, it does evaluate the plaintiff's role in the controversy, and the use of media to promote a message would surely be a factor in evaluating that aspect of the *Waldbaum* test. Moreover, it is important to remember that *Gertz* and *Waldbaum* were decided decades ago when there was a limited number of media outlets. Prominence in a controversy would, in many cases, have meant that the person involved had effective access to the limited media available. Today's media landscape is different, however. Plaintiffs now have access to an almost endless amount of media sources, many of which lack effectiveness (for example, a webpage that is read by only a small number of people). Consequently, it is possible that lower courts will adapt their analysis to evaluate the access requirement with greater frequency.<sup>28</sup>

Thus, reflecting on *Gertz*, a court must make two determinations before it can label a plaintiff a limited-purpose public figure. First, the court must determine that the plaintiff had sufficient access to effective channels of communication to counteract defamatory statements. Second, the court must determine that the plaintiff voluntarily thrust himself to the forefront of a public controversy in order to influence the outcome. The court must make both determinations in order to deem a plaintiff a limited-purpose public figure.

### **Question One: Do Social Media Platforms Provide Plaintiffs with Access to Effective Channels of Communication?**

To answer this question, one must first determine how the courts have interpreted the phrase *access to the channels of effective communication*. The Court in *Gertz* failed to provide a precise definition. For example, access to the *New York Times* would most likely constitute an effective channel of communication. But how about access to a newspaper that reaches a regional audience? How about one that reaches a small, rural audience? How about a blog post that is read by an average of twenty-five individuals per week? These questions have not been answered definitively. Nevertheless, over the years, the Supreme Court, lower courts, and legal scholars have given hints as to the meaning behind *access to the channels of effective communication*.

### ***Relevant Case Law and Scholarly Opinions***

Evaluating precedent, we know that there are two characteristics of the access requirement. First, to have access to an effective channel of communication, the channel must afford the plaintiff with a "realistic opportunity to counteract false statements."<sup>29</sup> Most likely, it must be one that enables the plaintiff to reach a similar audience to the one that originally heard the defamation. And, second, it must be one in which the plaintiff has some sort of continuous access.

In *Gertz*, the Court envisioned that plaintiffs would have a "realistic opportunity to counteract false statements."<sup>30</sup> In order to have this opportunity, it is logical to assume that an effective channel of communication would reach an audience of similar composition to the one that originally heard the defamation. One commenter has observed:

The test imagined by the Court in *Gertz* . . . would seem to construe the access to media element of the test by using a relatively narrow definition of access to media: not one that encompasses any and all opportunities to be heard by all varieties of audiences, but rather the opportunity to defend oneself to the audience that initially received the damaging information.<sup>31</sup>

If a plaintiff were to reach a different audience than the one that originally heard the defamatory statement (a substantially smaller audience, for example), it is difficult to see how he would have a realistic opportunity to counteract false statements.

In *Hutchinson v. Proxmire*,<sup>32</sup> the Court considered the continuing nature of the access. In that case, a U.S. senator allegedly defamed a research scientist, Ronald Hutchinson, by giving him the “Golden Fleece Award” for wasteful government spending.<sup>33</sup> Before the defamation occurred, Hutchinson had received public funds for his research and published numerous entries in professional journals.<sup>34</sup> His response to the defamatory statement was reported in “some newspapers and wire services.”<sup>35</sup> In the subsequent libel suit, however, the Supreme Court deemed Hutchinson a private individual. The Court wrote:

We cannot agree that Hutchinson had such access to the media that he should be classified as a public figure. Hutchinson’s access was limited to responding to the announcement of the Golden Fleece Award. He did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure.<sup>36</sup>

Both the composition of the audience and the continuing nature of the access were evident in *Hibdon v. Grabowski*,<sup>37</sup> one of the few cases to address the access requirement in the context of the Internet. *Hibdon* involved a plaintiff, Kerry Hibdon, who modified jet skis to travel at record-setting speeds (upwards of seventy miles per hour).<sup>38</sup> He publicized his work in the online newsgroup rec.sport.jetski, and his work was profiled in *Splash Magazine*.<sup>39</sup> But with attention came criticism. After the article appeared in *Splash Magazine*, numerous individuals “questioned the authenticity of the speed Hibdon’s modified jet skis had achieved” and “criticized Hibdon’s skills as a jet ski mechanic. . . .”<sup>40</sup> The comments were posted on rec.sport.jetski and on one of the defendant’s business websites.<sup>41</sup>

In his subsequent libel suit, Hibdon was deemed a limited-purpose public figure. The Tennessee Court of Appeals wrote, “Hibdon had access to and used effective means of communication, both through the news group and through *Splash Magazine*, in order to counteract the Defendant’s statements.”<sup>42</sup> Hibdon had used these avenues to communicate in the past (that is, he had continuous interaction with them); and, through them, he could defend his reputation in front of the audience that originally heard the defamation.<sup>43</sup>

### ***Applying the Law to Social Media Platforms***

Facebook and Twitter (and virtually all social media sites) undoubtedly provide users with regular and continuing access to the media. Making a post on either site costs no money and can be visible, within a matter of seconds, to your friends (if using Facebook), your followers (if using Twitter), or the general public (if using either). However, unlike traditional media sources, courts may find that Facebook and Twitter may not provide plaintiffs with a realistic opportunity to counteract false statements.

The average Facebook user has roughly 245 friends,<sup>44</sup> and 16 percent of those friends, on average, will see a post that he shares.<sup>45</sup> If the average hypothetical Facebook user is defamed by another user on his page, *Hibdon* could serve as persuasive precedent for a court to conclude that the Facebook user had access to effective channels of communication because, as in *Hibdon*, the user’s response would reach an audience similar to the one that originally heard the defamation. One commenter noted that:

the comparative openness of the Net means that more people who feel they've had their reputations besmirched have access to self-help. If some bozo writes 100 lines of false statement and innuendo about your sex life or personal habits, you can write 500 lines of point-by-point refutation. It's a "day in court" that comes cheap.<sup>46</sup>

Nevertheless, it is just as easy to imagine a scenario in which Facebook and Twitter are not viewed as sufficient to provide access to effective channels of communication. Let's presume that the profile of a hypothetical Facebook user is visible to the public; after making a post, the user is subsequently defamed by the *New York Times*. Because the *New York Times* has a circulation of 1.8 million readers, it is unlikely that the hypothetical Facebook user, who can reach at the absolute most a couple of hundred other users, would have a realistic opportunity to counteract false statements, at least if the only consideration is the number of readers in the direct audience.

As a counterargument, however, one question may be whether the relevant audience sees the rebuttal. The average Facebook user has a greater opportunity to reach the people he actually knows, as opposed to the many random strangers who may read the *New York Times*. Moreover, given the widespread use of search engines, the most important factor may be whether Facebook or the *New York Times* appears higher in a particular person's search results. Another factor might be whether the user has such a strong Internet presence (Facebook, Twitter, Tumblr, and other accounts combined) that the overall effect gives ample reach to various relevant audiences. But even if a plaintiff is not sufficiently prominent to be deemed a limited-purpose public figure, such an analysis may nevertheless be relevant in assessing damages.

In sum, the courts will most likely make the decision as to whether social media platforms provide plaintiffs with access to effective channels of communication on a case-by-case basis after balancing several factors. Those factors may include where the defamation occurred (e.g., in traditional media or social media or other outlets) and the size of the audience that the plaintiff can reach through social media use.

### **Question Two: Do Social Media Platforms Enable a Plaintiff to Voluntarily Thrust Himself to the Forefront of a Public Controversy?**

Many courts have evaluated whether a plaintiff, through Internet use, can voluntarily thrust himself to the forefront of a public controversy in order to influence the outcome. In these cases, the answer has been a resounding yes. However, an open question remains as to what, exactly, would be required for a plaintiff to thrust himself to the forefront of that controversy via social media use.

#### ***Relevant Case Law***

*Backlund v. Stone*,<sup>47</sup> an unpublished opinion from the Court of Appeal of California, is an example of a case in which a court found that the plaintiff thrust himself to the forefront of a public controversy through Internet use. Christopher Stone, the plaintiff, "operated a website for teenagers on which he posted lewd photographs and other scandalous and salacious material."<sup>48</sup> Stone posted at least one image of a minor female on the site.<sup>49</sup> In addition to operating the website, Stone regularly appeared in mass media (e.g., Fox News, CNN, and the *New York Times*) to discuss "sextortion," which the court described as "the use of compromising nude



photographs to blackmail the people in the photo.”<sup>50</sup> Despite Stone’s stance against “sextortion,” in February 2010, he threatened a nineteen-year-old female by stating that he would spam a seminude photo of her throughout the Internet.<sup>51</sup> After Gawker.com interviewed the girl, Stone sued her for defamation.<sup>52</sup>

The court deemed Stone a limited-purpose public figure. The court wrote, “Stone voluntarily thrust himself into a public controversy concerning the publication of lewd or compromising photographs of teenagers on the Internet.”<sup>53</sup> It added, “Stone became a limited public figure by operating a publicly accessible website that published lewd photos of minors, and by seeking the public eye when he appeared on television and in print media to discuss the topic of sextortion.”<sup>54</sup>

The court reached a similar conclusion in *Sinclair v. TubeSockTedD*.<sup>55</sup> In *Sinclair*, the plaintiff sued three anonymous defendants for defamation. The defendants had criticized Sinclair after “he [Sinclair] posted a YouTube.com video alleging that in November 1999, while visiting Chicago, he met then-state senator Barack Obama and then purchased cocaine from, used cocaine with, and performed a sex act on Mr. Obama.”<sup>56</sup> In dismissing the complaint, the court wrote, “Arguably, Sinclair is a limited-purpose public figure concerning the controversy that he sought to generate relating to candidate Obama and the 2008 presidential election . . . and hence he must show actual malice.”<sup>57</sup> *Sinclair* is important because it shows how a plaintiff using only the Internet can voluntarily thrust himself to the forefront of a public controversy in an attempt to impact its outcome.

*Hibdon*, a case referenced earlier, is another relevant example. In *Hibdon*, the court found that a public controversy existed “over the purported success of Hibdon’s jet ski modifications.”<sup>58</sup> The controversy was public because it impacted an “identifiable segment of the public” and because the forums on which the controversy played out (rec.sport.jetski and *Splash Magazine*) could be reached by national and international audiences.<sup>59</sup> Moreover, Hibdon thrust himself to the forefront of the controversy by posting on rec.sport.jetski and by agreeing to be profiled in *Splash Magazine*.<sup>60</sup> The court wrote, “[A]s the figure at the center of the controversy, Hibdon’s role was extensive.”<sup>61</sup>

But not all courts have deemed individuals who simply post information on the Internet to be limited-purpose public figures. *Franklin Prescriptions, Inc. v. New York Times Co.*<sup>62</sup> arose after the *New York Times* ran a story about online pharmacies that operated “outside the law” by selling drugs without a prescription.<sup>63</sup> Despite the fact that the *Times*’s story featured an image of the plaintiff’s website, the plaintiff Franklin Prescriptions did not sell drugs online and never sold drugs without a prescription.<sup>64</sup> In the subsequent libel suit, the court rejected the *Times*’s argument that the plaintiff was a limited-purpose public figure because of its Internet presence.

Important to the court’s decision was the fact that the plaintiff operated an informational website through which orders could not be placed. The court wrote:

Franklin did not inject itself into any controversy. Franklin merely provided an information only Website on the Internet and did not invite public attention, comment or criticism regarding the controversy of making drugs available via the Internet. Again, Franklin does not take or fill prescription orders online and does not allow for communication between the pharmacy and Internet users.<sup>65</sup>

The court added, “Franklin is a neutral party playing no part in the controversy of ‘online’ pharmacies as it only posted a Website for information similar to an advertisement in a phone

directory.”<sup>66</sup> The court concluded that Franklin never entered a public controversy. However, even if it had, it is not likely that Franklin (by operating a static website) would have been found to thrust itself to the forefront of that controversy.

When determining whether use of the Internet or social media enables a plaintiff to thrust himself to the forefront of a public controversy, cases evaluating libel claims in other mediums may prove influential. *Sewell v. Trib Publications, Inc.*<sup>67</sup> involved a teacher who criticized American military activities in Iraq in a college classroom.<sup>68</sup> Although not stated in the case, Sewell’s audience was likely small (probably similar in size to the audiences most Facebook and Twitter users reach). In finding Sewell to be a private figure, the court wrote, “[B]y discussing the controversy in his classroom, Sewell in no way thrust himself to the forefront of the controversy in any public forum.”<sup>69</sup> Sewell made no comments to traditional media, did not appear on television, and “certainly was not an actor in the events giving rise to the public controversy.”<sup>70</sup> In other words, Sewell did not have a large enough audience to thrust himself to the forefront of the public controversy involving the war in Iraq.

Nevertheless, it is important to note that some courts have held that plaintiffs do not need to achieve a prominent role in a public controversy to qualify as a limited-purpose public figure. The court in *Copp v. Paxton* wrote, “The ‘courts should look for evidence of affirmative actions by which purported ‘public figures’ have thrust themselves into the forefront of particular public controversies.’”<sup>71</sup> It added, “It is not necessary to show that a plaintiff actually achieves prominence in the public debate; it is sufficient that ‘[a plaintiff] attempts to thrust himself into the public eye’<sup>72</sup> or to influence a public decision.”<sup>73</sup>

### ***Applying the Law to Social Media Platforms***

*Backlund*, *Sinclair*, and *Hibdon* show that plaintiffs can be classified as limited-purpose public figures without using traditional media. These cases also show that, under the right circumstances, a plaintiff can voluntarily thrust himself to the forefront of a public controversy through Internet use. However, it seems clear that thrusting oneself to the forefront of a public controversy requires more than simple, ordinary Internet use.

If the average Facebook user makes posts on a matter of national public concern, that fact alone—even if the posts are made public and even if he desired to impact the outcome of a controversy—would most likely be insufficient to deem the user a limited purpose public figure. A court would likely follow the reasoning of *Sewell* and find that access to the average of 245 friends is insufficient to thrust a person to the forefront of a controversy.

If the posts were to go viral, however, there is a better argument that the Facebook user—even if otherwise “average” in terms of reach and audience—has now taken a place at the forefront of the controversy. But viral posts create an interesting question themselves. In many cases, the speaker has no control over whether a post goes viral. Experience has shown that controversies have arisen over posts that were intended to be private, which raises a question about whether the user was trying to thrust himself to the forefront of a controversy. In many cases, the user may not have intended such a result. The question then becomes whether that should matter in light of the inherently public nature of the Internet.

Courts may be more inclined to deem a social media user a limited-purpose public figure if he enters a more contained public controversy. For example, if a public controversy erupted on social media over a video game that has a small but loyal following, *Hibdon* would likely serve as persuasive precedent, and a court could deem that the user has thrust himself to the forefront

of that controversy because the relevant audience is smaller and the use may have greater influence in the relevant arena.

Thus, here again, the courts will most likely decide on a case-by-case basis whether a plaintiff has voluntarily thrust himself to the forefront of a public controversy in order to influence the outcome. Factors to be balanced by the courts when reaching this determination include: (1) the size of the audience that the plaintiff can reach through social media, (2) the scope of the public controversy, and (3) the plaintiff's intent in affecting the outcome of the controversy.

## Conclusion

It is unlikely that all users of social media will be deemed limited-purpose public figures. Rather, the courts will most likely continue to struggle with the distinction between private plaintiffs and limited-purpose public figures.<sup>74</sup>

Under the correct circumstances, courts should have no problem deeming plaintiffs who use social media to be limited-purpose public figures. There is no reason why the facts from *Hibdon*, which involved a controversy that was limited in scope, cannot play out on sites like Facebook or Twitter. Under such circumstances, social media should provide a plaintiff with access to effective channels of communication and should enable a plaintiff to thrust himself to the forefront of a public controversy. The situation becomes less clear when an individual (or entity) with a large audience defames a plaintiff who can reach only a limited audience through social media. Under that scenario, social media may not provide access to effective channels of communication and may not enable a plaintiff to thrust himself to the forefront of a public controversy, unless there are unanticipated extenuating factors, such as content going viral. Nevertheless, even if the plaintiff is not deemed a limited-purpose public figure, the ability of a plaintiff to reach a sizable audience via social media may be a factor in assessing damages and may help to mitigate damages.<sup>75</sup>

If Andy Warhol is correct, in the future, everybody will be world famous for fifteen minutes—but everybody won't necessarily be a limited-purpose public figure.

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<sup>1</sup> Katherine Dorsett Bennett, *Andy Warhol's "15 Minutes" of Fame Are Not Up Yet*, CNN (Sept. 5, 2012), <http://www.cnn.com/2012/09/05/living/campbell-soup-company-andy-warhol>.

<sup>2</sup> *Internet famous* is a term coined to refer to people who achieve notoriety almost exclusively through the Internet, by using social media, appearing in a viral video, keeping a popular blog or website, or otherwise making a name for oneself online.

<sup>3</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Robert Welch*, 418 U.S. 323 (1974).

<sup>4</sup> See *Sullivan*, 376 U.S. 254; *Gertz*, 418 U.S. 323.

<sup>5</sup> *Sullivan*, 376 U.S. at 280.

<sup>6</sup> Kent R. Middleton & William E. Lee, *THE LAW OF PUBLIC COMMUNICATION* 143 (8th ed. 2013).

<sup>7</sup> *BLACK'S LAW DICTIONARY* (9th ed. 2009).

<sup>8</sup> 418 U.S. 323 (1974).

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<sup>9</sup> *Id.* at 345.

<sup>10</sup> Middleton & Lee, *supra* note 6, at 131 (citing Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976)).

<sup>11</sup> *Id.* at 132 (citing Burnett v. Nat'l Enquirer, Inc., 144 Cal. App. 3d 991 (Cal. Ct. App. 1983)).

<sup>12</sup> *Id.* at 131 (citing Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062).

<sup>13</sup> *Gertz*, 418 U.S. at 345.

<sup>14</sup> Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 909 (2000) (citing *Gertz*, 418 U.S. at 344–45).

<sup>15</sup> *Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569, 1577 (Cal. App. 1st Dist. 2005) (“The limited purpose public figure is an individual who voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues.”).

<sup>16</sup> Erik Walker, *Defamation Law: Public Figures—Who Are They?*, 45 BAYLOR L. REV. 955, 969 (1993).

<sup>17</sup> *Id.* at 970.

<sup>18</sup> *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

<sup>19</sup> *Id.* at 164.

<sup>20</sup> *Gertz v. Robert Welch*, 418 U.S. 323, 344 (1974).

<sup>21</sup> 925 F.2d 703, 708–09 (Md. 4th Cir. 1991) (citing *Gertz*, 418 U.S. at 344).

<sup>22</sup> Mike Godwin, *Libel Law: Let It Die*, WIRED, Mar. 1996, *available at* [http://www.wired.com/wired/archive/4.03/letitdie.html.\\_pr.html](http://www.wired.com/wired/archive/4.03/letitdie.html._pr.html).

<sup>23</sup> 627 F.2d 1287 (D.C. Cir. 1980).

<sup>24</sup> *Id.* at 1296.

<sup>25</sup> *Id.* at 1297.

<sup>26</sup> *Id.* (quoting *Gertz v. Robert Welch*, 418 U.S. 323, 345 (1974)).

<sup>27</sup> *Id.* at 1298.

<sup>28</sup> Moreover, failure of a court to consider the access requirement, which derives from Supreme Court precedent, could be an issue raised on appeal.

<sup>29</sup> *Gertz*, 418 U.S. at 344.

<sup>30</sup> *Id.*

<sup>31</sup> Ann E. O'Connor, Note, 63 FED. COMM. L.J. 507, 531 (2011).

<sup>32</sup> 443 U.S. 111 (U.S. 1979).

<sup>33</sup> *Id.* at 114.

<sup>34</sup> *Id.* at 135.

<sup>35</sup> *Id.* at 134.

<sup>36</sup> *Id.* at 136.

