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CITY OF HOBOKEN Plaintiff, v. EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, AMERICAN PETROLEUM INSTITUTE, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY Docket No. HUD-L-3179-20 Civil Action CBLP Action **NOTICE OF DEFENDANTS CHEVRON CORPORATION AND CHEVRON U.S.A. INC.'S ANTI-SLAPP SPECIAL MOTION TO DISMISS**

To: Gerald Krovatin
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Attorneys for Plaintiff City of Hoboken

PLEASE TAKE NOTICE that, on a date to be set at the November 9, 2023 Case Management Conference (*see* June 7, 2023 Case Management Order, ¶4), Defendants Chevron Corporation and Chevron U.S.A. Inc., through the undersigned counsel, will move pursuant to California's anti-SLAPP law and the other legal authorities cited in the brief submitted with this motion before the Hon. Anthony V. D'Elia, J.S.C., Superior Court of New Jersey, W.J. Brennan Courthouse, 583 Newark Ave, 2nd Floor, Jersey City, NJ 07306, for an Order dismissing this lawsuit with prejudice, awarding Defendants attorneys' fees and costs of suit, and granting such other and further relief as the Court deems just.

In support of this application, the Defendants shall rely upon the accompanying Brief, Certification of Herbert J. Stern, Esq., and the documents attached to and referenced in those submissions.

A proposed form of Order is enclosed.

Oral argument is requested.

The current discovery end date is June 30, 2024.

Dated: July 7, 2023
Florham Park, New Jersey

By: */s/ Herbert J. Stern*
Herbert J. Stern

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CITY OF HOBOKEN Plaintiff, v. EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, AMERICAN PETROLEUM INSTITUTE, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY Docket No. HUD-L-3179-20 Civil Action CBLP Action **[proposed] ORDER DISMISSING THIS ACTION WITH PREJUDICE**

THIS MATTER having been brought before the Court by Defendants Chevron Corporation and Chevron U.S.A. Inc., through their counsel, by way of an Anti-SLAPP Special Motion to Dismiss, and granting such other and further relief as the Court deems just (the "Motion"), and the Court having considered all papers submitted in support of thereof and in opposition thereto, and for good cause shown;

IT IS, on this _____ day of _____, 2023, **ORDERED** that:

1. Defendants' Motion is **GRANTED.**
2. Defendants shall file an affidavit of attorneys' fees and costs within 30 days hereof, along with a proposed form of Final Judgment of Dismissal with Prejudice.

_____
Hon. Anthony V. D'Elia, J.S.C.

____ Opposed

_ __ Unopposed

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CITY OF HOBOKEN Plaintiff, v. EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, AMERICAN PETROLEUM INSTITUTE, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY Docket No. HUD-L-3179-20 Civil Action CBLP Action **CERTIFICATION OF HERBERT J. STERN, ESQ.**

HERBERT J. STERN, ESQ., of full age, does hereby certify as follows:

1. I am an attorney at law in the State of New Jersey, a member in good standing of this Court, and a member of the firm of Stern Kilcullen & Rufolo, LLC, counsel for Defendants Chevron Corporation and Chevron U.S.A. Inc. As such, the facts set forth herein are within my

personal knowledge, and if called and sworn as a witness, I could and would testify competently thereto.

2. I submit this Certification in support of Defendants Chevron Corporation and Chevron U.S.A. Inc.'s Anti-SLAPP Special Motion to Dismiss.

3. Attached hereto as **Exhibit A** is a true copy of *303 Creative LLC v. Elenis*, No. 21-476, 2023 WL 4277208 (U.S. June 30, 2023).

4. Attached hereto as **Exhibit B** is a true copy of *Counterman v. Colorado*, No. 22-138, 2023 WL 4187751 (U.S. June 27, 2023).

5. Attached hereto as **Exhibit C** is a true copy of *TEVA Pharms. USA, Inc. v. Stop Huntingdon Animal Cruelty USA*, No. BER-C-63-05, 2005 WL 1010454 (N.J. Super. Ct. Ch. Div. Apr. 1, 2005).