<sup>37</sup> 195 S.W.3d 48 (Tenn. Ct. App. 2005).

<sup>38</sup> *Id.* at 53.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 54.

<sup>41</sup> *Id.* at 54–55.

<sup>42</sup> *Id.* at 62.

<sup>43</sup> *See also* Thomas v. Patton, No. 162005CA003777XXXXMA, 2005 WL 3048033 (Fla. Cir. Ct. Oct. 21, 2005), *aff'd and remanded*, 939 So. 2d 139 (Fla. Dist. Ct. App. 2006); Stepnes v. Ritschel, 771 F. Supp. 2d 1019, 1030 (D. Minn. 2011), *aff'd*, 663 F.3d 952 (8th Cir. 2011). In both cases, plaintiffs who had access to media sources on the Internet were deemed limited-purpose public figures. However, because both plaintiffs also had access to traditional media sources, it is unclear whether their Internet access alone would have been sufficient to deem them limited-purpose public figures.

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<sup>44</sup> Hayley Tsukayama, *Your Facebook Friends Have More Friends than You*, WASH. POST (Feb. 3, 2012), [http://www.washingtonpost.com/business/technology/your-facebook-friends-have-more-friends-than-you/2012/02/03/gIQAuNULmQ\\_story.html](http://www.washingtonpost.com/business/technology/your-facebook-friends-have-more-friends-than-you/2012/02/03/gIQAuNULmQ_story.html).

<sup>45</sup> Bianca Bosker, *Facebook Explains How Often Your Posts Actually Get Seen*, HUFFINGTON POST (Feb. 29, 2012), [http://www.huffingtonpost.com/2012/02/29/facebook-posts\\_n\\_1311330.html](http://www.huffingtonpost.com/2012/02/29/facebook-posts_n_1311330.html).

<sup>46</sup> Godwin, *supra* note 22.

<sup>47</sup> No. B235179, LEXIS 6467 (Cal. App. 2d Dist. Sept. 4, 2012).

<sup>48</sup> *Id.* at \*1.

<sup>49</sup> *Id.* at \*2.

<sup>50</sup> *Id.* at \*5.

<sup>51</sup> *Id.* at \*14.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at \*17–18.

<sup>54</sup> *Id.* at \*18.

<sup>55</sup> 596 F. Supp. 2d 128 (D.D.C. 2009).

<sup>56</sup> *Id.* at 130 (citing Complaint at 8.).

<sup>57</sup> *Id.* at 133–34 (citing Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1296–97 (D.C. Cir. 1980)).

<sup>58</sup> Hibdon v. Grabowski, 195 S.W.3d 48, 62 (Tenn. Ct. App. 2005).

<sup>59</sup> *Id.* at 60.

<sup>60</sup> *Id.* at 62.

<sup>61</sup> *Id.* See also Ampex Corp. v. Cargle, 128 Cal. App. 4th 1569 (Cal. App. 1st Dist. 2005); Eagle Broadband, Inc. v. Mould, Unpub. LEXIS 10116 (Cal. App. 6th Dist. Dec. 14, 2007). In both cases, corporations were deemed to have thrust themselves into public controversies through Internet use and press releases.

<sup>62</sup> 267 F. Supp. 2d 425 (E.D. Pa. 2003).

<sup>63</sup> *Id.* at 434.

<sup>64</sup> *Id.* at 429.

<sup>65</sup> *Id.* at 441.

<sup>66</sup> *Id.* at 437.

<sup>67</sup> 622 S.E.2d 919, 923–24 (2005).

<sup>68</sup> *Id.* at 923.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 924.

<sup>71</sup> 45 Cal. App. 4th 829, 845–46, 52 Cal. Rptr. 2d 831, 844 (1996) (quoting Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 254–255, 208 Cal. Rptr. 137, 690 P.2d 610 (1984)).

<sup>72</sup> *Id.* at 845–46, 52 Cal. Rptr. 2d at 844 (quoting Rudnick v. McMillan, 25 Cal. App. 4th 1183, 1190, 31 Cal. Rptr. 2d 193 (1994)).

<sup>73</sup> *Id.* (citing Okun v. Superior Court, 629 P.2d 1369 (1981)).

<sup>74</sup> This should be nothing new. In *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978), the court famously wrote, “Defining public figures is much like trying to nail a jellyfish to the wall.”

<sup>75</sup> See *Franklin Prescriptions, Inc. v. N.Y. Times Co.*, 267 F. Supp. 2d 425 (E.D. Pa. 2003) (damages).

IN THE SUPREME COURT OF NORTH CAROLINA

No. 366PA13

FILED 6 NOVEMBER 2015

STATE OF NORTH CAROLINA

v.

LESTER GERARD PACKINGHAM

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, \_\_\_ N.C. App. \_\_\_, 748 S.E.2d 146 (2013), vacating a judgment entered on 30 May 2012 by Judge William Osmond Smith in Superior Court, Durham County. Heard in the Supreme Court on 8 September 2014.

*Roy Cooper, Attorney General, by Anne M. Middleton and David L. Elliott, Assistant Attorneys General, for the State-appellant.*

*Glenn Gerding, Appellate Defender,<sup>1</sup> for defendant-appellee.*

EDMUNDS, Justice.

The Court of Appeals vacated defendant's conviction for accessing a social networking Web site as a registered sex offender, finding that the applicable statute, N.C.G.S. § 14-202.5, is unconstitutional both on its face and as applied to defendant. We conclude that the statute is constitutional in all respects. Accordingly, we reverse the holding to the contrary of the Court of Appeals.

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<sup>1</sup> Glenn Gerding was appointed to the position of Appellate Defender on 1 November 2015. His motion to withdraw as private assigned counsel was allowed by this Court on 5 November 2015. His motion to represent defendant through this Court's appointment of the Appellate Defender was also allowed on 5 November 2015.

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In 2008, the General Assembly enacted N.C.G.S. § 14-202.5, which bans the use of commercial social networking Web sites by registered sex offenders. In April 2010, Officer Brian Schnee of the Durham Police Department began an investigation to detect such sex offenders living in Durham who were illegally accessing commercial social networking Web sites. Officer Schnee identified defendant Lester Gerard Packingham (defendant), who had been convicted in 2002 of a sexual offense in Cabarrus County, North Carolina, as a registered sex offender subject to N.C.G.S. § 14-202.5. Officer Schnee located defendant's name and photograph on the North Carolina Department of Justice Sex Offender Registry. While investigating the Web site Facebook.com, Officer Schnee found a user profile page that, based upon the profile photo, he believed belonged to defendant. Although the name on the Facebook account was "J.R. Gerrard," Officer Schnee was able to confirm that the Facebook page in fact was defendant's. During a subsequent search of defendant's residence, officers recovered a notice of "Changes to North Carolina Sex Offender Registration Laws" signed by defendant describing commercial social networking Web sites that he was prohibited from accessing. This document was admitted into evidence at trial.

On 20 September 2010, defendant was indicted by a Durham County grand jury for violating N.C.G.S. § 14-202.5. On 9 December 2010, defendant filed a motion to dismiss the charge in Superior Court, Durham County, contending that section 14-202.5 is unconstitutional on its face or as applied to him. On 19 April 2011, the trial court entered an order denying defendant's motion. The trial court's order included

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a finding of fact that both the State and defendant agreed that Facebook.com is a social networking Web site as contemplated by N.C.G.S. § 14-202.5. The trial court declined to address defendant's facial challenge but found that N.C.G.S. § 14-202.5 was constitutional as applied to defendant. On 22 June 2011, the Court of Appeals denied defendant's petition for certiorari.

The case went to trial and, after considering evidence that defendant maintained a Facebook page, a jury on 30 May 2012 found defendant guilty of one count of accessing a commercial social networking Web site by a registered sex offender. The trial court sentenced defendant to a term of six to eight months of imprisonment, suspended for twelve months, and defendant was placed on supervised probation.

Defendant appealed to the Court of Appeals, challenging the constitutionality of N.C.G.S. § 14-202.5. That court determined that N.C.G.S. § 14-202.5 "plainly involves defendant's First Amendment rights . . . because it bans the freedom of speech and association via social media" and concluded that intermediate scrutiny was appropriate. *State v. Packingham*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 748 S.E.2d 146, 150 (2013). While acknowledging the legitimate state interest in protecting children from sex offenders, the Court of Appeals found that the statute "is not narrowly tailored, is vague, and fails to target the 'evil' it is intended to rectify" because it "arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal." *Id.* at \_\_\_, 748



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S.E.2d at 154. The court further concluded that the language of N.C.G.S. § 14-202.5 “lacks clarity, is vague, and certainly fails to give people of ordinary intelligence fair notice of what is prohibited.” *Id.* at \_\_\_, 748 S.E.2d at 153. Accordingly, finding that the statute violates the First Amendment, the Court of Appeals held the statute unconstitutional on its face and as applied, and vacated defendant’s conviction. *Id.* at \_\_\_, 748 S.E.2d at 154. On 7 November 2013, this Court allowed the State’s Petition for Discretionary Review.

Statutes are presumed constitutional, *Wayne Cty. Citizens Ass’n for Better Tax Control v. Wayne Cty. Bd. of Comm’rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991), and the interpretation of a statute is controlled by the intent of the legislature, *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 294-95 (1975). We review challenges to the constitutionality of a statute de novo. *In re Adoption of S.D.W.*, 367 N.C. 386, 391, 758 S.E.2d 374, 378 (2014) (citing *Libertarian Party of N.C. v. State*, 365 N.C. 41, 46, 707 S.E.2d 199, 202-03 (2011)).

Defendant argues that N.C.G.S. § 14-202.5 is unconstitutional both on its face and as applied to him, contending that the statute violates his right to free speech as guaranteed by the United States and North Carolina Constitutions. U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . .”); N.C. Const. art. I, § 14 (“Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained . . . .”). As we begin our analysis, we note that while these constitutional provisions appear absolute,

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“[h]istory, necessity, and judicial precedent have proven otherwise: ‘Freedom of speech is not an unlimited, unqualified right.’ ” *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 297, 749 S.E.2d 429, 435 (2012) (quoting *State v. Leigh*, 278 N.C. 243, 250, 179 S.E.2d 708, 712 (1971)), *cert. denied*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013). In addition, when analyzing alleged violations of our State Constitution’s Free Speech Clause, this Court has given great weight to the First Amendment jurisprudence of the United States Supreme Court. *See State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993) (adopting that Court’s First Amendment jurisprudence “[i]n this case”).

The issue before us is whether the proscription of access to some social networking Web sites violates the First Amendment. An as-applied challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable. *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999). A facial challenge maintains that no constitutional applications of the statute exist, prohibiting its enforcement in any context. *Id.* The constitutional standards used to decide either challenge are the same. *Edwards v. District of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014).

We begin by considering defendant’s facial challenge, cognizant that a facial attack on a statute imposes a demanding burden on the challenger. *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707 (1987). This Court rarely upholds facial challenges because “[t]he fact that a statute ‘might

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operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.’ ” *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (quoting *Salerno*, 481 U.S. at 745, 107 S. Ct. at 2100, 95 L. Ed. 2d at 707).

The First Amendment is triggered by regulations that burden speech, so we must make an initial determination whether N.C.G.S. § 14-202.5 is a regulation of speech or a regulation of conduct. The distinction is critical because a statute that regulates speech is “subjected to exacting scrutiny: The State must show that the ‘regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.’ ” *Burson v. Freeman*, 504 U.S. 191, 198, 112 S. Ct. 1846, 1851, 119 L. Ed. 2d 5, 14 (1992) (plurality) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794, 804 (1983)). First Amendment protection of speech is extended to conduct only when the conduct in question “is inherently expressive.” *Rumsfeld v. Forum for Acad. & Inst’l Rights, Inc.*, 547 U.S. 47, 66, 126 S. Ct. 1297, 1310, 164 L. Ed. 2d 156, 175 (2006). In contrast, a regulation that governs conduct while imposing only an incidental burden upon speech “must be evaluated in terms of [its] general effect.” *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 2906, 86 L. Ed. 2d 536, 548 (1985). An incidental burden on speech is permissible “so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Id.*

The statute at issue provides in pertinent part:

(a) **Offense.** — It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.

(b) For the purposes of this section, a “commercial social networking Web site” is an Internet Web site that meets all of the following requirements:

- (1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.
- (2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.
- (3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.
- (4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

- (1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or
- (2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

N.C.G.S. § 14-202.5 (2013).

This statute addresses the ability of registered sex offenders to access some social networking Web sites. We concluded in *Hest* that legislation banning the operation of sweepstake systems primarily regulated “noncommunicative conduct rather than protected speech.” 366 N.C. at 296, 749 S.E.2d at 435. The plaintiff in *Hest* argued that video games which were used to announce the results of the sweepstakes should be protected by the First Amendment. We disagreed, finding that the statute at issue in that case prohibited not the video games but the underlying conduct of a sweepstakes whose outcome was announced through the video game. *Id.* at 297, 749 S.E.2d at 435. Unlike the statute in *Hest*, however, the statute here defines a “commercial social networking Web site” as one that facilitates social introduction between people, N.C.G.S. § 14-202.5(b)(2), and provides users with a means of communicating with each other, *id.* § 14-202.5(b)(4). As is apparent to any who access them, social networking Web sites provide both a forum for gathering information and a means of communication. Even so, like the statute in *Hest*, the essential purpose of section 14-202.5 is to limit conduct, specifically the ability of registered sex offenders to access certain carefully-defined Web sites. This limitation on conduct only incidentally burdens the ability of registered sex offenders to engage in speech after accessing those Web sites that fall within the statute’s reach. Thus we conclude that section 14-202.5 is a regulation of conduct.

Our next inquiry is whether N.C.G.S. § 14-202.5 governs conduct on the basis

of the content of speech or is instead a content-neutral regulation. *See Brown v. Town of Cary*, 706 F.3d 294, 300 (4th Cir. 2013) (“Our first task is to determine whether the [statute] ‘is content based or content neutral . . . .’”) (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 59, 114 S. Ct. 2038, 2047, 129 L. Ed. 2d 36, 50 (1994) (O’Connor, J., concurring)). The level of scrutiny we apply is based on this determination. Restrictions based upon the content of the speech trigger strict scrutiny, *see United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 814, 120 S. Ct. 1878, 1886, 146 L. Ed. 2d 865, 880 (2000), and are “presumptively invalid,” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542, 120 L. Ed. 2d 305, 317 (1992) (citations omitted). To survive under strict scrutiny, the regulation “must be the least restrictive means of achieving a compelling state interest.” *McCullen v. Coakley*, \_\_\_ U.S. \_\_\_, \_\_\_, 134 S. Ct. 2518, 2530, 189 L. Ed. 2d 502, 515 (2014) (citation omitted). In contrast, content-neutral regulations of conduct that impose an incidental burden on speech are subject to intermediate scrutiny because they “pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S. Ct. 2445, 2459, 129 L. Ed. 2d 497, 517 (1994).

The United States Supreme Court recently discussed the distinction between content-based and content-neutral regulations in *Reed v. Town of Gilbert*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). Under *Reed*, a court initially must consider “whether the law is content neutral on its face.” *Id.* at \_\_\_, 135 S. Ct. at 2228, 192 L. Ed. 2d at 246. Although *Reed* focused on the interpretation of content-

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based regulations of *speech*, while we concluded above that section 14-202.5 is a regulation of *conduct*, even under a *Reed* analysis we see that section 14-202.5 is a content-neutral regulation. On its face, this statute imposes a ban on accessing certain defined commercial social networking Web sites without regard to any content or message conveyed on those sites. The limitations imposed by the statute are based not upon speech contained in or posted on a site, but instead focus on whether functions of a particular Web site are available for use by minors. Thus, we conclude, as the Court did in *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661, 675 (1989), that section 14-202.5 “involve[s] a facially content-*neutral* ban on the use [of commercial social networking Web sites].” *Reed*, \_\_\_ U.S. at \_\_\_, 135 S. Ct. at 2228, 192 L. Ed. 2d at 247 (citing *Ward*, 491 U.S. at 792, 109 S. Ct. at 2754, 105 L. Ed. 2d at 676).

As to the intent of the General Assembly in passing section 14-202.5, the trial court found as a matter of law that the purpose of the statute is to “facilitate the legitimate and important aim of the protection of minors from sex offenders who are registered in accordance with Chapter 14, Article 27A of the General Statutes.” The parties have not challenged this conclusion of law. *Reed* states that a law, though content neutral on its face, is “considered [a] content-based regulation[] of speech” if the law “cannot be ‘justified without reference to the content of the regulated speech’ or [was] adopted by the government ‘because of disagreement with the message [the speech] conveys.’ ” *Id.* at \_\_\_, 135 S. Ct. at 2227, 192 L. Ed. 2d at 245 (fourth

alteration in original) (quoting *Ward*, 491 U.S. at 791, 109 S. Ct. at 2754, 105 L. Ed. 2d at 675). A court must address both prongs before concluding that a lower level of scrutiny applies to the law. *Id.* at \_\_\_, 135 S. Ct. at 2228, 192 L. Ed. 2d at 247. Assuming that these tests also apply to a regulation of conduct, we see that section 14-202.5 satisfies both. The justification of the statute—protecting minors from registered sex offenders—is unrelated to any speech on a regulated site. Nor does the statute have anything to say regarding the content of any speech on a regulated site. As a result, we conclude that, to the extent *Reed* applies to our analysis of section 14-202.5, the statute satisfies that case’s requirements and strict scrutiny is not required. Although the statute may impose an incidental burden on the ability of registered sex offenders to engage in speech on the Internet, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward*, 491 U.S. at 791, 109 S. Ct. at 2754, 105 L. Ed. 2d at 675 (citation omitted). Accordingly, we conclude that N.C.G.S. § 14-202.5 is a content-neutral regulation requiring intermediate scrutiny.

“Articulations of intermediate scrutiny vary depending on context, but tend to require an important or substantial government interest, a direct relationship between the regulation and the interest, and regulation no more restrictive than necessary to achieve that interest.” *Hest*, 366 N.C. at 298, 749 S.E.2d at 436 (citation omitted). The Supreme Court has provided guidance in applying intermediate



scrutiny. In *United States v. O'Brien*, the defendant claimed that the statute forbidding destruction of his Selective Service registration card was unconstitutional as applied to him because such a ban on burning the card violated his right to free speech. 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). The Supreme Court found that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct,” *id.* at 376, 88 S. Ct. at 1678, 20 L. Ed. 2d at 679, the regulation

is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest,

*id.* at 377, 88 S. Ct. at 1679, 20 L. Ed. 2d at 680. Because the statute at issue here is a content-neutral regulation that imposes only an incidental burden on speech, we believe the four-factor test from *O'Brien* is instructive in evaluating defendant’s facial attack on N.C.G.S. § 14-202.5.

Looking to the first two *O'Brien* factors, the parties agree that promulgating restrictions such as those contained in N.C.G.S. § 14-202.5 on registered sex offenders is within the constitutional power of the General Assembly and that protecting children from sexual abuse is a substantial governmental interest. We then consider *O'Brien*’s third factor, whether this governmental interest is related to the suppression of free expression. The State asserts that the statute was enacted to prevent registered sex offenders from prowling on social media and gathering

information about potential child targets. Viewing this statute as a preventive measure apparently intended to forestall illicit lurking and contact, we see that it is distinguishable from other North Carolina statutes that criminalize communications which have already occurred. The interest reflected in the statute at bar, which protects children from convicted sex offenders who could harvest information to facilitate contact with potential victims, is unrelated to the suppression of free speech. Accordingly, the statute satisfies *O'Brien's* third factor.