6. I certify that the foregoing statements made by me are true. I am aware that if any of these foregoing statements made by me are willfully false, I am subject to punishment.

s/ Herbert J. Stern

Dated: July 7, 2023

Herbert J. Stern, Esq.

EXHIBIT A

2023 WL 4277208
Only the Westlaw citation is currently available.
Supreme Court of the United States.

303 CREATIVE LLC, et al., Petitioners
v.
Aubrey ELENIS, et al.

No. 21-476
|
Argued December 5, 2022
|
Decided June 30, 2023

Synopsis

Background: The sole member-owner of limited liability company (LLC) that provided website and graphic design services and which sought to enter the wedding website business, together with the company, brought pre-enforcement action against members of the Colorado Civil Rights Commission (CCRC) and the Colorado Attorney General, seeking to enjoin the defendants from forcing the plaintiffs, through enforcement of the Colorado Anti-Discrimination Act (CADA), to convey on wedding websites messages inconsistent with the member-owner's religious belief that marriage should be reserved to unions between one man and one woman. The United States District Court for the District of Colorado, Marcia S. Krieger, J., 385 F.Supp.3d 1147, denied the plaintiffs' motion for summary judgment and for a preliminary injunction and subsequently, 405 F.Supp.3d 907, granted summary judgment to defendants. Plaintiffs appealed. The United States Court of Appeals for the Tenth Circuit, Briscoe, Circuit Judge, 6 F.4th 1160, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Gorsuch, held that:

[1] the wedding websites member-owner sought to create for her customers qualified as pure speech under the First Amendment;

[2] the wedding websites member-owner sought to create involved her speech;

[3] member-owner faced a credible threat of sanctions under the Act, as required to have standing to bring pre-enforcement action; and

[4] it would violate First Amendment for defendants to compel member-owner to create speech she did not believe.

Reversed.

Chief Justice Roberts, and Justices Thomas, Alito, Kavanaugh, and Barrett, joined.

Justice Sotomayor filed dissenting opinion, in which Justices Kagan and Jackson joined.

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

West Headnotes (31)

[1] **Civil Rights** Injury and Causation

In order for the sole member-owner of limited liability company (LLC) that provided website and graphic design services, and which sought to enter the wedding website business, to have standing to bring pre-enforcement action seeking an injunction to prevent the State of Colorado, through its enforcement of the provisions of the Colorado Anti-Discrimination Act (CADA), from forcing her to create wedding websites celebrating marriages that defied her religious beliefs that marriage should be reserved to unions between one man and one woman, member-owner had to show a credible threat existed that Colorado would, in fact, seek to compel speech from her that she did not wish to produce. U.S. Const. Amend. 1; Colo. Rev. Stat. Ann. § 24-34-601(2)(a).

[2] **Constitutional Law** Freedom of Speech, Expression, and Press

Constitutional Law Politics and Elections

The framers designed the Free Speech Clause of the First Amendment to protect the freedom to think as you will and to speak as you think; they did so because they saw the freedom of speech both as an end, because the freedom to think and speak is an inalienable human right,

and as a means, because the freedom of thought and speech is indispensable to the discovery and spread of political truth. U.S. Const. Amend. 1.

[3] **Constitutional Law** Purpose of constitutional protection

If there is any fixed star in the constitutional constellation of the United States, it is the principle that the government may not interfere with an uninhibited marketplace of ideas, under the Free Speech Clause of the First Amendment. U.S. Const. Amend. 1.

[4] **Constitutional Law** Freedom of Speech, Expression, and Press

The First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply misguided and likely to cause anguish or incalculable grief. U.S. Const. Amend. 1.

[5] **Constitutional Law** Expressive association

The First Amendment protects acts of expressive association. U.S. Const. Amend. 1.

[6] **Constitutional Law** Compelled or forced speech, support, or participation

Generally, under the First Amendment, the government may not compel a person to speak its own preferred messages. U.S. Const. Amend. 1.

[7] **Constitutional Law** Compelled or forced speech, support, or participation

It offends the First Amendment for the government to seek to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include. U.S. Const. Amend. 1.

[8] **Constitutional Law** Website content
Telecommunications Internet

The wedding websites sole member-owner of limited liability company (LLC) that provided website and graphic design services sought to create for her customers qualified as pure speech under the First Amendment; the websites promised to contain images, words, symbols, and other modes of expression, every website would be member-owner's original, customized creation, and she would create these websites to communicate ideas—namely, to celebrate and promote a couple's wedding and unique love story and to celebrate and promote what member-owner understood to be a true marriage, a union between one man and one woman. U.S. Const. Amend. 1.

[9] **Constitutional Law** Particular Issues and Applications in General
Constitutional Law Internet

All manner of speech, from pictures, films, paintings, drawings, and engravings to oral utterance and the printed word, qualify for the First Amendment's protections; no less can hold true when it comes to speech conveyed over the internet. U.S. Const. Amend. 1.

[10] **Civil Rights** Power to enact and validity
Constitutional Law Website content

The wedding websites sole member-owner of limited liability company (LLC) that provided website and graphic design services sought to create for her clients involved her speech under the First Amendment, for purposes of her pre-enforcement action to enjoin State of Colorado, through its enforcement of Colorado Anti-Discrimination Act (CADA), from forcing her to create wedding websites celebrating marriages that defied her religious belief that marriage should be reserved to unions between one man and one woman, even if her speech may combine with the couple's in the final product; member-owner intended to vet each prospective project to determine whether it was one she was willing to

endorse, she would consult with clients to discuss their unique stories as source material, and she would produce a final story for each couple using her own words and her own original artwork. U.S. Const. Amend. 1; Colo. Rev. Stat. Ann. § 24-34-601(2)(a).

[11] **Constitutional Law** Particular Issues and Applications in General

An individual does not forfeit constitutional protection under the First Amendment's Free Speech Clause simply by combining multifarious voices in a single communication. U.S. Const. Amend. 1.

[12] **Civil Rights** Injury and Causation

State of Colorado, through its intended enforcement of Colorado Anti-Discrimination Act (CADA), sought to compel speech that sole member-owner of limited liability company (LLC), which provided website and graphic design services, did not wish to provide if she offered wedding websites to clients celebrating marriages she endorsed, which were between one man and one woman, and thus member-owner faced a credible threat of sanctions under the Act, as required to have standing to bring pre-enforcement action to enjoin the State from compelling her speech in violation of First Amendment; State intended to force member-owner to create custom websites celebrating other marriages she did not in order to excise certain ideas or viewpoints from the public dialogue. U.S. Const. Amend. 1; Colo. Rev. Stat. Ann. § 24-34-601(2)(a).

[13] **Civil Rights** Power to enact and validity

Constitutional Law Website content

It would be an impermissible abridgment of First Amendment's right to speak freely for State of Colorado, through its enforcement of Colorado Anti-Discrimination Act (CADA), to compel sole member-owner of limited liability company (LLC) that provided website and graphic design services, and which sought to enter wedding website business, to create speech she did not believe by forcing her to convey on wedding websites messages inconsistent with her religious belief that marriage should be reserved to unions between one man and one woman; member-owner did not seek to sell ordinary commercial good but intended to create customized and tailored speech for each couple, and Colorado sought to put her to choice of either speaking as the State demanded or face sanctions for expressing her own beliefs on matter of major significance. U.S. Const. Amend. 1; Colo. Rev. Stat. Ann. §§ 24–34–602(1)(a), 24-34-601(2)(a), 24–34–605, 24–34–306(9).

[14] **Constitutional Law** Trade or Business

The First Amendment does not tolerate the government's compelling anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait; such a principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty, such as, for example, by requiring an unwilling movie director who is Muslim to make a film with a Zionist message, requiring a muralist who is an atheist to accept a commission celebrating Evangelical zeal, or forcing a male website designer married to another man to design websites for an organization that advocates against same-sex marriage. U.S. Const. Amend. 1.

[15] **Constitutional Law** Trade or Business

The First Amendment does not tolerate the government's forcing creative professionals to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so. U.S. Const. Amend. 1.