Although the fourth *O'Brien* factor appears to reflect the strict scrutiny requirement that the regulation be the “least restrictive means” of carrying out a compelling state interest, *McCullen*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 2530, 189 L. Ed. 2d at 515, the United States Supreme Court has since explained that for content-neutral regulations, the statute should be “narrowly tailored to serve a significant governmental interest,” *Ward*, 491 U.S. at 796, 109 S. Ct. at 2756, 105 L. Ed. 2d at 678 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069, 82 L. Ed. 2d 221, 227 (1984)) (finding that a narrowly tailored regulation controlling noise does not restrict free speech). Narrow tailoring requires the government to demonstrate that “alternative measures that burden substantially less speech would fail to achieve the government’s interests, not simply that the chosen route is easier.” *McCullen*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 2540, 189 L. Ed. 2d at 526.

Defendant argues that the statute is not narrowly tailored. Specifically, defendant contends that the statute's definition of a "commercial social networking Web site" is overbroad, that the statute does not take into account the underlying offense of conviction or the likelihood of recidivism, that the statute does not require criminal intent, that the statute is underinclusive because, *inter alia*, it applies only to commercial Web sites, that less burdensome laws already exist to protect children from baleful Internet contacts, and that sufficient alternatives allowing communication do not exist. Defendant's arguments are premised on the assumption that a statute regulating the manner of speech must be drawn as narrowly as possible, or at least more narrowly than this statute. However, the Supreme Court has stated explicitly that "[l]est any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Ward*, 491 U.S. at 798, 109 S. Ct. at 2757-58, 105 L. Ed. 2d at 680. The Court went on to explain that "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800, 109 S. Ct. at 2758, 105 L. Ed. 2d at 681.

Instead of imposing a blanket prohibition against Internet use, the statute establishes four specific criteria that must be met in order for a commercial social networking Web site to be prohibited. N.C.G.S. § 14-202.5(b). In addition, the statute entirely exempts Web sites that are exclusively devoted to speech, such as instant messaging services and chat rooms. *Id.* § 14-202.5(c). Thus we see that the General Assembly has carefully tailored the statute in such a way as to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors, thereby addressing the evil that the statute seeks to prevent. While we acknowledge that defendant has identified some areas in which the statute could have been drafted even more narrowly, we conclude that the statute is sufficiently narrowly drawn to satisfy the requirements of *Ward*.

Our inquiry does not end here, however. A content-neutral statute not only must be narrowly tailored but must also “leave open ample alternative channels for communication.” *Ward*, 491 U.S. at 791, 109 S. Ct. at 2753, 105 L. Ed. 2d at 675 (quoting *Cnty. for Creative Non-Violence*, 468 U.S. at 293, 104 S. Ct. at 3069, 82 L. Ed. 2d at 227). Subsection 14-202.5(c) allows such alternatives through specific exceptions for Web sites that provide discrete e-mail, chat room, photo-sharing, and instant messaging services. A Web site that requires one seeking access to provide no more than a username and an email address to reach the page does not necessarily violate the statute. Only a site that generates or creates a Web page or a personal profile for the user and otherwise meets the requirements of the statute is prohibited.

In addition, even if a site falls within the definition of a “commercial social networking Web site” found in subsection 14-202.5(b), in order to convict a registered sex offender of accessing the site, the State must prove that “the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.” N.C.G.S. § 14-202.5(a).

In his brief and argument to this Court, defendant lists numerous well-known Web sites that he contends he could not access legally. In considering those and other similar sites, we find that even where defendant is correct, the Web offers numerous alternatives that provide the same or similar services that defendant could access without violating N.C.G.S. § 14-202.5. For example, defendant would not violate N.C.G.S. § 14-202.5 by accessing the Paula Deen Network, a commercial social networking Web site that allows registered users to swap recipes and discuss cooking techniques, because its Terms of Service require users to be at least eighteen years old to maintain a profile. *Paula Deen Network Terms of Service*, <http://www.pauladeen.com/terms-of-service/> (last visited 5 November 2015) (“This website is designed for and targeted to Adults. It is intended solely and exclusively for those at least 18 years of age or older.”). Similarly, users may follow current events on WRAL.com, which requires users to be at least eighteen years old to register with the site and, as a result, is not prohibited. *Capitol Broadcasting Company Terms of Use*, <http://www.capitolbroadcasting.com/terms-of-use/> (last visited 5 November 2015) (“[Y]ou must be at least 18 years old to register and to use

the Services.”). A sex offender engaging in an on-line job search is free to use the commercial social networking Web site Glassdoor.com, which prohibits use by individuals under the age of eighteen. *Glassdoor Terms of Use*, <http://www.glassdoor.com/about/terms.htm> (last visited 5 November 2015) (“To access or use Glassdoor, you must be 18 years of age or older . . .”). Finally, sex offenders permissibly may access Shutterfly to share photos, because that site limits its users to those eighteen and older. *Shutterfly Terms of Use*, <http://shutterfly-inc.com/terms.html> (last visited 5 November 2015) (“In order to create a member account with any of our Sites and Apps, you must be at least 18 years of age.”).

While we leave for another day the question whether a site’s terms of use alone are sufficient as a matter of law to impute knowledge of the site’s limitations on access to a registrant, such terms of use provide specific and pertinent information to a registered sex offender seeking lawful access to the Internet. These examples demonstrate that the Web offers registered sex offenders myriad sites that do not run afoul of the statute. In addition, such methods of communication as text messages, FaceTime, electronic mail, traditional mail, and phone calls, which are not based on use of a Web site, are unrestricted. Accordingly, the regulation leaves open ample channels of communication that registered sex offenders may freely access.

Defendant cites cases from other jurisdictions faulting similar statutes. However, those cases are not binding on this Court, and the statutes under consideration in those cases are readily distinguishable from our own. For instance,

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a federal circuit court found unconstitutional an Indiana statute that sought to prevent most sex offenders from communicating with minors by prohibiting their use of commercial social networking Web sites, including instant messaging services and chat rooms. *See Doe v. Prosecutor, Marion Cty.*, 705 F.3d 694, 695-96 (7th Cir. 2013). The circuit court found that the law was not narrowly tailored to prevent illicit communications between sex offenders and minors. *Id.* at 695. Not only did the Indiana statute prohibit use of instant messaging and chat room services, both of which are exempted under N.C.G.S. § 14-202.5, Indiana's statute focused on preventing communications, while North Carolina's statute focuses on preventing registered sex offenders from gathering information about minors on the Internet. Similarly, while a federal court concluded that Louisiana's statute, which was analogous to Indiana's, was facially unconstitutional because it was vague and overbroad, *Doe v. Jindal*, 853 F. Supp. 2d 596, 607 (M.D. La. 2012), Louisiana thereafter amended that statute to a version more in line with N.C.G.S. § 14-202.5, *see* La. Rev. Stat. Ann. 14:91.5 (2012), *available at* <http://legis.la.gov/Legis/Law.aspx?d=78714>.

Thus, we conclude that N.C.G.S. § 14-202.5 satisfies *O'Brien's* four factors, is narrowly tailored to serve a substantial governmental interest, and leaves available ample alternative channels of communication. Defendant has failed to meet the high bar necessary to mount a successful facial challenge. *See, e.g., Thompson*, 349 N.C. at 496, 508 S.E.2d at 285 (holding defendant's facial challenge to a statute regulating

pretrial release failed when defendant did not establish that no set of circumstances existed under which the act would not be valid). Accordingly, we conclude the statute is constitutional on its face.

We next consider defendant's as-applied challenge. A statute that is constitutional on its face nevertheless may be unconstitutional as applied to a particular defendant. Because Facebook does not limit users to those over the age of eighteen and otherwise fits the definition of a commercial social networking Web site set out in N.C.G.S. § 14-202.5, defendant is forbidden to access that site unless the statute is unconstitutional as applied to him. Earlier in this opinion we observed that the trial court made the uncontested finding that the government's interest here is protecting minors by preventing registered sex offenders from gathering information about them on social media. Although we also found that the statute is content-neutral, we observed that it imposes an incidental burden on speech on the Internet. We now consider whether this incidental restriction on defendant is no greater than is essential to further the government's interest. *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679, 20 L. Ed. 2d at 680.

Beginning with consideration of the nature and severity of the incidental restriction, we have stated that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes." *Hest*, 366 N.C. at 298, 749 S.E.2d at 436 (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 1595, 104 L. Ed. 2d 18, 25 (1989)). The United States Fourth Circuit Court of Appeals has held that,



in the context of responding to a posting on a political campaign page maintained on Facebook.com, simply “liking” the post is speech protected by the First Amendment, an analysis with which we agree. *See Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) (“[C]licking on the ‘like’ button literally causes to be published the statement that the User ‘likes’ something, which is itself a substantive statement.”). Here, defendant posted the following on Facebook: “Man God is Good! How about I got so much favor they dismissed the ticket before court even started? . . . Praise be to GOD, WOW! Thanks JESUS!” If merely “liking” a post on Facebook.com is speech protected by the First Amendment, we have no doubt that posting a message on that site falls within this category as well. Thus, the statutory restrictions on defendant’s right to speech on Facebook, while incidental, are not trivial.

Considering next the governmental interest in protecting minors, when “a direct relationship between the regulation and the interest” exists, *Hest*, 366 N.C. at 298, 749 S.E.2d at 436, an incidental burden on speech can be justified if the governmental interest is being furthered, *see Turner Broad. Sys.*, 512 U.S. at 662, 114 S. Ct. at 2469, 129 L. Ed. 2d at 530. Nevertheless, “[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’” *Id.* at 664, 114 S. Ct. at 2470, 129 L. Ed. 2d at 531 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1995)). Instead, the State must demonstrate “that the regulation will in fact alleviate these harms in a direct and material way.” *Id.*

(citations omitted). The State argues that protection of minors from known sexual predators is a vital duty, one this Court has recognized in another context. *See Standley v. Town of Woodfin*, 362 N.C. 328, 333, 661 S.E.2d 728, 731 (2008) (discussing the risk of recidivism among sex offenders).

In considering this balance between the governmental interest and the incidental burden on this defendant's speech, we are mindful of our opinion in *Britt v. State*, in which we were confronted with a challenge to the constitutionality of N.C.G.S. § 14-415.1, which banned all convicted felons from possessing firearms. 363 N.C. 546, 681 S.E.2d 320 (2009). We held that the statute violated the North Carolina Constitution when applied to the plaintiff because his underlying offense (a nonviolent drug crime), his subsequent lawful behavior and demonstrated respect for the law, and his history of peaceable conduct following his conviction, all gave no indication that he posed any substantial threat to society. *Id.* at 550, 681 S.E.2d at 323. As a result, we concluded that the statute barring the plaintiff from possessing a firearm was "not fairly related" to the governmental purpose for which the statute was enacted, which was "the preservation of public peace and safety." *Id.* The statute was unconstitutional as applied to the plaintiff when prosecution would not further that governmental interest.

As indicated by our analysis in *Britt*, the determination whether a statute is unconstitutional as applied is strongly influenced by the facts in a particular case. In ascertaining whether the government's interest in protecting children from

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registered sex offenders who are lurking on social networking Web sites and gleaning information on potential targets is furthered by prosecution of this defendant, we observe that defendant has the status of a registered sex offender because he was convicted of indecent liberties with a minor, a sex crime against a child falling directly within the purview of section 14-202.5. Officers who searched his home found a signed written notice advising defendant of sites he could not legally access. Defendant set up his Facebook page under an alias, further indicating his awareness that he was indulging in forbidden behavior while simultaneously hiding his identity from investigators and parents. Thus defendant's case is readily distinguishable from *Britt*, in which the plaintiff's underlying conviction for drugs was considerably less directly related to the possession of "sporting rifles and shotguns" than is defendant's indecent liberties conviction to his use of Internet sites frequented by minors. Moreover, the plaintiff in *Britt* discussed the law's application to him with his local sheriff and thereafter voluntarily divested himself of all firearms before instituting his constitutional challenge to the statute, while defendant here deliberately disguised his identity. *Id.* at 547-48, 681 S.E.2d at 321-22. Unlike the plaintiff in *Britt*, defendant neither demonstrated respect for the law nor made good faith efforts to comply with the statute. These facts satisfy us that the incidental burden imposed upon this defendant, who is barred from Facebook.com but not from many other sites, is not greater than necessary to further the governmental interest of protecting children from registered sex offenders. Thus, N.C.G.S. § 14-202.5 is not an

unreasonable regulation and is constitutional as applied to defendant. *Cf. id.* at 550, 681 S.E.2d at 323.

Defendant also argues that N.C.G.S. § 14-202.5 is unconstitutionally overbroad. “In the First Amendment context, . . . this Court recognizes ‘a second type of facial challenge,’ whereby a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” *United States v. Stevens*, 559 U.S. 460, 473, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435, 447 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6, 128 S. Ct. 1184, 1190 n.6, 170 L. Ed. 2d 151, 160 n.6 (2008)). In *Broadrick v. Oklahoma*, the Court clarified the limited scope of the overbreadth doctrine, explaining that

the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from “pure speech” toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

413 U.S. 601, 615, 93 S. Ct. 2908, 2917-18, 37 L. Ed. 2d 830, 842 (1973). Because the

notion of striking a statute at the request of one to whom it otherwise unquestionably applies goes against the grain of “prudential limitations on constitutional adjudication,” *New York v. Ferber*, 458 U.S. 747, 767, 102 S. Ct. 3348, 3360, 73 L. Ed. 2d 1113, 1130 (1982), the Supreme Court of the United States has recognized that the doctrine is “strong medicine” to be administered only with caution and as a “last resort,” *id.* at 769, 102 S. Ct. at 3361, 73 L. Ed. 2d at 1130 (quoting *Broadrick*, 413 U.S. at 613, 93 S. Ct. at 2916, 37 L. Ed. 2d at 814). A party raising such a challenge “bears the burden of demonstrating, ‘from the text of [the law] and from actual fact,’ that substantial overbreadth exists.” *Virginia v. Hicks*, 539 U.S. 113, 122, 123 S. Ct. 2191, 2198, 156 L. Ed. 2d 148, 159 (2003) (alteration in original) (quoting *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 14, 108 S. Ct. 2225, 2234, 101 L. Ed. 2d 1, 17 (1988)). When a statute’s infringement on speech protected under the First Amendment is marginal, a finding of facial invalidity is inappropriate if the “remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.” *Ferber*, 458 U.S. at 770 n.25, 102 S. Ct. at 3362 n.25, 73 L. Ed. 2d at 1131 n.25 (alterations in original) (quoting *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 580-81, 93 S. Ct. 2880, 2898, 37 L. Ed. 2d 796, 817 (1973)).

In an overbreadth analysis, the reviewing court must “construe the challenged statute.” *United States v. Williams*, 553 U.S. 285, 293, 128 S. Ct. 1830, 1838, 170 L. Ed. 2d 650, 662 (2008). As detailed above in our analysis of the facial constitutionality

of the statute, we see that the statute is drafted carefully to limit its reach by establishing four specific criteria that must be met before access to a commercial social networking Web site is prohibited to a registered sex offender, N.C.G.S. § 14-202.5(b); that the statute exempts sites that are exclusively devoted to speech, *id.* § 14-202.5(c); and that the statute requires the State to prove that a registered sex offender knew the site permitted minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site, *id.* § 14-202.5(a). These factors ensure that registered sex offenders are prohibited from accessing only those Web sites where they could actually gather information about minors to target. Outside these limits, registered sex offenders are free to use the Internet.

Although this statute “may deter protected speech to some unknown extent,” *Broadrick*, 413 U.S. at 615, 93 S. Ct. at 2917, 37 L. Ed. 2d at 842, that effect can be characterized “at best [as] a prediction,” *id.*, 93 S. Ct. at 2917-18, 37 L. Ed. 2d at 842, and we “cannot, with confidence, justify invalidating [this] statute on its face,” *id.*, 93 S. Ct. at 2918, 37 L. Ed. 2d at 842, and prohibit the State from continuing to enforce a statute protecting such an important government interest, *id.* Given the reluctance with which courts administer the strong medicine of overbreadth, we conclude section 14-202.5 does not sweep too broadly in preventing registered sex offenders from accessing carefully delineated Web sites where vulnerable youthful users may congregate. As in *Broadrick*, “whatever overbreadth may exist should be cured

through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.” *Id.* at 615-16, 93 S. Ct. at 2918, 37 L. Ed. 2d at 842.

Finally, the State challenges the Court of Appeals holding that the statute is unconstitutionally vague. Laws that are not “clearly defined” are void for vagueness under the Due Process Clause. *See Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222, 227 (1972). Laws must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,” *id.* at 108, 92 S. Ct. at 2298-99, 33 L. Ed. 2d at 227, and must also provide sufficient clarity to prevent arbitrary and discriminatory enforcement, *see Petersilie*, 334 N.C. at 182, 432 S.E.2d at 839; *see also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). Vague laws chill free speech because “[u]ncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.’ ” *Grayned*, 408 U.S. at 109, 92 S. Ct. at 2299, 33 L. Ed. 2d at 228 (second alteration in original) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S. Ct. 1316, 1323, 12 L. Ed. 2d 377, 385 (1964)).

Vagueness cannot be raised by a defendant whose conduct falls squarely within the scope of the statute. *See Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 2562, 41 L. Ed. 2d 439, 458 (1974) (“One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.”); *see also Hoffman Estates*, 455 U.S. at 495, 102 S. Ct. at 1191, 71 L. Ed. 2d at 369 (“A plaintiff who engages in some conduct that

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is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.”). The Court of Appeals “assume[d] that persons of ordinary intelligence would likely interpret the statute as prohibiting access to mainstream commercial social networking sites such as *Facebook.com*.” *Packingham*, \_\_\_ N.C. App. at \_\_\_, 748 S.E.2d at 153. Whatever the status of other Web sites, no party disputes that Facebook.com, the site at issue here, falls under N.C.G.S. § 14-202.5’s definition of “commercial social networking Web site.” While an argument may be made that the statutory term “access” could be vague in other contexts, defendant’s logging into his Facebook account and posting a message on his page is unquestionably “accessing” Facebook.com. Defendant’s conduct defeats his vagueness claim.

Accordingly, we reverse the opinion of the Court of Appeals.

REVERSED.

Justice ERVIN did not participate in the consideration or decision of this case.



Justice HUDSON dissenting.

The majority concludes that N.C.G.S. § 14-202.5 (2013), which bars any registered sex offender from accessing any commercial social networking site on which he knows a minor can create or maintain a profile, is constitutional on its face and as applied to defendant. Because I conclude that the statute is unconstitutional on its face, I disagree with the majority's reversal of the Court of Appeals. More specifically, I conclude that section 14-202.5 is not narrowly tailored enough to withstand even intermediate scrutiny and that it is facially overbroad under the First Amendment. Accordingly, I respectfully dissent.

As an initial matter, I agree with the majority opinion to the extent it concludes that N.C.G.S. § 14-202.5, by proscribing access to commercial social networking sites, targets sites which are used for “gathering information and [as] means of communication.” However, I do not agree with the later assertion that the statute primarily regulates conduct and places only an “incidental” burden on speech. This statute completely bars registered sex offenders from communicating with others through many widely utilized commercial networking sites. Therefore, in my view, it primarily targets expressive activity usually protected by the First Amendment. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997) (observing that previous cases from that Court “provide no basis for qualifying the level of First Amendment scrutiny that should be applied” to online activities); *see also Brown v.*

*Entm't Merchs. Ass'n*, \_\_\_ U.S. \_\_\_, \_\_\_, 131 S. Ct. 2729, 2733 (2011) (“And whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary when a new and different medium for communication appears.” (citation and internal quotation marks omitted)).

The majority finds the “four-factor test from [*United States v. O’Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968)] instructive” in applying intermediate scrutiny to what it sees as an “incidental” burden on speech. *O’Brien* involved a regulatory ban on burning of a draft card, which the Court saw as conduct having a “communicative element.” *Id.* at 376, 88 S. Ct. at 1678. Because I read *O’Brien* to apply only where the restriction primarily targets expressive conduct, and because the statute at issue here necessarily burdens speech directly, I would not apply *O’Brien*’s four-factor test here. *See id.*, 88 S. Ct. at 1678-79 (“This Court has held that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”). Instead, I would analyze this statute as one that, by design and in effect, primarily and directly regulates First Amendment-protected activity, not conduct.

Because this statute primarily regulates speech (and other protected activity), I would apply the scrutiny applicable to restrictions on speech. *See, e.g., McCullen v. Coakley*, \_\_\_ U.S. \_\_\_, \_\_\_, 134 S. Ct. 2518, 2530 (2014); *Holder v. Humanitarian Law*

*Project*, 561 U.S. 1, 26-28, 130 S. Ct. 2705, 2723-24 (2010). According to these cases, the next step would be to determine whether the statute is content-based or content-neutral. Content-based restrictions are “presumptively unconstitutional” and can stand only if they survive strict scrutiny, the most difficult test in federal constitutional law. *McCullen*, \_\_\_ at \_\_\_, 134 S. Ct. 2530. In contrast, content-neutral measures that burden speech are subject to a form of intermediate scrutiny—a still difficult but less exacting analysis. *See id.* at \_\_\_, 134 S. Ct. 2530.

Here, applying the United States Supreme Court’s recent decision in *Reed v. Town of Gilbert*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2218 (2015), the majority concludes that N.C.G.S. § 14-202.5 is a content-neutral burden on conduct only incidentally affecting speech. While I think there is a strong argument in light of *Reed* that the statute is content-based because it prohibits registered sex offenders from accessing some websites, but not others, based on the content that appears on the sites, I do not think we need to resolve this question because I conclude that the law cannot withstand even intermediate scrutiny.

The intermediate scrutiny standard applicable to content-neutral regulations on speech requires the government to demonstrate, *inter alia*, that the restriction is “narrowly tailored to serve a significant governmental interest.” *McCullen*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 2534 (quoting *Ward v. Rock Against Racism*, 491 U.S.781, 796, 109 S. Ct. 2756, 2746 (1989)). More specifically,

[f]or a content-neutral time, place, or manner

regulation to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate [and significant] interests. Such a regulation, unlike a content-based restriction of speech, need not be the least restrictive or least intrusive means of serving the government's interests. But the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

*Id.* at \_\_\_, 134 S. Ct. at 2535 (citations and internal quotation marks omitted). In short, when a statute “burden[s] substantially more speech than necessary to achieve the [government’s] asserted interests,” it will fail this form of intermediate scrutiny. *Id.* at \_\_\_, 134 S. Ct. at 2537. Here, there is no dispute that the State’s purported concern—protecting minors from exploitation by registered sex offenders using the Internet—qualifies as a legitimate and significant government interest. The central question, then, is whether section 14-202.5 “burden[s] substantially more speech than necessary” in support of that interest. *Id.* at \_\_\_, 134 S. Ct. at 2537.

I conclude that it does. First, the statute as written sweeps too broadly regarding who is subject to its prohibitions. As noted, the State’s interest here is in protecting minors from registered sex offenders using the Internet. However, this statute applies to *all* registered offenders. *See* § 14-202.5(a) (“It is unlawful for a [registered] sex offender . . . to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.”). The statute is not restricted in application only to those whose offenses

harmed a minor or in some way involved a computer or the Internet, nor to those who have been shown to be particularly violent, dangerous, or likely to reoffend. This statute therefore groups together, without distinction, offenders whose history and past conduct directly implicate the State's concerns with those who do not. To the extent the statute does so, it "burden[s] . . . more speech than necessary to achieve the [State's] interests." *McCullen*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 2537.

Second, as written, the statute also sweeps far too broadly regarding the activity it prohibits. The majority asserts that the statute prohibits "registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors." But in fact, the statute contains no such limitation. Section 14-202.5 defines the term "commercial social networking Web site" as a website that (1) is operated by someone who derives revenue from the site; (2) facilitates "social introduction" or "information exchanges" between two or more people; (3) allows users "to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, [or] other personal information about the user . . . that may be accessed by other users or visitors" to the site; and (4) provides "users or visitors mechanisms to communicate with other users." N.C.G.S. § 14-202.5(b). I note in particular that the statute's description of a "personal profile[ ]," and the language "such as" when referring to the information that can appear in such profiles, could bring within the statute's scope many websites that allow users to register by

going through the minimal process of creating a username and adding an email address or telephone number. As a result, this definition clearly includes sites that are normally thought of as “social networking” sites, like Facebook, Google+, LinkedIn, Instagram, Reddit, and MySpace. However, the statute also likely includes sites like Foodnetwork.com, and even news sites like the websites for *The New York Times* and North Carolina’s own *News & Observer*. See *The News & Observer Terms of Service*, <http://www.newsobserver.com/customer-service/terms-of-service/> (last visited Oct. 22, 2015) (stating that “[i]f you are under eighteen (18) then you may only use NewsObserver.com with the consent of a parent or legal guardian” but not limiting registration on the site to adults). Most strikingly, the statute may even bar all registered offenders from visiting the sites of Internet giants like Amazon<sup>2</sup> and Google.

In short, however legitimate—even compelling—the State’s interest in protecting children might be, the plausible sweep of the statute as currently written “create[s] a criminal prohibition of alarming breadth,” *United States v. Stevens*, 559 U.S. 460, 474, 130 S. Ct. 1577, 1588 (2010), and extends well beyond the evils the State seeks to combat. I therefore conclude that N.C.G.S. § 14-202.5 “burden[s]

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<sup>2</sup> The statute does except from this definition any website that “[h]as as its primary purpose the facilitation of commercial transactions involving goods or services *between its members or visitors*.” N.C.G.S. § 14-202.5(c)(2) (emphasis added). However, as defendant argues, “Amazon’s primary purpose is to facilitate transactions *between Amazon itself and its visitors*, not between users of the Web site and other users.” (Emphasis added.) Accordingly, it appears that this exception does not actually apply to websites like Amazon, but only covers websites like Craigslist or eBay.

substantially more speech than necessary to achieve the [State's legitimate] interests," *McCullen*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 2537, and cannot survive even the intermediate scrutiny applied to content-neutral restrictions on speech.

In addition, for similar reasons, I conclude that this statute is also facially overbroad under the First Amendment. The overbreadth inquiry is very similar to the "narrow-tailoring" inquiry described above: First Amendment overbreadth doctrine requires a court to invalidate a statute that "prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292, 128 S. Ct. 1830, 1838 (2008). There is, however, one important nuance. Namely, while the Supreme Court of the United States has often invalidated specific applications of statutes under as-applied challenges, *see, e.g., McCullen*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 2528, 2541, that Court has also made clear that First Amendment doctrine specifically permits litigants to make facial challenges based on overbreadth, *see, e.g., Stevens*, 559 U.S. at 473, 130 S. Ct. at 1587 ("In the First Amendment context, however, this Court recognizes a second type of *facial* challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." (emphasis added) (citation and internal quotation marks omitted)); *Williams*, 553 U.S. at 292, 128 S. Ct. at 1838 ("According to our First Amendment overbreadth doctrine, a statute is *facially invalid* if it prohibits a substantial amount of protected speech." (emphasis added)). The Court has even noted that such a challenge is permitted when the challenger's

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*HUDSON, J., dissenting*

own conduct would clearly fall within the scope of the statute's prohibition and the claim is based only on how that statute might apply to the activity of others. *See, e.g., Humanitarian Law Project*, 561 U.S. at 20, 130 S. Ct. at 2719 (“[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the speech of others. [But s]uch a plaintiff may have a valid overbreadth claim under the First Amendment . . .”). In light of this precedent permitting such challenges, and for the reasons noted above, I would hold that the statute at issue here, N.C.G.S. § 14-202.5, is facially overbroad and therefore unconstitutional, regardless of its application in this specific case.

For the foregoing reasons, I conclude that N.C.G.S. § 14-202.5 is both insufficiently narrowly tailored to satisfy intermediate scrutiny and facially overbroad under the First Amendment. Because I disagree with the majority's conclusions to the contrary, I respectfully dissent.

Justice BEASLEY joins in this opinion.



## 1 Rights and Liabilities in Media Content § 4:5 (2d ed.)

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Chapter 4. Internet Media

### § 4:5. Section 230 and federal immunity for interactive computer services

#### References

West's Key Number Digest

- West's Key Number Digest, [Telecommunications](#) 🔑1340

The single most profound American legal policy impacting on the regulation of Internet media was the passage of § 230 of The Communications Decency Act.<sup>1</sup> [Section 230](#) reads in its entirety:

#### § 230. Protection for private blocking and screening of offensive material

##### (a) Findings

##### The Congress finds the following:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

##### (b) Policy

##### It is the policy of the United States—

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
  - (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
  - (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
  - (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
  - (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.
- (c) Protection for “good samaritan” blocking and screening of offensive material

##### (1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

##### (2) Civil liability

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No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph

**(d) Obligations of interactive computer service**

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

**(e) Effect on other laws**

**(1) No effect on criminal law**

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

**(2) No effect on intellectual property law**

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

**(3) State law**

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

**(4) No effect on Communications Privacy law**

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

**(f) Definitions**

As used in this section:

**(1) Internet**

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

**(2) Interactive computer service**

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

**(3) Information content provider**

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

**(4) Access software provider**

The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

In interpreting § 230, courts have tended to place special attention on the provision in section (c)(1) that states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>2</sup>

The entire statute, however, is important, and all of the sections should be read in relation to one another.

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Section 230 thus defines “Interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”<sup>3</sup>

In contrast, “information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>4</sup>

In the immediate aftermath of the passage of § 230, courts gave the provision a sweeping interpretation, and for several years all the momentum was in the direction of an expansive construction of the immunity, an expansion fueled in part by a celebratory mood regarding the wonders and possibilities of the Internet.<sup>5</sup> As more litigation and scholarly commentary on the appropriate scope of Internet immunity evolved, however, the mood began to change somewhat, as an increasing number of judges and scholars started to question whether Congress really did intend for § 230 to have the broad sweep that courts had given it.<sup>6</sup> Some judicial decisions began to craft exceptions to or narrower interpretations of the immunity, and many thoughtful commentators suggested that the time may have come for Congress itself to revisit the issue, in the interest of ensuring that the rule of law remains enforceable on the Internet.<sup>7</sup>

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Footnotes

<sup>1</sup> 47 U.S.C.A. § 230.

<sup>2</sup> 47 U.S.C.A. § 230(c)(1).

<sup>3</sup> 47 U.S.C.A. § 230(f)(2).

<sup>4</sup> 47 U.S.C.A. § 230(f)(3).

<sup>5</sup> See *infra* § 4:7.

<sup>6</sup> See *infra* § 4:8.

<sup>7</sup> See *infra* § 4:8.

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1 Rights and Liabilities in Media Content § 6:2 (2d ed.)

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Chapter 6. Defamation

§ 6:2. Defamatory meaning

References

West's Key Number Digest

- West's Key Number Digest, [Libel and Slander](#)  1

Treatises and Practice Aids

- [Internet Law and Practice § 24:14](#)
- Smolla, Law of Defamation §§ 4:1 to 4:15 (2d ed.)
- [Landau, Lindey on Entertainment, Publishing and the Arts § 4:3 \(3d ed.\)](#)

A substantial number of defamation suits turn on the issue of whether the words involved are capable of sustaining a defamatory meaning. The question “what is a defamatory statement?” has always been closely related to the traditional distinction in defamation law between statements of “fact” and statements of “opinion.”<sup>1</sup> Similarly, the notion of “defamatory meaning” is also linked to the doctrine that mere verbal abuse, insults, and rhetorical hyperbole are not actionable as defamation.<sup>2</sup>

Whatever definition of “defamatory meaning” is employed, it is clear that the statement must be significantly injurious to reputation to actually cause persons to think less of the plaintiff in some sense. To be accused of murder is one thing, to be accused of letting weeds grown in one’s yard another.<sup>3</sup>

The *Restatement Second, Torts* indicates that “a communication is defamatory if it tends so to harm the reputation of another as to lower him in the esteem of the community or to deter third persons from association or dealing with him.”<sup>4</sup> William Prosser emphasized a popular, commonsense definition, stating that which is defamatory “tends to injure ‘reputation’ in the popular sense, to diminish the esteem, respect, good-will, or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.”<sup>5</sup>

One popular approach is to define “defamatory” by stringing together a long litany of colorful pejoratives. Barron Parke’s definition is “a publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule.”<sup>6</sup> Following this example, one frequently encounters definitions of “defamatory” phrased in terms of a communication which “exposes any person to hatred, contempt, ridicule, or obloquy or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation.”<sup>7</sup> New York, not to be outdone, defines defamatory as “words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce [an] evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse [in] society.”<sup>8</sup> Despite the number of colorful variations, however, no complete comprehensive definition is possible, or even desirable,<sup>9</sup> for the essence of the term, whether stated in a long list of adjectives or a short and sweet capsule, is the tendency to injure reputation.<sup>10</sup> A statement is “defamatory” if it causes reputational harm to a plaintiff, holding the plaintiff up to scorn, ridicule, hatred, or contempt.<sup>11</sup> As is often the case in the law of torts, the general verbal formulas are of little practical use. Just as general definitions of negligence decide very few cases, general definitions of what is defamatory provide little intelligible guidance

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to the practical lawyer. The problem of what is “defamatory” is more realistically viewed as a collection of specialized rules developed in recurring situations.

Allegations about a plaintiff’s future conduct cannot be defamatory because they can amount to no more than the speaker’s opinion about what may happen in the future. (Allegations concerning future conduct may thus be held nonactionable either because they are inherently incapable of being defamatory or because they are always deemed opinion as a matter of law.) In *Shiver v. Apalachee Publishing Co.*,<sup>12</sup> for example, prior to an election a newspaper ran a fictional letter to the editor which alleged that the plaintiff (a political candidate) would engage in illegal or unethical conduct if he were to be elected. The alleged defamation took place in the form of a rhetorical question asking if the plaintiff, if elected, would engage in unethical activity. The court held that since the alleged fabrication was only speculation by the author regarding events that would take place in the future and was not even an affirmative assertion that those events would ever take place, the statement was not actionable. The court said that the rhetorical question was merely an opinion regarding a future event and as such could not be either true or false. Therefore, a libel action could not be sustained.<sup>13</sup>

While defamatory meaning is typically determined by the trial court and the jury applying their common sense to give the words their natural and reasonable construction,<sup>14</sup> at times expert testimony is offered to either advance or refute the allegedly defamatory meaning of a communication. In *Rudin v. Dow Jones & Co.*,<sup>15</sup> *Barron’s* had printed a headline referring to the plaintiff, an attorney, as a “mouthpiece” for Frank Sinatra. The plaintiff established that among attorneys, the term “mouthpiece” had a distinctly defamatory meaning.<sup>16</sup> One of the plaintiff’s witnesses was Justice Bruce Kauffman, a former justice of the Pennsylvania Supreme Court, who testified that the word “mouthpiece,” when used to describe an attorney, “clearly communicates one who is more concerned with fulfilling the directions and instructions of a client, usually a criminal client, and even more specifically an underworld client, and has little or no concern with the code of professional responsibility, the rules of court and the applicable law.”<sup>17</sup> In an aggressive and creative trial tactic, the plaintiff called as an expert witness a professor of psychology, who conducted two studies to determine the contrast, if any, between a reader’s impression of an attorney referred to as another’s “spokesman,” on the one hand, and an attorney referred to as another’s “mouthpiece,” on the other. In the first study, the psychologist analyzed responses from 89 persons interviewed in New York City’s financial district. Approximately half of those interviewed were given a questionnaire asking for their impression of an attorney referred to as “John Doe’s spokesman” in a headline over a letter to the editor. The remaining interviewers were given an identical questionnaire, except that “John Doe’s mouthpiece” was substituted for “John Doe’s spokesman.” The results of the study established that to a statistically significant degree the respondents rated “John Doe’s mouthpiece” as more negative than “John Doe’s spokesman.” In a second study the same procedure was used, but instead of the reference to John Doe, the questionnaires actually used Frank Sinatra’s name, asking the respondents for their reactions to the phrases “Sinatra’s spokesman” and “Sinatra’s mouthpiece.” The psychologist testified that the substitution of the name Sinatra for John Doe did not significantly affect the outcome of the study and that once again, the word “mouthpiece” created a statistically significant—more negative—impression on readers than did the word “spokesman.”

*Barron’s* presented its own expert, who also conducted a social science study. That study indicated that although “mouthpiece” was a “somewhat negative term,” it became significantly less negative when used in connection with Frank Sinatra’s name. The bottom-line conclusion of the defendant’s expert was that the difference between the ratings of the word “spokesman” and the word “mouthpiece” was less salient when used in conjunction with Sinatra’s name.

The court concluded that this battle of psycholinguistics research, as well as the expert testimony of a number of prestigious lawyers including Justice Kauffman, was still not enough to establish the plaintiff’s burden that the word “mouthpiece” would be understood as defamatory to the ordinary and average reader. The defendant had claimed that among most readers of *Barron’s*, the word “mouthpiece” would be seen as little more than a slang term for a lawyer, just as “sawbones” might be used for a member of the medical profession.<sup>18</sup> The court concluded that the word “mouthpiece” did not invariably convey a defamatory meaning, that its meaning can depend upon the context in which it appears. The court said that two factors led it to conclude that the evidence was insufficient to establish the claim of defamatory meaning. First, the witnesses clearly attributed a defamatory meaning to the word only when it was used of a lawyer. The plaintiff, however, was not identified as a lawyer in the publication, and readers were not likely to recall that the plaintiff was identified as a lawyer in an article that appeared two months earlier. Second, although the attorney’s testimony, standing alone, was not wholly irrelevant to the

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question of how *Barron's* readers viewed the caption, that testimony could not be viewed as persuasively establishing that *Barron's* readers were unlikely to have understood the word in the innocent sense of “spokesman.” With regard to the social science studies conducted by the two experts in the case, the court stated that they were intriguing examples of psycholinguistics research, but they, at best, provided ambiguous evidence as to how *Barron's* readers were likely to have perceived the disputed word. Although both studies tended to lend support to the conclusion that “mouthpiece” is generally perceived as a somewhat negative term, and certainly as a more negative term than “spokesman,” that was not enough to establish that the phrase was defamatory. To prevail in a defamation action it is necessary to demonstrate not only that the term applied to the plaintiff was more negative than a possible alternative but also that the word was understood by the ordinary reasonable reader as being defamatory.<sup>19</sup>

In *Robinson v. Radio One, Inc.*,<sup>20</sup> the court held that the false imputation of homosexuality was defamatory under Texas law. Falsely imputing homosexuality was justified as defamatory, the court reasoned, because prior to *Lawrence v. Texas*,<sup>21</sup> sodomy was criminalized. Despite the abrogation of anti-sodomy laws in *Lawrence* and advances in the rights of gays and lesbians in society, in the form of marriage equality, anti-discrimination laws, and societal acceptance of sexual minorities, the court held, “judicial caution requires the Court to acknowledge that the imputation of homosexuality might as a matter of fact expose a person to public hatred, contempt or ridicule.”<sup>22</sup>

The issue of defamatory meaning in defamation actions is often interwoven with other defenses that are simultaneously asserted, a tactic sometimes described as a “rolled up plea,” in which it is essentially asserted that everything a plaintiff cites as offending and actionable is either not defamatory, not factual (but instead opinion or hyperbole), or substantially true.<sup>23</sup>

A good example of the competing cross-currents in cases dealing with defamatory meaning is provided by the split decision of the United States Court of Appeals for the Second Circuit in *Chau v. Lewis*.<sup>24</sup> In *Chau* the Second Circuit dealt with a libel claim brought by Wing Chau against the author Michael Lewis. Chau was the manager of an investment firm, Harding Advisory LLC, that specialized in collateralized debt obligations. Lewis wrote a book, *The Big Short: Inside the Doomsday Machine*, dealing with the American housing market collapse in 2008–2009 and the global financial crisis that ensued in its aftermath.<sup>25</sup> As its title suggested, Lewis focused on “shorts.” Lewis investigated investors who shorted, or bet against, the subprime mortgage bond market at a time when most investors thought real estate prices would continue to rise, and thus, in the parlance of Wall Street, were in “long” positions.<sup>26</sup> One of the “iconoclasts” that the book depicted was Steve Eisman, who managed a hedge fund. Eisman also served as one of Lewis’s sources for the book. Chau’s defamation suit arose from passages in Chapter 6 of the book. Those passages included a description of a dinner conversation that took place in January 2007 at the Wynn Las Vegas Hotel during the 2007 American Securitization Forum.<sup>27</sup> Eisman was seated next to Chau at the dinner.<sup>28</sup> Chau argued that the account portrayed him as an example of those dealing with Collateralized Debt Obligations in a manner that was in violation of fiduciary obligations to clients, fraudulent, and unethical.