[16] **Civil Rights** Public Accommodations

Governments in the United States have a compelling interest in eliminating discrimination in places of public accommodation.

[17] **Civil Rights** Public Accommodations

Public accommodations laws vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.

[18] **Civil Rights** Sexual orientation or identity

Civil Rights Contracts, trade, and commercial activity

States may protect gay persons, just as they can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.

[19] **Civil Rights** Power to enact and validity

No public accommodations law is immune from the demands of the Constitution.

[20] **Civil Rights** Power to enact and validity

Constitutional Law Compelled or forced speech, support, or participation

Public accommodations statutes can sweep too broadly under the First Amendment when deployed to compel speech. U.S. Const. Amend. 1.

[21] **Civil Rights** Federal preemption

States Federal Supremacy; Preemption

When a state public accommodations law and the Constitution collide, there can be no question which must prevail under the Supremacy clause. U.S. Const. art. 6, cl. 2.

[22] **Constitutional Law** Entities protected

Speakers do not shed their First Amendment protections by employing the corporate form to disseminate their speech. U.S. Const. Amend. 1.

[23] **Constitutional Law** Freedom of Speech, Expression, and Press

The First Amendment's protections do not belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive. U.S. Const. Amend. 1.

[24] **Constitutional Law** Freedom of Speech, Expression, and Press

While the Free Speech Clause of the First Amendment does not protect status-based discrimination unrelated to expression, generally it does protect a speaker's right to control her own message—even when others may disapprove of the speaker's motive or the message itself. U.S. Const. Amend. 1.

[25] **Constitutional Law** Religious speech or activities

Constitutional Law Political speech, beliefs, or activity in general

The First Amendment's Free Speech Clause does not tolerate the government forcing an individual to utter what is not in her mind about a question of political and religious significance. U.S. Const. Amend. 1.

[26] **Constitutional Law** Freedom of Speech, Expression, and Press

Under the First Amendment's Free Speech Clause, no government may affect a speaker's message by forcing her to accommodate other views; no government may alter the expressive content of her message; and no government may interfere with her desired message. U.S. Const. Amend. 1.

[27] **Constitutional Law** Compelled or forced speech, support, or participation

There is nothing incidental about an infringement on speech protected by the First Amendment when a public accommodations law is applied peculiarly to compel expressive activity. U.S. Const. Amend. 1.

[28] **Constitutional Law** Freedom of Speech, Expression, and Press

Constitutional Law Trade or Business

The First Amendment extends to all persons engaged in expressive conduct, including those who seek profit, such as speechwriters, artists, and website designers. U.S. Const. Amend. 1.

[29] **Constitutional Law** Freedom of Speech, Expression, and Press

A commitment to speech for only some messages and some persons is no commitment at all under the First Amendment. U.S. Const. Amend. 1.

[30] **Constitutional Law** Particular Issues and Applications in General

Abiding the Constitution's commitment to the freedom of speech means all of us will encounter ideas we consider unattractive, misguided, or even hurtful, but tolerance, not coercion, is the Nation's answer. U.S. Const. Amend. 1.

[31] **Constitutional Law** Freedom of Speech, Expression, and Press

The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. U.S. Const. Amend. 1.

West Codenotes

Held Unconstitutional

Colo. Rev. Stat. Ann. § 24-34-601(2)(a)

Syllabus *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499 (1906).

***1** Lorie Smith wants to expand her graphic design business, 303 Creative LLC, to include services for couples seeking wedding websites. But Ms. Smith worries that Colorado will use the Colorado Anti-Discrimination Act to compel her —in violation of the First Amendment—to create websites celebrating marriages she does not endorse. To clarify her rights, Ms. Smith filed a lawsuit seeking an injunction to prevent the State from forcing her to create websites celebrating marriages that defy her belief that marriage should be reserved to unions between one man and one woman.

CADA prohibits all "public accommodations" from denying "the full and equal enjoyment" of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait. Colo. Rev. Stat. § 24–34–601(2)(a). The law defines "public accommodation" broadly to include almost every public-facing business in the State. § 24–34–601(1). Either state officials or private citizens may bring actions to enforce the law. §§ 24–34–306, 24–34–602(1). And a variety of penalties can follow any violation.