The Second Circuit panel was divided, 2-1, over whether the statements were actionable. The majority opinion, written by Judge Wesley, parsed each claimed defamatory statement, in what might be critically described as a divide and conquer methodology. Judge Wesley’s majority opinion held each statement non-actionable. These holdings were based on a variety of defamatory meaning doctrines, coupled with the substantial truth defense and the opinion defense. The majority thus embraced what in defamation lore was once known as a “rolled up plea,” a defensive posture that is based on the claim to the extent that offending statements are factual, they are true, and in all other respects they are merely non-actionable subjective characterizations or opinions. As the majority explained:

Chapter 6 of *The Big Short* portrays Chau as starting out from a series of simple finance-related jobs to becoming the founder and principal of a financial firm managing CDOs, which provided him with what many Americans hope for—great wealth. The market events of 2008 and 2009 may undoubtedly influence one’s perception as to whether going long on CDOs meant Chau was a fool, or Chau was a rube, or his motivations were avarice; but hindsight cannot give such opinions a defamatory meaning. Lewis’s various implications that Chau was wrong about the mortgage market are not actionable.<sup>29</sup>



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In sharp contrast, Judge Winter, in a vigorous and persuasive dissent, concluded just the opposite, holding that taken as a whole, the statements at issue in the book portrayed Chau as “admitting to acts that a jury could easily find to have breached his obligations to investors in the fund that employed him and to have constituted civil or criminal fraud.”<sup>30</sup> As Judge Winter saw it, the majority had improperly removed the alleged defamatory statements from their context, artificially stripping them of the factual defamatory meaning they naturally carried:

Appellant is the only CDO manager mentioned by name in the relevant chapter of the book and is depicted as the poster child for the CDO managers described above. Appellant is portrayed as lining his own pockets and foisting doomed-to-fail portfolios upon investors. Although he was paid to monitor the amount of risk in the fund’s portfolio, he worried only about volume because he was paid by volume. And, knowing that the default rate of residential mortgages was sufficient to wipe out the fund’s holdings, appellant sold all his interests in the fund, passing all the risk to the fund’s investors, who believed he was monitoring that risk. The portrayal of the appellant is particularly graphic because it purports to show his state of mind and his actions out of his own mouth.<sup>31</sup>

*Chau* stands as a vivid illustration of key fault lines in contemporary defamation law. Defendants in defamation suits naturally tend to gravitate to a divide and conquer mode of analysis. When considered in isolation, it is often easier to pick off such statements as literally true, or as opinion. Often (though not always) the trick of isolating statements renders them more vulnerable to the defenses of substantial truth, or opinion, or as devoid of any actionable defamatory meaning. In contrast, plaintiffs generally tend to emphasize the overall portraiture of a publication, arguing that often the sum is greater than the parts. Through approaches such as defamation by implication, for example, plaintiffs invite courts to judge publications by their overall impact on the average reader.

This dynamic is not any absolute rule, of course. There may be situations in which the strategies are reversed, and defendants benefit from the overall gestalt meaning of publication, while plaintiffs benefit from taking specific negative statements in isolation.

Whatever the dynamic, the sound approach for courts is to consider both isolated statements that plausibly stand alone (headlines are strong examples), and the overall meaning and context, to ask what the impact of the publication would have been on an average reader or viewer.<sup>32</sup> To be actionable the false statement must be something that would actually alter someone’s reputation in the community, as opposed to a triviality that no segment of the community would care about.<sup>33</sup>

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Footnotes

<sup>1</sup> See *infra* § 6:17. See also *Mink v. Knox*, 613 F.3d 995, 38 Media L. Rep. (BNA) 1961 (10th Cir. 2010) (To determine whether a statement purports to state actual facts about an individual a court scrutinizes the meaning of the statement in context.); *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 93386, 961 N.E.2d 380, 39 Media L. Rep. (BNA) 2697 (Ill. App. Ct. 1st Dist. 2011) (To determine whether a statement is protected by the First Amendment in a defamation action, the test is whether the statement can reasonably be interpreted as stating a fact, considering: (1) whether the statement has a readily understood and precise meaning; (2) whether the statement can be verified; and (3) whether its social or literary context signals that it has factual content.). See also *Bertrand v. Mullin*, 846 N.W.2d 884, 889, 42 Media L. Rep. (BNA) 1940 (Iowa 2014) (“The tort recognizes ‘[i]t is the thought conveyed, not the words, that does the harm.’”), quoting *Turner v. Brien*, 184 Iowa 320, 326, 167 N.W. 584, 586, 3 A.L.R. 1585 (1918) (overruled in part by, *Ragland v. Household Finance Corp.*, 254 Iowa 976, 119 N.W.2d 788, 99 A.L.R.2d 694 (1963)); *Ragland v. Household Finance Corp.*, 254 Iowa 976, 981, 119 N.W.2d 788, 791, 99 A.L.R.2d 694 (1963).

<sup>2</sup> See *infra* § 6:21. See also *Schaecher v. Bouffault*, 772 S.E.2d 589 (Va. 2015) (Defamatory words are those

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“tend[ing] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”), quoting *Restatement Second, Torts* § 559; and citing *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092, 21 Media L. Rep. (BNA) 1449 (4th Cir. 1993) (applying Virginia law).

<sup>3</sup> *Kurowski v. Burroughs*, 994 A.2d 611, 210 Pa. Super. 69, (Pa.Super. 2010) (holding that false accusations of “[b]eing cited for a weeds violation ... is not so weighty and severe as to constitute injury sufficient to support a cause of action for defamation”); *Brokers’ Choice of America, Inc. v. NBC Universal, Inc.*, 2014 WL 3307834 (10th Cir. 2014) (“A statement may be defamatory if it tends ... to harm the reputation of another [so] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”), quoting *Burns v. McGraw-Hill Broadcasting Co., Inc.*, 659 P.2d 1351, 1357, 9 Media L. Rep. (BNA) 1257 (Colo. 1983) (quotation marks omitted); *Graboff v. Collieran Firm*, 744 F.3d 128, 136, 42 Media L. Rep. (BNA) 1545 (3d Cir. 2014) (“A statement is defamatory if ‘it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.’ ... But the statement must do more than merely embarrass or annoy the plaintiff; it must provoke ‘the kind of harm which has grievously fractured [one’s] standing in the community of respectable society.’”), quoting *Tucker v. Philadelphia Daily News*, 577 Pa. 598, 848 A.2d 113, 124, 32 Media L. Rep. (BNA) 1705 (2004), quoting *Scott-Taylor, Inc. v. Stokes*, 425 Pa. 426, 229 A.2d 733, 734 (1967); *Schaecher v. Bouffault*, 772 S.E.2d 589, 593 (Va. 2015) (“Characterizing the level of harm to one’s reputation required for defamatory ‘sting,’ we have stated that defamatory language ‘tends to injure one’s reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous.’”), quoting *Moss v. Harwood*, 102 Va. 386, 392, 46 S.E. 385 (1904); and citing *Adams v. Lawson*, 58 Va. 250, 255–56, 17 Gratt. 250, 1867 WL 2890 (1867) (“It is sufficient if the language tends to injure the reputation of the party, to throw contumely, or to reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule or contempt.”); *Moseley v. Moss*, 47 Va. 534, 538, 6 Gratt. 534, 1850 WL 3029 (1850) (actionable defamation “tend[s] to make the party subject to disgrace, ridicule, or contempt”); *Pan Am Systems, Inc. v. Atlantic Northeast Rails and Ports, Inc.*, 804 F.3d 59, 64, 43 Media L. Rep. (BNA) 3004 (1st Cir. 2015) (“A statement is defamatory if it tends to harm the reputation of another either by lowering the esteem in which he is held or by discouraging others from associating with him.”), citing *Bakal v. Weare*, 583 A.2d 1028, 1029 (Me. 1990).

<sup>4</sup> *Restatement Second, Torts* § 559 (1977). See also *QSP, Inc. v. Aetna Cas. and Sur. Co.*, 256 Conn. 343, 773 A.2d 906, 2001-1 Trade Cas. (CCH) ¶ 73294 (2001) (A communication is defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.); *Starr v. Boudreaux*, 978 So. 2d 384, 36 Media L. Rep. (BNA) 2499 (La. Ct. App. 1st Cir. 2007) (“Defamatory words are, by definition, words which tend to harm the reputation of another so as to lower the person in the estimation of the community, to deter others from associating or dealing with the person, or otherwise expose the person to contempt or ridicule.”). See also *Lott v. Levitt*, 556 F.3d 564, 568, 37 Media L. Rep. (BNA) 1257 (7th Cir. 2009) (“Defamation is the publication of a false statement that ‘tends to harm a person’s reputation to the extent that it lowers that person in the eyes of the community or deters others from associating with that person.’”), citing *Tuite v. Corbitt*, 224 Ill. 2d 490, 310 Ill. Dec. 303, 866 N.E.2d 114, 121, 35 Media L. Rep. (BNA) 1193 (2006). ; *McNally v. University of Hawaii*, 2011 WL 322533 (D. Haw. 2011) (“[w]hether a communication is defamatory ‘depends, among other factors, upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place.’”) quoting *Fernandes v. Tenbruggencate*, 65 Haw. 226, 228, 649 P.2d 1144, 1147, 8 Media L. Rep. (BNA) 2577 (1982) quoting *Fernandes v. Tenbruggencate*, 65 Haw. 226, 228, 649 P.2d 1144, 1147, 8 Media L. Rep. (BNA) 2577 (1982). See also *W.J.A. v. D.A.*, 210 N.J. 229, 238, 43 A.3d 1148, 40 Media L. Rep. (BNA) 1830 (2012) (“[A] statement is defamatory if it is false, communicated to a third person, and tends to lower the subject’s reputation in the estimation of the community or to deter third persons from associating with him.”), quoting *Lynch v. New Jersey Educ. Ass’n*, 161 N.J. 152, 164–65, 735 A.2d 1129 (1999) (citing *Restatement (Second) of Torts* §§ 558, 559 (4th ed. 1977); *State Farm Fire & Cas. Co. v. Radcliff*, 987 N.E.2d 121, 137 (Ind. Ct. App. 2013) (“A defamatory communication is defined as one that tends ‘to harm a person’s reputation by lowering the person in the community’s estimation or deterring third persons from dealing or associating with the person.’”), quoting *Dugan v. Mittal Steel USA Inc.*, 929 N.E.2d 184, 186, 30 I.E.R. Cas. (BNA) 1607, 159 Lab. Cas. (CCH) P 61014 (Ind. 2010) (quotation omitted) and *Journal-Gazette Co., Inc. v. Bandido’s, Inc.*, 712 N.E.2d 446, 451, 27 Media L. Rep. (BNA) 2089 (Ind. 1999); *Scholz v. Delp*, 83 Mass. App. Ct. 590, 593, 988 N.E.2d 4 (2013) (“A false statement that ‘would tend to hold the



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plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community,' would be considered defamatory.'"), quoting *Phelan v. May Dept. Stores Co.*, 443 Mass. 52, 56, 819 N.E.2d 550, 22 I.E.R. Cas. (BNA) 137 (2004) and *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 853, 330 N.E.2d 161 (1975); *Gressett v. Contra Costa County*, 2013 WL 2156278 (N.D. Cal. 2013) ("To sustain a cause of action for defamation, a plaintiff must demonstrate the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage."), citing *Ringler Associates Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1179, 96 Cal. Rptr. 2d 136, 29 Media L. Rep. (BNA) 1033 (1st Dist. 2000).

Prosser and Keeton on the Law of Torts § 111 p 773.

*Parmiter v. Coupland*, 6 M. & W. 105, 109, 151 Eng. Rep. 340, 342 (1840), quoted in *Eldredge, The Law of Defamation* § 7, at 31 (1978).

*Gallagher v. Johnson*, 188 Mont. 117, 611 P.2d 613, 6 Media L. Rep. (BNA) 1793 (1980); *Zetes v. Stephens*, 108 A.D.3d 1014, 969 N.Y.S.2d 298 (4th Dep't 2013) (statement that plaintiff made several threats was such as to tend to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or to induce an evil opinion of him in the minds of right-thinking persons)..

*Kimmerle v. New York Evening Journal*, 262 N.Y. 99, 102, 186 N.E. 217 (1933). *See also* *Boule v. Hutton*, 138 F. Supp. 2d 491, 504, 2001-2 Trade Cas. (CCH) ¶ 73396 (S.D. N.Y. 2001), *aff'd* in part, *vacated* in part on other grounds, 328 F.3d 84, 31 Media L. Rep. (BNA) 1793, 66 U.S.P.Q.2d 1659, 2003-2 Trade Cas. (CCH) ¶ 74095 (2d Cir. 2003) (The gravamen of a defamation claim is an injury to reputation; exposing one "to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or ... induces an evil opinion of one in the minds of right-thinking persons, and ... deprives one of ... confidence and friendly intercourse in society."); *Robins v. National Enquirer, Inc.*, 23 Media L. Rep. (BNA) 2562, 1995 WL 776708 (D.S.C. 1995) (statements in magazine article that plaintiff granted defendant an exclusive interview and that plaintiff's banter with ex-lover of woman who drowned her children may have led to woman's acts were not defamatory because they did not make plaintiff appear odious, infamous, or ridiculous); *Biro v. Conde Nast*, 883 F. Supp. 2d 441 (S.D. N.Y. 2012) (quoting *Kimmerle v. New York Evening Journal*, 262 N.Y. 99, 102, 186 N.E. 217 (1933)), and, citing *Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 113, 23 I.E.R. Cas. (BNA) 725, 33 Media L. Rep. (BNA) 2281 (2d Cir. 2005) ("A statement that tends to injure another in his or her trade, business or profession is defamatory per se."); *Shay v. Walters*, 702 F.3d 76 (1st Cir. 2012) ("A communication is susceptible to defamatory meaning if it 'would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community.'") quoting *Phelan v. May Dept. Stores Co.*, 443 Mass. 52, 819 N.E.2d 550, 553, 22 I.E.R. Cas. (BNA) 137 (2004)).

*See Newell v. Field Enterprises, Inc.*, 91 Ill. App. 3d 735, 47 Ill. Dec. 429, 415 N.E.2d 434, 6 Media L. Rep. (BNA) 2450, 20 A.L.R.4th 551 (1st Dist. 1980) ("each case must be decided on its own facts"); *Galvin v. Gallagher*, 81 Ill. App. 3d 927, 37 Ill. Dec. 150, 401 N.E.2d 1243, 6 Media L. Rep. (BNA) 1030 (1st Dist. 1980) (same); *Catalano v. Pechous*, 69 Ill. App. 3d 797, 805, 25 Ill. Dec. 838, 387 N.E.2d 714, 721, 4 Media L. Rep. (BNA) 2094 (1st Dist. 1978), judgment *aff'd*, 83 Ill. 2d 146, 50 Ill. Dec. 242, 419 N.E.2d 350, 6 Media L. Rep. (BNA) 2511 (1980) (same).

*See, e.g., Lee v. Bankers Trust Co.*, 166 F.3d 540, 546, 14 I.E.R. Cas. (BNA) 1389 (2d Cir. 1999) (New Jersey examines three key factors for the analysis of defamatory meaning. It views the factors of content, verifiability, and context as essential to a court's assessment. The content factor requires a court to consider the fair and natural meaning. The verifiability factor concerns whether the statement was objective or subjective, and the context factor invokes consideration of the impression of the statement and the general tenor of the expression); *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 4 Media L. Rep. (BNA) 2356 (E.D. Mich. 1979); *Burns v. McGraw-Hill Broadcasting Co., Inc.*, 659 P.2d 1351, 9 Media L. Rep. (BNA) 1257 (Colo. 1983); *Byars v. Kolodziej*, 48 Ill. App. 3d 1015, 1017, 6 Ill. Dec. 814, 363 N.E.2d 628, 630, 2 Media L. Rep. (BNA) 2327 (4th Dist. 1977); *Denny v. Mertz*, 84 Wis. 2d 654, 267 N.W.2d 304, 4 Media L. Rep. (BNA) 1153 (1978).

*South Middlesex Opportunity Council, Inc. v. Town of Framingham*, 2010 WL 3607481 (D. Mass. 2010) (A statement is "defamatory" under Massachusetts law if it could be read as discrediting the plaintiff in the minds of

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any considerable and respectable class of the community; defamatory statement holds the plaintiff up to scorn, hatred, ridicule, or contempt.).

Shiver v. Apalachee Pub. Co., 425 So. 2d 1173, 9 Media L. Rep. (BNA) 1053 (Fla. Dist. Ct. App. 1st Dist. 1983).

Shiver v. Apalachee Pub. Co., 7 Media L. Rep. (BNA) 2160, 2162 (Fla. Cir. Ct. 1981), *aff'd*, 425 So. 2d 1173, 9 Media L. Rep. (BNA) 1053 (Fla. Dist. Ct. App. 1st Dist. 1983).

*See infra* § 6:3.

Rudin v. Dow Jones & Co., Inc., 557 F. Supp. 535, 9 Media L. Rep. (BNA) 1305 (S.D. N.Y. 1983).

Rudin v. Dow Jones & Co., Inc., 557 F. Supp. 535, 537–40, 9 Media L. Rep. (BNA) 1305 (S.D. N.Y. 1983).

Rudin v. Dow Jones & Co., Inc., 557 F. Supp. 535, 537–40, 9 Media L. Rep. (BNA) 1305 (S.D. N.Y. 1983).

Rudin v. Dow Jones & Co., Inc., 557 F. Supp. 535, 541–45, 9 Media L. Rep. (BNA) 1305 (S.D. N.Y. 1983).

Rudin v. Dow Jones & Co., Inc., 557 F. Supp. 535, 541–45, 9 Media L. Rep. (BNA) 1305 (S.D. N.Y. 1983). For an interesting example of the use of a linguistics expert to attempt to demonstrate the absence of defamatory meaning, *see* Fong v. Merena, 66 Haw. 72, 655 P.2d 875, 877 (1982).

Robinson v. Radio One, Inc., 695 F.Supp.2d 425 (N.D. Tex. 2010).

Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (invalidating state statute criminalizing same-sex sexual conduct).

Robinson v. Radio One, Inc., 695 F.Supp.2d 425, 428 (N.D. Tex. 2010).

*See* Biro v. Conde Nast, 883 F. Supp. 2d 441 (S.D. N.Y. 2012) (“Defendants make several overlapping arguments that each of the allegedly defamatory statements is not actionable as a matter of law. Specifically, they argue that the allegedly defamatory statements (1) are not susceptible of a defamatory connotation or are substantially true; (2) constitute nonactionable statements of opinion; (3) are based on unchallenged statements of fact and are not actionable as a result of any defamatory implication; and/or (4) are protected as fair and true reports of judicial proceedings.”).

Chau v. Lewis, 771 F.3d 118, 42 Media L. Rep. (BNA) 2728 (2d Cir. 2014).

Chau v. Lewis, 771 F.3d 118, 122, 42 Media L. Rep. (BNA) 2728 (2d Cir. 2014).

Chau v. Lewis, 771 F.3d 118, 122, 42 Media L. Rep. (BNA) 2728 (2d Cir. 2014).

Chau v. Lewis, 771 F.3d 118, 122, 42 Media L. Rep. (BNA) 2728 (2d Cir. 2014).

Chau v. Lewis, 771 F.3d 118, 122, 42 Media L. Rep. (BNA) 2728 (2d Cir. 2014).

Chau v. Lewis, 771 F.3d 118, 131, 42 Media L. Rep. (BNA) 2728 (2d Cir. 2014).

Chau v. Lewis, 771 F.3d 118, 132, 42 Media L. Rep. (BNA) 2728 (2d Cir. 2014) (Winter, J. dissenting).

Chau v. Lewis, 771 F.3d 118, 133, 42 Media L. Rep. (BNA) 2728 (2d Cir. 2014) (Winter, J. dissenting).

*See* Hogan v. Winder, 762 F.3d 1096, 1105, 38 I.E.R. Cas. (BNA) 1463 (10th Cir. 2014) (“Words that appear at first blush to convey a defamatory meaning may be explained away as innocuous when their context is made clear. Conversely, words innocent on their face may, when explained in context, convey a defamatory meaning.”), quoting West v. Thomson Newspapers, 872 P.2d 999, 1011 n.18, 23 Media L. Rep. (BNA) 1097 (Utah 1994),

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quoting Smolla, Law of Defamation 2d § 4:5(1).

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[Schaecher v. Bouffault, 772 S.E.2d 589, 595–96 \(Va. 2015\)](#) (“The mere implication that one might be in violation of an easement, absent more—such as inflammatory language or context to suggest that the statement causes particular harm to one’s reputation—does not rise to the level of defamation. It does not so ‘harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him,’ ... such as by making the plaintiff appear odious, infamous, or ridiculous, or subjecting her to contempt, scorn, shame, or disgrace.”).

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## 1 Law of Defamation § 1:34 (2d ed.)

Law of Defamation | November 2016 Update  
Rodney A. Smolla

Part I. Defamation  
Chapter 1. Overview

### § 1:34. Elements of the modern cause of action

#### References

There is simply no way succinctly to state the elements of a modern cause of action for defamation, because the constitutional minimums that apply to the tort differ depending on the public or private status of the plaintiff and the public or private status of the speech. Individual states, furthermore, are free to establish fault levels above minimum constitutional requirements. Finally, states follow many different approaches as to when they impose the requirement of special harm. The following list contains all the principal elements that are possible in a modern cause of action for defamation. There are notations, where appropriate, indicating situations in which an element may be unnecessary. Depending on the circumstances and jurisdiction, the modern action for defamation includes some or all of the following elements:

- (1) a statement of fact;
- (2) that is false;
- (3) and defamatory;
- (4) of and concerning the plaintiff;
- (5) that is published to a third party (other than the plaintiff and defendant);
- (6) not absolutely or conditionally privileged;
- (7) that causes actual injury (this requirement is sometimes obviated by the device known as presumed harm, which remains available in certain cases);
- (8) that is the result of fault by the defendant (this requirement is also waived in certain cases, which may be governed by strict liability; when “fault” is required it may range from “actual malice” to ordinary negligence, depending on the circumstances and jurisdiction);
- (9) that causes special (pecuniary) harm in addition to generalized reputational injury (this requirement is often excused, if under the law of the state the defamation involved is categorized as “libel per se” or “slander per se”).

It is common to see opinions reciting some or all of these elements within a particular jurisdiction as comprising the cause of action for libel, though given the complexity of modern First Amendment overlays on the common-law cause of action, such formulations are often incomplete portraits of the actual burdens that rest upon a plaintiff.<sup>1</sup>

The interrelationships among the elements are such that they are not necessarily best explained in the order in which they appear on the list above. Some of these elements are common-law requirements; others are imposed (depending on the circumstances) by the Constitution. Because the application of the common-law rules is no longer intelligible without a thorough understanding of constitutional requirements, Chapters 2 (§§ 2:1 et seq.) and 3 (§§ 3:1 et seq.) begin by establishing the basic constitutional fault rules in the modern law of defamation, discussing the critical public figure/private figure dichotomy and the problems of proving the existence of actual malice and negligence. (Because of the exceptional importance of the principal Supreme Court decisions in this area, the first nine sections of Chapter 2 (§§ 2:1 to 2:9) cover the primary Supreme Court cases in substantial detail.) Chapter 4 (§§ 4:1 et seq.) encompasses the technical common-law

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requirements of the cause of action: defamatory meaning, the “of and concerning” the plaintiff requirement, and publication. Chapters 5 (§§ 5:1 et seq.) and 6 deal with the related issues of truth and the fault/opinion distinction, respectively, and Chapter 7 (§§ 7:1 et seq.) covers the confusing special harm rules. The many absolute and conditional common-law privileges are discussed in Chapter 8 (§§ 8:1 et seq.), and the coverage of defamation is concluded in Chapter 9 (§§ 9:1 et seq.) with an explanation of modern rules governing damages and other remedies.

Political speech thus occupies a unique place in the constitutional constellation, and that special placement manifests itself in many different doctrinal contexts. In procedural matters, for example, courts are particularly likely to find harm irreparable in circumstances in which the timing of a political statement is important in relation to impending political events.<sup>11</sup>

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Footnotes

<sup>1</sup> See, e.g., *Henderson v. Walled Lake Consol. Schools*, 469 F.3d 479, 494, 214 Ed. Law Rep. 473, 2006 FED App. 0426P (6th Cir. 2006) (“The elements of a cause of action for libel are: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication.”), quoting *Linebaugh v. Sheraton Michigan Corp.*, 198 Mich. App. 335, 338, 497 N.W.2d 585, 61 Fair Empl. Prac. Cas. (BNA) 1093 (1993). See also *Hyland v. Raytheon Technical Services Co.*, 277 Va. 40, 75 Va. Cir. 497, 670 S.E.2d 746, 28 I.E.R. Cas. (BNA) 1173 (2009) (“Generally, under our common law, a private individual asserting a claim of defamation first must show that a defendant has published a false factual statement that concerns and harms the plaintiff or the plaintiff’s reputation.”), citing *WJLA-TV v. Levin*, 264 Va. 140, 152–54, 564 S.E.2d 383, 390–91, 30 Media L. Rep. (BNA) 2249 (2002); *Gazette, Inc. v. Harris*, 229 Va. 1, 15, 37, 325 S.E.2d 713, 725, 738, 23 Ed. Law Rep. 332, 11 Media L. Rep. (BNA) 1609, 54 A.L.R.4th 685 (1985); *Allen v. ASRC Communication*, 2010 WL 1404179 (E.D. Mo. 2010) (“Under Missouri law, in a defamation claim, a plaintiff must establish: ‘1) publication, 2) of a defamatory statement, 3) that identifies the plaintiff, 4) that is false, 5) that is published with the requisite degree of fault, and 6) damages the plaintiff’s reputation.’”), citing *Johnson v. Allstate Indem. Co.*, 278 S.W.3d 228 (Mo. Ct. App. E.D. 2009), quoting *State ex rel. BP Products North America Inc. v. Ross*, 163 S.W.3d 922, 929 (Mo. 2005); see also *Ruzicka Elec. and Sons, Inc. v. International Broth. of Elec. Workers, Local 1, AFL-CIO*, 427 F.3d 511, 522, 178 L.R.R.M. (BNA) 2193, 151 Lab. Cas. (CCH) P 10552 (8th Cir. 2005); *South Middlesex Opportunity Council, Inc. v. Town of Framingham*, 752 F. Supp. 2d 85 (D. Mass. 2010) (under Massachusetts law, defamation plaintiff must prove that the publication of the defamatory statement was a material element or substantial cause of the damages); *Chandok v. Klessig*, 632 F.3d 803, 814 (2d Cir. 2011) (“New York law allows a plaintiff to recover for defamation by proving that the defendant published to a third party a defamatory statement of fact that was false, was made with the applicable level of fault, and either was defamatory per se or caused the plaintiff special harm, so long as the statement was not protected by privilege.”) citing *Albert v. Loksen*, 239 F.3d 256, 265–66, 17 I.E.R. Cas. (BNA) 361, 142 Lab. Cas. (CCH) P 59148 (2d Cir. 2001); *Art of Living Foundation v. Does*, 2011 WL 2441898 (N.D. Cal. 2011) (“The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage.”), citing *Wong v. Tai Jing*, 189 Cal. App. 4th 1354, 1369, 117 Cal. Rptr. 3d 747 (6th Dist. 2010); *McNally v. University of Hawaii*, 2011 WL 322533 (D. Haw. 2011) (“To prove defamation under Hawaii law, McNally must establish four elements: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) negligence by the publisher; and (4) either actionability of the statement irrespective of special harm, or the existence of special harm caused by the publication.”), citing *Wilson v. Freitas*, 121 Haw. 120, 128, 214 P.3d 1110 (Ct. App. 2009), as amended, (Aug. 4, 2009) and cert. rejected, 2009 WL 4686526 (Haw. 2009); *McReady v. O’Malley*, 2011 WL 1258136 (D. Md. 2011) (“To establish a prima facie case of defamation when the plaintiff is not a public figure, the plaintiff must prove: (1) that the defendant made a defamatory communication to a third person; (2) that the statement was false; (3) that the defendant was at fault in communicating the statement; and (4) that the plaintiff suffered harm.”), quoting *Samuels v. Tschechelin*, 135 Md. App. 483, 763 A.2d 209, 242, 149 Ed. Law Rep. 784 (2000); *West v. Morehead*, 2011 WL 4025724 (S.C. Ct. App. 2011) (“To establish a defamation claim, a plaintiff must prove: (1) a false and defamatory statement was made; (2) the unprivileged statement was

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published to a third party; (3) the publisher was at fault; and (4) either the statement was actionable regardless of harm or the publication of the statement caused special harm.”) *Erickson v. Jones Street Publishers, L.L.C.*, 368 S.C. 444, 465, 629 S.E.2d 653, 664, 34 Media L. Rep. (BNA) 1610 (2006)); *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002); *Hanks v. Wavy Broadcasting, LLC*, 40 Media L. Rep. (BNA) 1424, 2012 WL 405065 (E.D. Va. 2012). (“The elements of libel are (1) publication of (2) an actionable statement with (3) the requisite intent.”) quoting *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092, 21 Media L. Rep. (BNA) 1449 (4th Cir. 1993); *Shay v. Walters*, 702 F.3d 76 (1st Cir. 2012) (“To establish a defamation claim under Massachusetts law, four elements are required: (1) that ‘[t]he defendant made a statement, concerning the plaintiff, to a third party’; (2) that the statement was defamatory such that it ‘could damage the plaintiff’s reputation in the community’; (3) that ‘[t]he defendant was at fault in making the statement’; and (4) that ‘[t]he statement either caused the plaintiff economic loss ... or is actionable without proof of economic loss.’”), quoting *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 782 N.E.2d 508, 510–11, 16 A.L.R.6th 815 (2003); *Krajewski v. Gusoff*, 2012 PA Super 166, 53 A.3d 793 (2012) (In an action for defamation, the plaintiff must prove: (1) the defamatory character of the communication; (2) publication by the defendant; (3) its application to the plaintiff; (4) understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of it as intended to be applied to plaintiff; (6) special harm to the plaintiff; (7) abuse of a conditionally privileged occasion.); *Hogan v. Winder*, 2012 WL 4356326 (D. Utah 2012) (To state a claim for defamation, a plaintiff must establish “that the defendants published the statements concerning him, that the statements were false, defamatory, and not subject to any privilege, that the statements were published with the requisite degree of fault, and that their publication resulted in damage.” “[A] statement is defamatory if it impeaches an individual’s honesty, integrity, virtue, or reputation and thereby exposes the individual to public hatred, contempt, or ridicule.”); *Heyward v. Credit Union Times*, 2012 WL 6632764 (D.N.M. 2012) (“Under New Mexico law, a prima-facie case of the tort of defamation includes: (i) a published communication by the defendant; (ii) the communication includes an asserted statement of fact; (iii) the communication was concerning the plaintiff; (iv) the statement of fact is false; (v) the communication was defamatory; (vi) the persons receiving the communication understood it to be defamatory; (vii) the defendant knew the communication was false or negligently failed to recognize that it was false, or acted with malice; (viii) the communication caused actual injury to the plaintiff’s reputation; and (ix) the defendant abused its privilege to publish the communication.”), citing N.M. Civ. U.J.I. 13-1002(B) N.M.R.A.); *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 429, 773 P.2d 1231, 1236, 4 I.E.R. Cas. (BNA) 562 (1989) (“Generally, the elements of a defamation action include: a defamatory communication, published by the defendant, to a third person, of an asserted fact, of and concerning the plaintiff, and proximately causing actual injury to the plaintiff.”); *Biro v. Conde Nast*, 883 F. Supp. 2d 441 (S.D. N.Y. 2012) (“Under New York law, a plaintiff must establish five elements to recover in libel: (1) a written defamatory statement of fact concerning the plaintiff; (2) publication to a third party; (3) fault (either negligence or actual malice depending on the status of the libeled party); (4) falsity of the defamatory statement; and (5) special damages or per se actionability (defamatory on its face).”), quoting *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 176 (2d Cir. 2000); *Gressett v. Contra Costa County*, 2013 WL 2156278 (N.D. Cal. 2013) (“To sustain a cause of action for defamation, a plaintiff must demonstrate the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage.”), citing *Ringler Associates Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1179, 96 Cal. Rptr. 2d 136, 29 Media L. Rep. (BNA) 1033 (1st Dist. 2000); *Bierman v. Weier*, 826 N.W.2d 436, 444, 41 Media L. Rep. (BNA) 1320 (Iowa 2013) (“Libel per se statements have ‘a natural tendency to provoke the plaintiff to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse.’”) (internal citations omitted); *Duc Tan v. Le*, 300 P.3d 356, 363 (Wash. 2013) (“A defamation action consists of four elements: (1) a false statement, (2) publication, (3) fault, and (4) damages.”) citing *Herron v. KING Broadcasting Co.*, 112 Wash. 2d 762, 768, 776 P.2d 98, 17 Media L. Rep. (BNA) 1289 (1989) (holding modified by, *Richmond v. Thompson*, 130 Wash. 2d 368, 922 P.2d 1343 (1996)); *Tharpe v. Saunders*, 285 Va. 476, 737 S.E.2d 890, 892, 41 Media L. Rep. (BNA) 1505 (2013) (“The elements of defamation are ‘(1) publication of (2) an actionable statement with (3) the requisite intent.’”), quoting *Jordan v. Kollman*, 269 Va. 569, 575, 612 S.E.2d 203, 206 (2005); *Mills v. Iowa*, 2013 WL 617019 (S.D. Iowa 2013) (“To state a claim for defamation, Plaintiff must establish the following prima facie elements: 1) Defendants made a statement about Plaintiff; 2) the statement was false; 3) the statement was made with malice; 4) the statement was communicated to somebody other than Plaintiff, 5) the statement tended to injure the reputation of Plaintiff, expose Plaintiff to public hatred, contempt or ridicule, or injured Plaintiff in his efforts to maintain his business; 6) the Summary judgment in favor of Defendants is warranted in light of Plaintiff’s non-resistance ... ; and 7) the amount of damage.”); *Armstrong v. Thompson*, 80 A.3d 177, 183 (D.C. 2013) (“To assert a defamation claim in the District of Columbia, a plaintiff must allege: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the



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defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm."'); *Hopper v. Swinnerton*, 2013 WL 6198245 (Idaho 2013) ("In a defamation action, a plaintiff must prove that the defendant: (1) communicated information concerning the plaintiff to others; (2) that the information was defamatory; and (3) that the plaintiff was damaged because of the communication."'), quoting *Clark v. The Spokesman-Review*, 144 Idaho 427, 430, 163 P.3d 216, 219, 35 Media L. Rep. (BNA) 1737 (2007); *Thomas v. United Steelworkers Local 1938*, 743 F.3d 1134, 1142, 37 I.E.R. Cas. (BNA) 1233, 164 Lab. Cas. (CCH) P 10674, 87 Fed. R. Serv. 3d 1571 (8th Cir. 2014) ("Defamation under Minnesota law requires proof that the alleged defamatory statement (1) was communicated to someone other than the plaintiff, (2) was false, and (3) tended to harm the plaintiff's reputation and lower [the plaintiff] in the estimation of the community."'), quoting *Chambers v. Travelers Companies, Inc.*, 668 F.3d 559, 564, 114 Fair Empl. Prac. Cas. (BNA) 539, 33 I.E.R. Cas. (BNA) 595 (8th Cir. 2012), citing *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919–20, 29 I.E.R. Cas. (BNA) 564 (Minn. 2009); *Brokers' Choice of America, Inc. v. NBC Universal, Inc.*, 2014 WL 3307834 (10th Cir. 2014) (Colorado law "defines defamation as: '(1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by publication.'"), quoting *Han Ye Lee v. Colorado Times, Inc.*, 222 P.3d 957, 961, 38 Media L. Rep. (BNA) 1054 (Colo. App. 2009); *Clulee v. St. Pierre*, 13-881 La. App. 5 Cir. 5/14/14, 2014 WL 1922956 (La. Ct. App. 5th Cir. 2014) ("To maintain an action for defamation, a plaintiff must prove (1) defamatory words; (2) publication; (3) falsity; (4) malice, actual or implied; and (5) resulting injury. If even one of the required elements of the tort of defamation is lacking, the cause of action fails."); *Bertrand v. Mullin*, 846 N.W.2d 884, 892 (Iowa 2014) ("In an ordinary case, a plaintiff establishes a prima facie claim for defamation by showing the defendant '(1) published a statement that (2) was defamatory (3) of and concerning the plaintiff, and (4) resulted in injury to the plaintiff.'") (internal citation omitted); *Miller v. Central Indiana Community Foundation, Inc.*, 11 N.E.3d 944, 38 I.E.R. Cas. (BNA) 813 (Ind. Ct. App. 2014) ("To establish defamation, a plaintiff must prove the following elements: (1) a communication with defamatory imputation; (2) malice; (3) publication; and (4) damages."), citing *Shine v. Loomis*, 836 N.E.2d 952, 956 (Ind. Ct. App. 2005), trans. denied; *D'Amico v. Correctional Medical Care, Inc.*, 120 A.D.3d 956, 991 N.Y.S.2d 687 (4th Dep't 2014) ("The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se."), quoting *Salvatore v. Kumar*, 45 A.D.3d 560, 563, 845 N.Y.S.2d 384, 26 I.E.R. Cas. (BNA) 1742 (2d Dep't 2007); *Yarus v. Walgreen Co.*, 2014 WL 6908022 (E.D. Pa. 2014) ("In order to prevail in a defamation action under Pennsylvania law, the plaintiff has the burden of proving: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) an understanding by the reader or listener of its defamatory meaning; and (5) an understanding by the reader or listener of an intent by the defendant that the statement refer to the plaintiff. 42 Pa. Cons.Stat. Ann. § 8343(a) (1998); *Tucker v. Fischbein*, 237 F.3d 275, 281 (3rd Cir. 2001). In addition, additional minimum constitutional standards of fault may apply depending on the public or private status of the plaintiff and whether the speech pertains to matters of public concern."), citing Smolla, Law of Defamation 2d §§ 3:7, 3:18, 3:23 (1994); *Pendleton v. Newsome*, 772 S.E.2d 759, 762, 318 Ed. Law Rep. 1153 (Va. 2015) ("A common law complaint for libel or slander historically included three elements: the inducement, an explanation of the facts demonstrating that the allegedly defamatory statement is actionable; the colloquium, an explanation of how the allegedly defamatory statement refers to the plaintiff, if he is not explicitly named; and the innuendo, an explanation of the allegedly defamatory meaning of the statement, if it is not apparent on its face."), citing *Webb v. Virginian-Pilot Media Companies, LLC*, 287 Va. 84, 88, 752 S.E.2d 808, 811, 300 Ed. Law Rep. 610, 42 Media L. Rep. (BNA) 1228 (2014); *Schaecher v. Bouffault*, 772 S.E.2d 589 (Va. 2015) ("In Virginia, when a plaintiff alleges defamation by publication, the elements are '(1) publication of (2) an actionable statement with (3) the requisite intent.'"), quoting *Tharpe v. Saunders*, 285 Va. 476, 480, 737 S.E.2d 890, 892, 41 Media L. Rep. (BNA) 1505 (2013); *Eddington v. Torrez*, 2015 WL 3874813 (Mich. Ct. App. 2015) ("A claim of defamation requires proof of the following elements: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication."), citing *Mitan v. Campbell*, 474 Mich. 21, 24, 706 N.W.2d 420, 34 Media L. Rep. (BNA) 1084 (2005); *Ponder v. Lake Forest Property Owners Ass'n*, 2015 WL 3935490 (Ala. Civ. App. 2015) (To establish a prima facie case of defamation, a plaintiff must show (1) that the defendant was at least negligent (2) in publishing (3) a false and defamatory statement to another (4) concerning the plaintiff, (5) which is either