Before the district court, Ms. Smith and the State stipulated to a number of facts: Ms. Smith is "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender" and "will gladly create custom graphics and websites" for clients of any sexual orientation; she will not produce content that "contradicts biblical truth" regardless of who orders it; Ms. Smith's belief that marriage is a union between one man and one woman is a sincerely held conviction; Ms. Smith provides design services that are "expressive" and her "original, customized" creations "contribut[e] to the overall message" her business conveys "through the websites" it creates; the wedding websites she plans to create "will be expressive in nature," will be "customized and tailored" through close collaboration with individual couples, and will "express Ms. Smith's and 303

Creative's message celebrating and promoting" her view of marriage; viewers of Ms. Smith's websites "will know that the websites are her original artwork;" and "[t]here are numerous companies in the State of Colorado and across the nation that offer custom website design services."

Ultimately, the district court held that Ms. Smith was not entitled to the injunction she sought, and the Tenth Circuit affirmed.

Held: The First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees. Pp. ——– ——.

(a) The framers designed the Free Speech Clause of the First Amendment to protect the "freedom to think as you will and to speak as you think." *Boy Scouts of America v. Dale*, 530 U. S. 640, 660–661, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) (internal quotation marks omitted). The freedom to speak is among our inalienable rights. The freedom of thought and speech is "indispensable to the discovery and spread of political truth." *Whitney v. California*, 274 U. S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). For these reasons, "[i]f there is any fixed star in our constitutional constellation," *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), it is the principle that the government may not interfere with "an uninhibited marketplace of ideas," *McCullen v. Coakley*, 573 U. S. 464, 476, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014) (internal quotation marks omitted).

***2** This Court has previously faced cases where governments have sought to test these foundational principles. In *Barnette*, the Court held that the State of West Virginia's efforts to compel schoolchildren to salute the Nation's flag and recite the Pledge of Allegiance "invad[ed] the sphere of intellect and spirit which it is the purpose of the First Amendment ... to reserve from all official control." 319 U.S. at 642, 63 S.Ct. 1178. State authorities had "transcend[ed] constitutional limitations on their powers." 319 U.S. at 642, 63 S.Ct. 1178. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, Inc., 515 U. S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), the Court held that Massachusetts's public accommodations statute could not be used to force veterans organizing a parade in Boston to include a group of gay, lesbian, and bisexual individuals because the parade was protected speech, and requiring the veterans to include voices they wished to exclude would impermissibly require them to "alter the expressive content of their parade." *Id.,* at 572–573, 115 S.Ct. 2338. And in *Boy Scouts of America* v. *Dale*, when the Boy Scouts sought to exclude assistant scoutmaster James Dale from membership after learning he was gay, the Court held the Boy Scouts to be "an expressive association" entitled to First Amendment protection. 530 U.S. at 656, 120 S.Ct. 2446. The Court found that forcing the Scouts to include Mr. Dale would undoubtedly "interfere with [its] choice not to propound a point of view contrary to its beliefs." *Id.,* at 654, 120 S.Ct. 2446.

These cases illustrate that the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply "misguided," *Hurley*, 515 U. S., at 574, 115 S.Ct. 2338, and likely to cause "anguish" or "incalculable grief," *Snyder v. Phelps*, 562 U. S. 443, 456, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). Generally, too, the government may not compel a person to speak its own preferred messages. See *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 505, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Pp. ——– ——.

(b) Applying these principles to the parties' stipulated facts, the Court agrees with the Tenth Circuit that the wedding websites Ms. Smith seeks to create qualify as pure speech protected by the First Amendment under this Court's precedents. Ms. Smith's websites will express and communicate ideas—namely, those that "celebrate and promote the couple's wedding and unique love story" and those that "celebrat[e] and promot[e]" what Ms. Smith understands to be a marriage. Speech conveyed over the internet, like all other manner of speech, qualifies for the First Amendment's protections. And the Court agrees with the Tenth Circuit that the wedding websites Ms. Smith seeks to create involve *her* speech, a conclusion supported by the parties' stipulations, including that Ms. Smith intends to produce a final story for each couple using her own words and original artwork. While Ms. Smith's speech may combine with the couple's in a final product, an individual "does not forfeit constitutional protection simply by combining multifarious voices" in a single communication. *Hurley*, 515 U. S., at 569, 115 S.Ct. 2338.