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actionable without having to prove special harm (actionable per se) or actionable upon allegations and proof of special harm); [Reyna v. Baldridge](#), 2015 WL 4273265 (Tex. App. San Antonio 2015) (“the essential elements of a common law libel per se claim are that the defendant (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with ... actual malice, if the plaintiff was a public official or public figure, ... regarding the truth of the statement.”); [Pan Am Systems, Inc. v. Atlantic Northeast Rails and Ports, Inc.](#), 804 F.3d 59, 64, 43 Media L. Rep. (BNA) 3004 (1st Cir. 2015) (“a defamation cause of action ‘arises from (1) the defendant’s unprivileged publication to a third party (2) of a false statement pertaining to the plaintiff (3) through fault amounting at least to negligence, (4) as long as the statement either is defamatory per se or causes special harm.’”), citing [Garrett v. Tandy Corp.](#), 295 F.3d 94, 103 (1st Cir. 2002), citing [Rippett v. Bemis](#), 672 A.2d 82, 86 (Me. 1996); [Thompson v. Robbins](#), 2015 WL 9312124, \*1-2 (Del. Super. Ct. 2015) (“In Delaware, the elements for a *prima facie* case of defamation are as follows: 1) the defendant made a defamatory statement; 2) concerning the plaintiff; 3) the statement was published; 4) a third party would understand the character of the communication as defamatory; and 5) plaintiff was injured as a result of the statement.”); [Stephen G. Perlman, Rearden LLC v. Vox Media, Inc.](#), 2015 WL 5724838, \*13 (Del. Ch. 2015) (“To sustain a cause of action for defamation, Plaintiffs must plead five elements: (1) defamatory communication; (2) publication; (3) reference to each Plaintiff asserting a claim; (4) a third party’s understanding of the communication’s defamatory character; and (5) injury.”); [Tipping v. Martin](#), 2016 WL 397088, \*3 (N.D. Tex. 2016) (“The elements of a defamation claim are ‘(1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases.’”), quoting [In re Lipsky](#), 460 S.W.3d 579, 593, 43 Media L. Rep. (BNA) 1793 (Tex. 2015), citing [WFAA-TV, Inc. v. McLemore](#), 978 S.W.2d 568, 571, 26 Media L. Rep. (BNA) 2385 (Tex. 1998); [Peirce v. Bryant](#), 2016 WL 3035891, \*6 (D.S.C. 2016), report and recommendation adopted, 2016 WL 3017212 (D.S.C. 2016) (“The essential elements of a claim for defamation under South Carolina law are: 1) a false and defamatory statement; 2) unprivileged publication to a third party by defendant; 3) fault on the part of the defendant publisher; and 4) actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.”), citing [Erickson v. Jones Street Publishers, L.L.C.](#), 368 S.C. 444, 455, 629 S.E.2d 653, 664, 34 Media L. Rep. (BNA) 1610 (2006) (disapproved of by, [Floyd v. WBTW](#), 2007 WL 4458924 (D.S.C. 2007)); [Klayman v. City Pages](#), 2016 WL 3033141, \*4 (11th Cir. 2016) (“In Florida, defamation is composed of the following elements: (1) publication, (2) a defamatory statement, (3) falsity, and (4) actual damages.”), citing [Jews For Jesus, Inc. v. Rapp](#), 997 So. 2d 1098, 1106, 36 Media L. Rep. (BNA) 2540 (Fla. 2008); [Dobias v. Oak Park and River Forest High School Dist. 200](#), 2016 IL App (1st) 152205, 2016 WL 3476994 (Ill. App. Ct. 1st Dist. 2016) (“To state a claim for defamation, a plaintiff must allege facts that show: (1) the defendant made a false statement about the plaintiff; (2) the defendant made an unprivileged publication of that statement to a third party; and (3) the publication caused her damages. [Green](#), 234 Ill.2d at 491. A defamatory statement is one that harms a person’s reputation to the extent that it lowers the person in the eyes of the community or deters the community from associating with her or him.”).

<sup>11</sup> [New York Progress and Protection PAC v. Walsh](#), 733 F.3d 483, 486 (2d Cir. 2013) (“‘The harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics and a delay of even a day or two may be intolerable.’”), quoting [Klein v. City of San Clemente](#), 584 F.3d 1196, 1208 (9th Cir. 2009).



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Rodney A. Smolla

Part I. Defamation  
Chapter 1. Overview

### § 1:27.50. Protecting reputation in the internet and social media age

#### References

One of the transformative changes created by the Internet and contemporary social media is that the reputation of individuals, corporations, and organizations largely “resides” on the Internet. The notion of what a “reputation” is has always been a bit mystical. We talk of “a good name” as a personal asset or company brand that may be damaged by defamation. With the Internet and social media it is possible to actually view and document and record the ups and downs of someone’s “reputation” in a manner far less visible than in an earlier age. We are seeing new reaches of the universe with sharper resolution through more powerful telescopes. What was once only vaguely visible, seen through a glass darkly, is now often clear as fine crystal. When a defamatory message is posted on the Internet, one can view and track and permanently document the echo boom of comments, posts, tweets, and repetitions of the defamatory story as the falsehood spreads like a virulent virus across digital space.<sup>1</sup> In minutes or hours a defamatory story may get millions of hits and generate thousands of comments and repetitions.<sup>2</sup> A victim of defamation may watch in real time the destruction and havoc being rendered to the victim’s reputation.<sup>3</sup> Moreover, once the proliferation of the falsehood is unleashed, it often can never be contained. The poisonous radiation continues to damage the plaintiff long after the fires from the original explosion are extinguished.<sup>4</sup> Retractions and rewrites never fully catch up with, repair, or remedy the reputational damage.<sup>5</sup>

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#### Footnotes

<sup>1</sup> See *W.J.A. v. D.A.*, 210 N.J. 229, 43 A.3d 1148, 1159-60, 40 Media L. Rep. (BNA) 1830 (2012). (“In today’s world, one’s good name can too easily be harmed through publication of false and defaming statements on the Internet. Indeed, for a private person defamed through the modern means of the Internet, proof of compensatory damages respecting loss of reputation can be difficult if not well-nigh insurmountable.”).

<sup>2</sup> See *Stephen G. Perlman, Rearden LLC v. Vox Media, Inc.*, 2015 WL 5724838, \*5 (Del. Ch. 2015) (“In the first fifteen minutes after The Verge published the August 28 Article, various journalists and editors associated with The Verge, Polygon, and Vox promoted the article as the “definitive account” based on “exhaustive proof,” despite the fact that they had not fact-checked the article with OL2, using social media platforms such as Facebook, LinkedIn, Twitter, Tumblr, and Google+ to reach hundreds of thousands, if not millions, of readers. Readers quickly posted 300 comments (288 in the first two days) responding to the August 28 Article, and the article spread rapidly through social media networks. Soon the August 28 Article became a top Google search result for “OnLive,” behind only OnLive’s own corporate and service web pages and the OnLive Wikipedia page. In fact, two years later the August 28 Article was still the fourth Google result for “OnLive.” Also, when Internet users use Google to search for “Steve Perlman,” Google provides three “In-depth articles,” which it identifies as

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“high-quality content to help [users] learn about or explore a subject;” the August 28 Article appears alongside two articles from [www.businessweek.com](http://www.businessweek.com) and [www.smithsonianmag.com](http://www.smithsonianmag.com), respectively, both highly credible publications.”).

<sup>3</sup> [Laughland v. Beckett](#), 2015 WI App 70, ¶¶21-23, 365 Wis. 2d 148, 870 N.W.2d 466, 473 (Ct. App. 2015) (“Laughland did not estimate the monetary value of the damage to his ‘social reputation,’ but described his reaction to learning of the fictitious Laughland Facebook page as follows:

I was very concerned for my reputation. I did a Google search and [it] came up as a first hit[,] just my name and so I know everyone could see it.... [W]hen I saw this situation unfold and realized that there was a profile of the nature that was out there[,] I had sheer panic because I knew without hesitation that a lot of people were going to see it, especially after I ... found out it hit a top Google search. ....I was mortified and petrified that something bad was, you know, potentially was going to happen, because of my reputation because of that sitting there.”).

<sup>4</sup> [Laughland v. Beckett](#), 2015 WI App 70, ¶¶21-23, 365 Wis. 2d 148, 870 N.W.2d 466, 473 (Ct. App. 2015) (“A person’s reputation and good name is of inestimable value to him and once it has been besmirched by another through carelessness or malice restoration is virtually impossible. Protection of a citizen’s good name is a proper concern of the state.”), quoting [Denny v. Mertz](#), 106 Wis. 2d 636, 658, 318 N.W.2d 141, 8 Media L. Rep. (BNA) 1369 (1982) (footnote omitted).

<sup>5</sup> The case [Perlman v. Vox Media](#), discussed subsequently in this Treatise, see *infra* § 4:93.50, provides an example of this phenomenon. As noted in that subsequent discussion in a footnote parenthetical, even a defamatory article that is quickly removed and rewritten with corrections can cause exponential harm that continues indefinitely. See [Stephen G. Perlman, Rearden LLC v. Vox Media, Inc.](#), 2015 WL 5724838, \*18 (Del. Ch. 2015) (“In the short period during which the uncorrected August 19 Article was available on The Verge’s website, it attracted a large number of readers and comments and was shared widely and cited across the Internet and social media networks throughout the United States and internationally.”).

Tech and Social Media: How far  
can you go?

# Development of Social Media

- 1995 classmates.com sometimes cited as the first “social” site
- 1997 SixDegrees
- 2002 friendster
- 2003 LinkedIn, MySpace
- 2004 Facebook, 2006 opened to public
- 2010 Instagram
- 2011 Snapchat

# What's hotter than Snapchat?

The screenshot shows a Google Chrome browser window with multiple tabs open. The active tab displays the URL <https://www.ustelecom.org/blog/emerging-role-snapchat-2016-election>. The website header features the USTelecom logo and navigation links: Home, Contact Us, Login, and a search bar. A secondary navigation bar includes links for Who We Are, Issues, Broadband Industry, Events & Education, News, and Blog. On the right side of the page, there are social media sharing icons for WhatsApp, Twitter, Facebook, and a generic share icon.

The main content area is titled "Emerging Role of Snapchat in 2016 Election" and is attributed to USTelecom Media, dated 05.08.2015. The article text reads:

Mobilizing millennial voters and other young audiences will be key in the 2016 Presidential election. In recent election cycles, digital platforms have played an increasingly prominent role as candidates harness innovative new technologies and social networks to reach important demographics. And now it appears that one of America's fastest-growing smartphone apps, [Snapchat](#), is leading the field in campaign and voter outreach.

According to a Business Insider Intelligence [report](#), more than 60 percent of the million-plus Snapchat users are between the ages of 18-24, and the platform ranks as the youngest social network. Enabling users to share photos, messages and videos that automatically delete after recipients view them, Snapchat is outpacing Instagram, which has a user base that includes 28 percent of 18-24 year-olds. A [piece](#) recently appearing in The New York Times discusses how its newest media element [Discover](#) will be utilized by media outlets such as [CNN](#), [VICE](#) and [Yahoo News](#) to feed content via the app every 24 hours, offering a dynamic new conduit through which to cover the election cycle.

Presidential candidates have already begun embracing Snapchat as an important part of their election toolkit. Senator Rand Paul (R-Ky.), who started using the app last year, participated in a short [Snapchat interview](#) with CNN, sharing his views on potential GOP candidates Chris Christie and Scott Walker. In addition, Hillary Clinton appeared in a [video](#) for Snapchat dedicated to commemorating International Women's Day. And, Marco Rubio [became a user](#) in April as part of campaign efforts to build his ranks of followers. As Jeb Bush's communications advisor Tim Miller notes, Snapchat's value to candidates lies in its ability to provide "a way to reach people who aren't reading long-form political articles."

In regard to its popularity as an emergent application for campaign messaging, Snapchat [explains](#), "Social media companies tell us what to read based on what's most recent or most popular. We see it differently. We count on editors and artists, not clicks and shares, to determine what's important."

At the bottom of the article, it is tagged with: [app](#), [elections](#), [social media](#), and [technology](#).

The left sidebar of the website lists authors: Alan Roth, Anne Veigle, Anthony Jones, Jon Banks, Kam Dhingra, Kevin Rupy, Mary Schultz, Patrick Brogan, Portia Krebs, Robert Mayer, Tom Soroka, USTelecom Events, USTelecom Media, and Walter McCormick. Below the authors list is an "Archives" section.

# New platforms are constantly evolving

The screenshot shows a web browser window displaying the USTelecom blog. The browser's address bar shows the URL <https://www.ustelecom.org/blog/new-social-network-encourages-political-engagement>. The USTelecom logo, featuring a stylized globe and the text 'USTELECOM THE BROADBAND ASSOCIATION', is in the top left. A navigation menu at the top right includes links for Home, Contact Us, Login, and a search bar. Below the logo, a list of authors is provided: Alan Roth, Anne Veigle, Anthony Jones, Jon Banks, Kam Dhingra, Kevin Rupy, Mary Schultz, Patrick Brogan, Portia Krebs, Robert Mayer, Tom Soroka, USTelecom Events, USTelecom Media, and Walter McCormick. The main content area features the article title 'New Social Network Encourages Political Engagement' in green, followed by the author 'USTelecom Media' and the date '07.21.2015'. The article text discusses the 'Brigade' social network, its purpose for political engagement, and its features like compatibility scores and social credits. It also mentions partnerships with advocacy organizations. On the right side of the article, there are social media sharing icons for Google+, Twitter, Facebook, and a generic share icon.

New Social Network Encourages Political Engagement | USTelecom - Google Chrome

<https://www.ustelecom.org/blog/new-social-network-encourages-political-engagement>

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- Robert Mayer
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- USTelecom Events
- USTelecom Media
- Walter McCormick

Archives

Home > Blog > New Social Network Encourages Political Engagement

## New Social Network Encourages Political Engagement

USTelecom Media  
07.21.2015

Political points of view shared on social media can sometimes be obscured by daily postings of travel updates, family events or personal photos. However, for those wishing to engage in greater political discourse online, there's now a new social network expressly designed and dedicated for this purpose. [Brigade](#), backed by Napster and Facebook founder Sean Parker, is the first platform that lets users express opinions, poll friends and have dedicated conversations on important issues that matter to them.

Parker said that the development of Brigade was informed by Americans' alternating political apathy and passion for politics. In an interview detailed in [TechCrunch](#), he noted, "When we were thinking about how to engage people in politics, most people say they don't care about politics. They hate politicians. Congressional approval ratings are at a historic low. Trust in government is at a historic low. From one point of view, the system is about as broken as it can be. But when we interview users, we find that everyone has an issue they care about or something that they want to change in the world."

According to [BuzzFeed](#), an early test of Brigade engaged approximately 13,000 users, who, on average, either agreed or disagreed with approximately 90 issues. As of July 4, more than one million opinions have been expressed via the app, which encourages users to publicly share their position on specific issues and trending topics such as "Trade with Asia," "Hillary Clinton's Economic Agenda," and the "GOP Presidential Race."

Users can see their compatibility score that indicates political common ground with others accessing the platform, and participants earn "social credits" for converting a user to their position. In addition to the "agree" and "disagree" functions, users can also express their position in detail without a character limit.

[National Journal](#) reports that Brigade not only seeks to engage Americans in greater political dialogue, but is also interested in partnering with advocacy organizations looking to gain important exposure through the new online tool. For example, using Brigade has attracted supporters for [Represent Us](#), while [Forecast the Facts](#) has been able to garner greater email subscriptions.

# Most popular sites

Facebook	900,000,000 estimated unique monthly visitors
Twitter	310,000,000
LinkedIn	255,000,000
Pinterest	250,000,000
Google Plus	120,000,000
Tumblr	110,000,000
Instagram	100,000,000

# According to the Pew research center:

- Social networking sites are increasingly used to keep up with close social ties
- The average user of a social networking site has more close ties and is half as likely to be socially isolated as the average American
- Facebook users are more trusting than others
- Facebook users have more close relationships
- Internet users get more support from their social ties and Facebook users get the most support
- Facebook users are much more politically engaged than most people
- Facebook revives “dormant” relationships



# Legal Issues relating to social media

- Civil Liability
- Criminal Liability
- Government Censorship
- Private Censorship

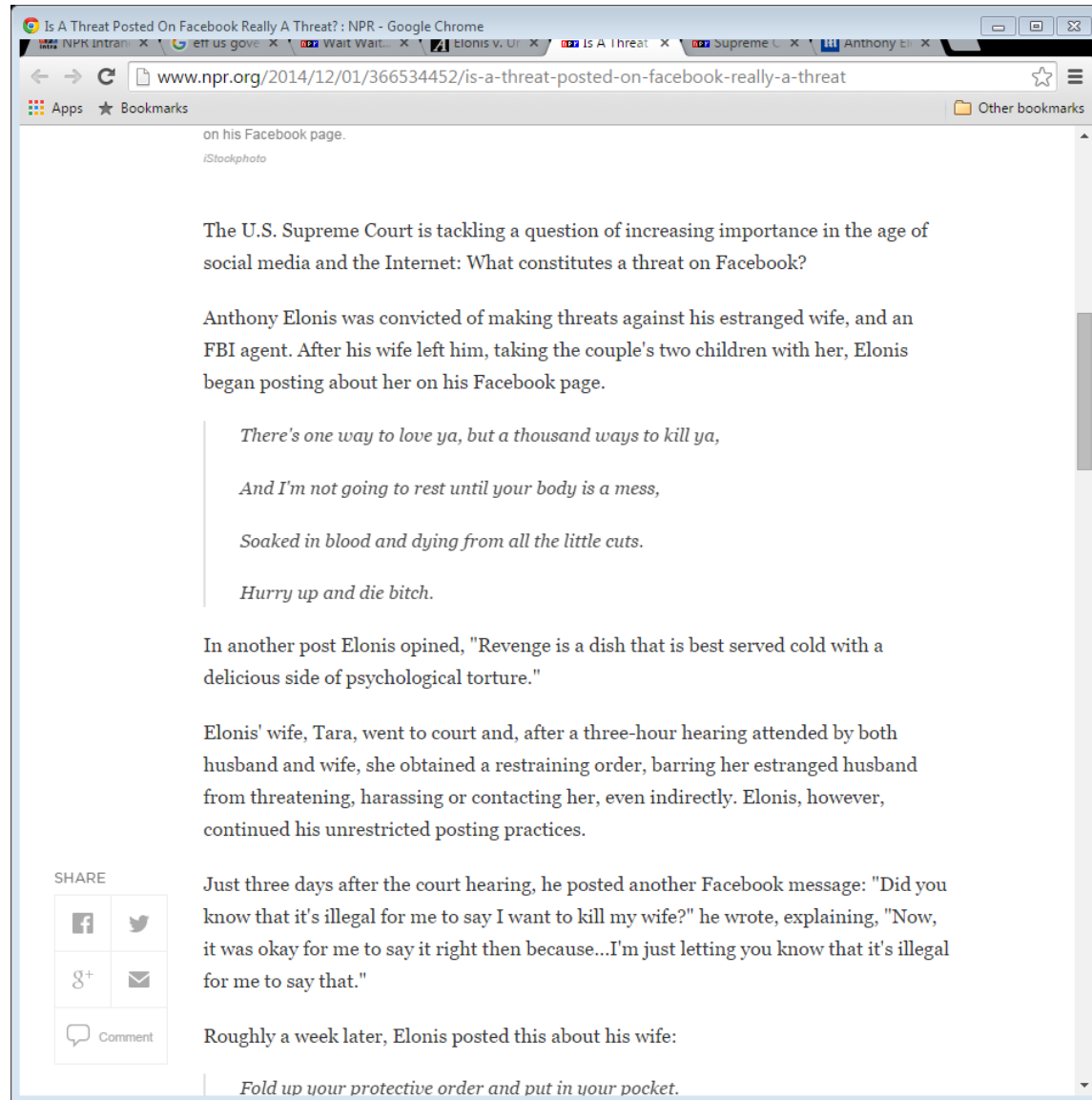
# Courtney sued for libel over tweets

- "oi vey don't f\*\*\* with my wardrobe or you will end up in a circle of corched earth hunted til your dead."
- "as one of her many bullied victims smashes her face soon as she's an assault addict herself (there's apparently prostitution in her record too"

# Twice.

- [From the now-suspended Twitter account @CourtneyLoveUK] @noozjunkie I was f---ing devastated when Rhonda J Holmes Esq of san diego was bought off @fairnewsspears perhaps you can get a quote.