Ms. Smith seeks to engage in protected First Amendment speech; Colorado seeks to compel speech she does not wish to provide. As the Tenth Circuit observed, if Ms. Smith offers wedding websites celebrating marriages she endorses, the State intends to compel her to create custom websites celebrating other marriages she does not. 6 F.4th 1160, 1178.

Colorado seeks to compel this speech in order to "excis[e] certain ideas or viewpoints from the public dialogue." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). Indeed, the Tenth Circuit recognized that the coercive "[e]liminati[on]" of dissenting ideas about marriage constitutes Colorado's "very purpose" in seeking to apply its law to Ms. Smith. 6 F.4th at 1178. But while the Tenth Circuit thought that Colorado could compel speech from Ms. Smith consistent with the Constitution, this Court's First Amendment precedents teach otherwise. In *Hurley*, *Dale,* and *Barnette,* the Court found that governments impermissibly compelled speech in violation of the First Amendment when they tried to force speakers to accept a message with which they disagreed. Here, Colorado seeks to put Ms. Smith to a similar choice. If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs, sanctions that may include compulsory participation in "remedial ... training," filing periodic compliance reports, and paying monetary fines. That is an impermissible abridgement of the First Amendment's right to speak freely. *Hurley*, 515 U. S., at 574, 115 S.Ct. 2338.

***3** Under Colorado's logic, the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the message—if the topic somehow implicates a customer's statutorily protected trait. 6 F.4th at 1199 (Tymkovich, C. J., dissenting). Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty. The Court's precedents recognize the First Amendment tolerates none of that. To be sure, public accommodations laws play a vital role in realizing the civil rights of all Americans, and governments in this country have a "compelling interest" in eliminating discrimination in places of public accommodation. *Roberts v. United States Jaycees*, 468 U. S. 609, 628, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). This Court has recognized that public accommodations laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 250, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (internal quotation marks omitted). Over time, governments in this country have expanded public accommodations laws in notable ways. Statutes like Colorado's grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants. *Dale*, 530 U. S., at 656–657, 120 S.Ct. 2446. Often, these enterprises exercised something like monopoly power or hosted or transported others or their belongings. See, *e.g., Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 437, 9 S.Ct. 469, 32 L.Ed. 788 (1889). Importantly, States have also expanded their laws to prohibit more forms of discrimination. Today, for example, approximately half the States have laws like Colorado's that expressly prohibit discrimination on the basis of sexual orientation. The Court has recognized this is "unexceptional." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ——, ——, 138 S.Ct. 1719, 1728, 201 L.Ed.2d 35 (2018). States may "protect gay persons, just as [they] can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment." *Ibid.* At the same time, this Court has also long recognized that no public accommodations law is immune from the demands of the Constitution. In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech. See, *e.g., Hurley*, 515 U. S., at 571, 578, 115 S.Ct. 2338; *Dale*, 530 U. S., at 659, 120 S.Ct. 2446. As in those cases, when Colorado's public accommodations law and the Constitution collide, there can be no question which must prevail. U. S. Const. Art. VI, § 2.

As the Tenth Circuit saw it, Colorado has a compelling interest in ensuring "equal access to publicly available goods and services," and no option short of coercing speech from Ms. Smith can satisfy that interest because she plans to offer "unique services" that are, "by definition, unavailable elsewhere." 6 F.4th at 1179–1180 (internal quotation marks omitted). In some sense, of course, her voice is unique; so is everyone's. But that hardly means a State may coopt an individual's voice for its own purposes. The speaker in *Hurley* had an "enviable" outlet for speech, and the Boy Scouts in *Dale* offered an arguably unique experience, but in both cases this Court held that the State could not use its public accommodations statute to deny a speaker the right "to choose the content of his own message." *Hurley*, 515 U. S., at 573, 115 S.Ct. 2338; see *Dale*, 530 U. S., at 650–656, 120 S.Ct. 2446. A rule otherwise would conscript any unique voice to disseminate the government's preferred messages in violation of the First Amendment. Pp. —— – ——.