# What is a “true threat?”



on his Facebook page.

*iStockphoto*

The U.S. Supreme Court is tackling a question of increasing importance in the age of social media and the Internet: What constitutes a threat on Facebook?

Anthony Elonis was convicted of making threats against his estranged wife, and an FBI agent. After his wife left him, taking the couple's two children with her, Elonis began posting about her on his Facebook page.

*There's one way to love ya, but a thousand ways to kill ya,*

*And 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.*

In another post Elonis opined, "Revenge is a dish that is best served cold with a delicious side of psychological torture."

Elonis' wife, Tara, went to court and, after a three-hour hearing attended by both husband and wife, she obtained a restraining order, barring her estranged husband from threatening, harassing or contacting her, even indirectly. Elonis, however, continued his unrestricted posting practices.

Just three days after the court hearing, he posted another Facebook message: "Did you know that it's illegal for me to say I want to kill my wife?" he wrote, explaining, "Now, it was okay for me to say it right then because...I'm just letting you know that it's illegal for me to say that."

Roughly a week later, Elonis posted this about his wife:

*Fold up your protective order and put in your pocket.*

SHARE

f t

g+ e

Comment

# Twitter transparency report

## Removal requests

January 1 - June 30, 2014

COUNTRY	REMOVAL REQUESTS (COURT ORDERS)	REMOVAL REQUESTS (GOV'T AGENCY, POLICE, OTHER)	PERCENTAGE WHERE SOME CONTENT WITHHELD	ACCOUNTS SPECIFIED	ACCOUNTS WITHHELD
 Australia	-	-	-	-	-
 Brazil	8	0	0%	14	0
 Canada	0	3	0%	5	0
 Colombia	0	1	0%	1	0
 Cyprus	0	1	0%	1	0
 Ecuador	-	-	-	-	-
 France	1	107	28%	112	0
 Germany	0	2	0%	3	0
 Greece	0	2	0%	2	0
 Hong Kong	1	0	0%	1	0
 India	0	5	0%	9	0
 Indonesia	-	-	-	-	-
 Ireland	1	1	0%	13	0
 Italy	-	-	-	-	-
 Japan	2	6	25%	31	0

 Kuwait	0	5	0%	7	0
 Mexico	-	-	-	-	-
 Netherlands	0	3	33%	3	0
 Norway	1	1	0%	1	0
 Pakistan	0	12	0%*	101	0*
 Russia	0	32	59%	34	8
 South Korea	-	-	-	-	-
 Spain	1	1	0%	4	0
 Turkey	65	121	30%*	304	17*
 United Arab Emirates	0	1	0%	13	0
 United Kingdom	3	14	6%	22	0
 United States	5	26	0%	42	0
 Venezuela	-	-	-	-	-
<b>TOTAL</b>	<b>88</b>	<b>344</b>	<b>9%</b>	<b>723</b>	<b>25</b>

# Facebook transparency report

Facebook - Google Chrome

https://govtrequests.facebook.com/country/United%20States/2014-H2/

Select Report July 2014 - December 2014 ▾

## United States Law Enforcement Requests for Data

We respond to valid requests relating to criminal cases. Each and every request we receive is checked for legal sufficiency and we reject or require greater specificity on requests that are overly broad or vague.

Total Requests	Users / Accounts Requested	Percentage of requests where some data produced
14,274	21,731	79.14%

Government Request Type	Total Requests	Users / Accounts Requested	Percentage of requests where some data produced
Search Warrant ⓘ	7,924	12,403	84.21%
Subpoena ⓘ	4,638	7,278	71.67%
Emergency Disclosures ⓘ	618	685	63.27%
Court Order (18 USC 2703(d)) ⓘ	241	328	86.72%
Court Order (Other) ⓘ	267	415	62.17%
Pen Register/Trap and Trace ⓘ	583	619	91.08%
Title III ⓘ	3	3	100.00%

## United States National Security Requests for Data

# Kansas social media policy

In Kansas, Professors Must Now Watch What They Tweet : NPR - Google Chrome

www.npr.org/2014/05/14/312524014/in-kansas-professors-must-now-watch-what-they-tweet

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The Kansas Board of Regents gave final approval Wednesday to a strict new policy on what employees may say on social media. Critics say the policy violates both the First Amendment and academic freedom, but school officials say providing faculty with more specific guidelines will actually bolster academic freedom on campus.

The controversial policy was triggered by an equally controversial tweet posted last September by David Guth, an associate journalism professor. Reacting to a lone gunman who killed 12 people at the Washington Navy Yard in Washington, D.C., he wrote:


"The blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters."

Guth was placed on administrative leave after an outcry from the public and state lawmakers.

Rep. Travis Couture-Lovelady, a member of the Kansas House of Representatives and the National Rifle Association, says he was outraged by the tweet. He supports the board of regents' new policy to place parameters on professors.

"Look, you have freedom of speech, but you can't go this far," he says. "I think having a clear understanding between faculty and the board of regents on what's acceptable and what's not is better for everyone involved."

The new policy says that faculty and staff of the state's six universities, 10



Critics say a new social media policy approved by the Kansas Board of Regents, barring staff and faculty from posting anything "contrary to the best interests of the university," is too restrictive.

[palebluerobot/flickr](#)

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# Unconstitutional?

- The policy prohibited "improper use of social media" defined as:
- **i.** directly incites violence or other immediate breach of the peace;
- **ii.** when made pursuant to (i.e. in furtherance of) the employee's official duties, is contrary to the best interest of the university;
- **iii.** discloses without authority any confidential student information, protected health care information, personnel records, personal financial information, or confidential research data; or
- **iv.** subject to the balancing analysis required by the following paragraph, impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's official duties, interferes with the regular operation of the university, or otherwise adversely affects the university's ability to efficiently provide services.



# Firing public employees

Facebook 'Like' Protected By First Amendment, Appeals Court Rules - Google Chrome

www.huffingtonpost.com/2013/09/18/facebook-like\_n\_3949132.html


Apps ★ Bookmarks

Other bookmarks

## Facebook 'Like' Protected By First Amendment, Appeals Court Rules

The Huffington Post | By Dominique Mosbergen

Posted: 09/18/2013 2:37 pm EDT | Updated: 09/18/2013 3:56 pm EDT



1.2k

405

142

0

28

Like

Share

Tweet

LinkedIn

Comment

A federal appeals court ruled this week that a Facebook "like" is a form of speech protected by the First Amendment. "Liking" something on the social media site is a "substantive statement" being made by a user, said the court, and it should have the same free speech protections as other modes of expression.

The ruling by the Fourth U.S. Circuit Court of Appeals is the latest in a legal battle involving a former sheriff's deputy and his ex-boss.

As CNN explained in a report last year, the saga began several years ago when Sheriff B.J. Roberts of Hampton, Va., fired his deputy, Daniel Ray Carter Jr., and five other employees for supporting his rival in a 2009 election.

Carter had reportedly shown his support for the other candidate by "liking" the "Jim Adams For Hampton Sheriff" page. Roberts, who was re-elected, allegedly canned Carter in retaliation for his actions.

Arguing that his Facebook "like" should be protected by the First Amendment, Carter sued his former employer.

However, in 2012, a Virginia U.S. District Court judge ruled against Carter, saying that "liking" a Facebook page is insufficient speech to merit constitutional protection because it doesn't "involve actual statements."

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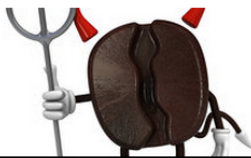
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### SUGGESTED FOR YOU

Mark Hamill Denies Famous 'Star Wars' Fumble



Psychopaths Are More Likely To Order This Drink



# Court upholds firing of police officer for this Facebook post


- I just found out that Greenville Police Department did not send a representative to the funeral of Pearl Police Officer Mike Walter, who was killed in the line of duty on May 1, 2012. This is totally unacceptable. I don't want to hear about the price of gas-officers would have gladly paid for and driven their own vehicles had we known the city was in such dire straights as to not to be able to afford a trip to Pearll, Ms., which, by the way, is where our police academy is located. The last I heard was the chief was telling the assistant chief about getting a group of officers to go to the funeral. Dear Mayor, can we please get a leader that understands that a department sends officers of the funeral of an officer killed in the line of duty? Thank you. Susan Graziosi.

# The Lindsey Stone controversy

Happy Now?: 'Good Employee' Lindsey Stone Fired Over Facebook Photo

Neetzan Zimmerman  
Filed to: LINDSEY STONE 11/22/12 4:05pm

141,395 1 ☆



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MAGAZINE | How One Stupid Tweet Blew Up Justine Sacco's Life



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1505

# How One Stupid Tweet Blew Up Justine Sacco's Life

By JON RONSON FEB. 12, 2015

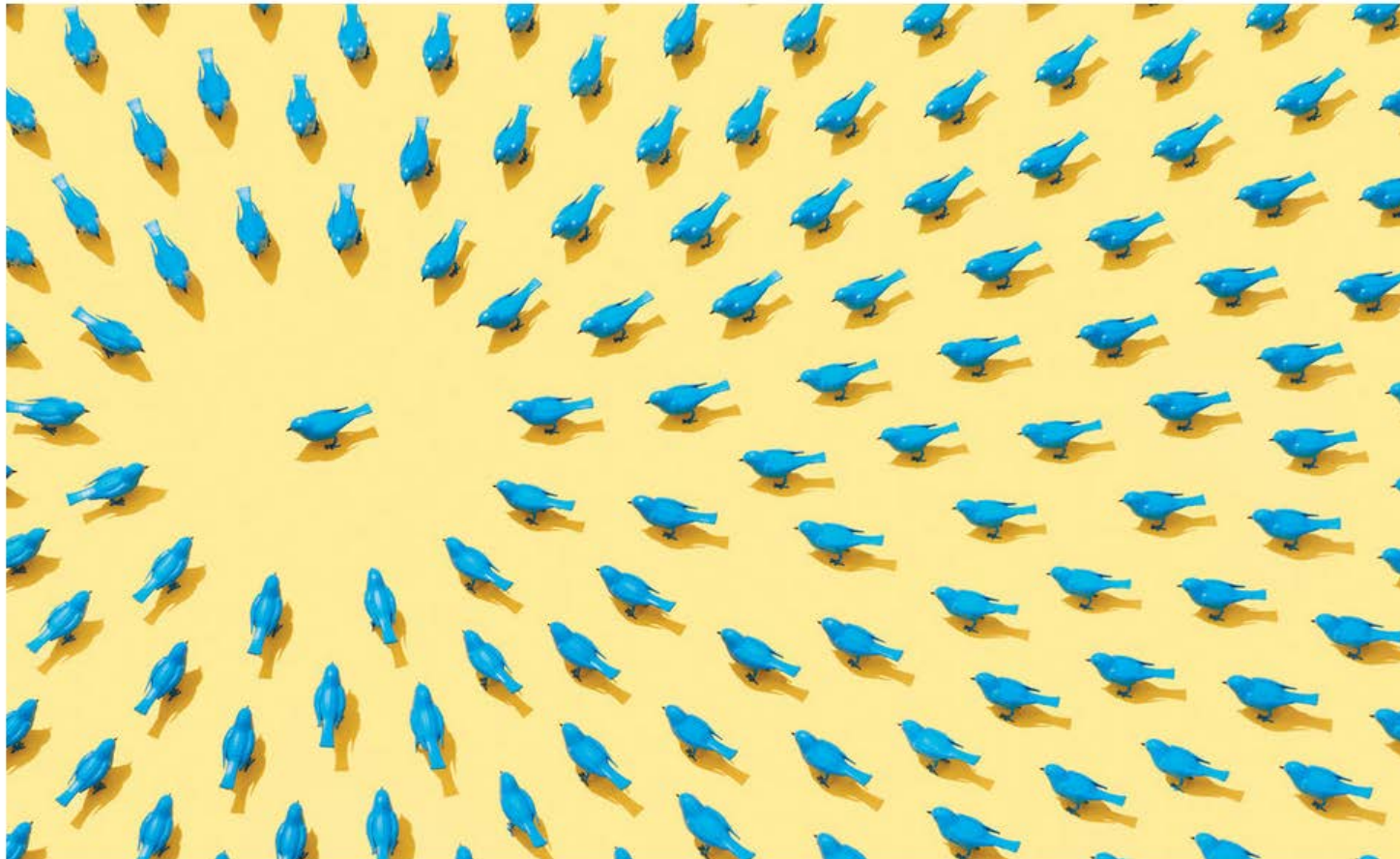


Photo illustration by Andrew B. Myers. Prop stylist: Sonia Rentsch.

# Sacco's tweets

- “ ‘Weird German Dude: You’re in First Class. It’s 2014. Get some deodorant.’ — Inner monologue as I inhale BO. Thank God for pharmaceuticals.”
- “Chilly — cucumber sandwiches — bad teeth. Back in London!”
- “Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!”

# What should free speech protect?

The New York Times | <https://nyti.ms/1MhmTct>

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U.S.

# U.S. Drops Charges That Professor Shared Technology With China

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By MATT APUZZO SEPT. 11, 2015

WASHINGTON — When the Justice Department arrested the chairman of Temple University’s physics department this spring and accused him of sharing sensitive American-made technology with China, prosecutors had what seemed like a damning piece of evidence: schematics of sophisticated laboratory equipment sent by the professor, Xi Xiaoxing, to scientists in China.

The schematics, prosecutors said, revealed the design of a device known as a pocket heater. The equipment is used in superconductor research, and Dr. Xi had signed an agreement promising to keep its design a secret.

But months later, long after federal agents had led Dr. Xi away in handcuffs, independent experts discovered something wrong with the evidence at the heart of the Justice Department’s case: The blueprints were not for a pocket heater.

Faced with sworn statements from leading scientists, including an inventor of the pocket heater, the Justice Department on Friday afternoon dropped all charges against Dr. Xi, an American citizen.

It was an embarrassing acknowledgment that prosecutors and F.B.I. agents did not understand — and did not do enough to learn — the science at the heart of the case before bringing charges that jeopardized Dr. Xi's career and left the impression that he was spying for China.

"I don't expect them to understand everything I do," Dr. Xi, 57, said in a telephone interview. "But the fact that they don't consult with experts and then charge me? Put my family through all this? Damage my reputation? They shouldn't do this. This is not a joke. This is not a game."

The United States faces an onslaught from outside hackers and inside employees trying to steal government and corporate secrets. President Obama's strategy to combat it involves aggressive espionage investigations and prosecutions, as well as increased cyberdefenses.

But Dr. Xi's case, coming on the heels of a similar case that was dismissed a few months ago in Ohio, raises questions about whether the Justice Department, in its rush to find Chinese spies, is ensnaring innocent American citizens of Chinese ancestry.

A spokeswoman for Zane D. Memeger, the United States attorney in Philadelphia who brought the charges, did not elaborate on the decision to drop the case. In court documents, the Justice Department said that "additional information came to the attention of the government."

The filing gives the government the right to file the charges again if it chooses. A spokesman for John P. Carlin, the assistant attorney general who is overseeing the crackdown on economic espionage, had no comment on whether Justice Department officials in Washington reviewed the case.

The science involved in Dr. Xi's case is, by any measure, complicated. It involves the process of coating one substance with a very thin film of another. Dr. Xi's lawyer, Peter Zeidenberg, said that despite the complexity, it appeared that the government never consulted with experts before taking the case to a grand jury. As a result, prosecutors misconstrued the evidence, he said.



Mr. Zeidenberg, a lawyer for the firm Arent Fox, represented both Dr. Xi and Sherry Chen, a government hydrologist who was charged and later cleared in the Ohio case. A longtime federal prosecutor, Mr. Zeidenberg said he understood that agents felt intense pressure to crack down on Chinese espionage, but the authorities in these cases appeared to have been too quick to assume that their suspicions were justified.

In Dr. Xi's case, Mr. Zeidenberg said, the authorities saw emails to scientists in China and assumed the worst. But he said the emails represented the kind of international academic collaboration that governments and universities encourage. The technology discussed was not sensitive or restricted, he said.

"If he was Canadian-American or French-American, or he was from the U.K., would this have ever even got on the government's radar? I don't think so," Mr. Zeidenberg said.

The Justice Department sees a pernicious threat of economic espionage from China, and experts say the government in Beijing has an official policy encouraging the theft of trade secrets. Prosecutors have charged Chinese workers in the United States with stealing Boeing aircraft information, specialty seeds and even the pigment used to whiten Oreo cookie cream.

Other researchers and academics are being closely watched. The F.B.I. is investigating a Chinese-American mapping expert who abruptly resigned from Ohio State University last year and disappeared while working with NASA, *The Columbus Dispatch* reported this week. In May, the Justice Department charged a Chinese professor and others with stealing acoustics equipment from American companies.

About a dozen F.B.I. agents, some with guns drawn, stormed Dr. Xi's home in the Philadelphia suburbs in May, searching his house just after dawn, he said. His two daughters and his wife watched the agents take him away in handcuffs on fraud charges.

"Unfortunately I think this is influenced by the politics of the time," he said. "But I think it's wrong. We Chinese-Americans, we contribute to the country, to the national security, to everything."

Temple University put him on administrative leave and took away his title as chairman of the physics department. He was given strict rules about who at the school he could talk to. He said that made it impossible for him to continue working on a long-running research project that was nearing completion.

Dr. Xi, who came to the United States in 1989 and is a naturalized citizen, was adamant that he was innocent. But it was only when he and his lawyers reviewed the government's evidence that they understood what had happened. "When I read it, I knew that they were mixing things up," Dr. Xi said.

His lawyers contacted independent scientists and showed them the diagram that the Justice Department said was the pocket heater. The scientists agreed it was not.

In a sworn affidavit, one engineer, Ward S. Ruby, said he was uniquely qualified to identify a pocket heater. "I am very familiar with this device, as I was one of the co-inventors," he said.

Last month, Mr. Zeidenberg delivered a presentation for prosecutors and explained the science. He gave them sworn statements from the experts and implored the Justice Department to consult with a physicist before taking the case any further. Late Friday afternoon, the Justice Department dropped the case "in the interests of justice."

"We wish they had come to us with any concerns they had about Professor Xi prior to indicting him, but at least they did listen," Mr. Zeidenberg said.

Dr. Xi choked back tears as he described an ordeal that was agonizing for his family. "I barely came out of this nightmare," he said.

A version of this article appears in print on September 12, 2015, on Page A1 of the New York edition with the headline: U.S. Abandoning Spying Charges Against Scholar.