(c) Colorado now seems to acknowledge that the First Amendment *does* prohibit it from coercing Ms. Smith to

create websites expressing any message with which she disagrees. Alternatively, Colorado contends, Ms. Smith must simply provide the same commercial product to all, which she can do by repurposing websites celebrating marriages she does endorse for marriages she does not. Colorado's theory rests on a belief that this case does not implicate pure speech, but rather the sale of an ordinary commercial product, and that any burden on Ms. Smith's speech is purely "incidental." On the State's telling, then, speech more or less vanishes from the picture—and, with it, any need for First Amendment scrutiny. Colorado's alternative theory, however, does not sit easily with its stipulation that Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create "customized and tailored" expressive speech for each couple "to celebrate and promote the couple's wedding and unique love story." Colorado seeks to compel just the sort of speech that it tacitly concedes lies beyond its reach.

The State stresses that Ms. Smith offers her speech for pay and does so through 303 Creative LLC, a company in which she is "the sole member-owner." But many of the world's great works of literature and art were created with an expectation of compensation. And speakers do not shed their First Amendment protections by employing the corporate form to disseminate their speech. Colorado urges the Court to look at the reason Ms. Smith refuses to offer the speech it seeks to compel, and it claims that the reason is that she objects to the "protected characteristics" of certain customers. But the parties' stipulations state, to the contrary, that Ms. Smith will gladly conduct business with those having protected characteristics so long as the custom graphics and websites she is asked to create do not violate her beliefs. Ms. Smith stresses that she does not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments.

***4** The First Amendment's protections belong to all, not just to speakers whose motives the government finds worthy. In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance. In the past, other States in *Barnette*, *Hurley*, and *Dale* have similarly tested the First Amendment's boundaries by seeking to compel speech they thought vital at the time. But abiding the Constitution's commitment to the freedom of speech means all will encounter ideas that are "misguided, or even hurtful." *Hurley*, 515 U. S., at 574, 115 S.Ct. 2338. Consistent with the First Amendment, the Nation's answer is tolerance, not coercion. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. Colorado cannot deny that promise consistent with the First Amendment. Pp. —— – ——, —— – ——.

6 F.4th 1160, reversed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, KAVANAUGH, and BARRETT, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN and JACKSON, JJ., joined.

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Opinion

Justice GORSUCH delivered the opinion of the Court.

Like many States, Colorado has a law forbidding businesses from engaging in discrimination when they sell goods and services to the public. Laws along these lines have done much to secure the civil rights of all Americans. But in this particular case Colorado does not just seek to ensure the sale of goods or services on equal terms. It seeks to use its law to compel an individual to create speech she does not believe.

The question we face is whether that course violates the Free Speech Clause of the First Amendment.

I

A

Through her business, 303 Creative LLC, Lorie Smith offers website and graphic design, marketing advice, and social media management services. Recently, she decided to expand her offerings to include services for couples seeking websites for their weddings. As she envisions it, her websites will provide couples with text, graphic arts, and videos to "celebrate" and "conve[y]" the "details" of their "unique love story." App. to Pet. for Cert. 182a, 187a, 198a. The websites will discuss how the couple met, explain their backgrounds, families, and future plans, and provide information about their upcoming wedding. All of the text and graphics on these websites will be "original," "customized," and "tailored" creations. *Id.*, at 187a. The websites will be "expressive in nature," designed "to communicate a particular message." *Id.*, at 181a. Viewers will know, too, "that the websites are [Ms. Smith's] original artwork," for the name of the company she owns and operates by herself will be displayed on every one. *Id.*, at 187a.

While Ms. Smith has laid the groundwork for her new venture, she has yet to carry out her plans. She worries that, if she does so, Colorado will force her to express views with which she disagrees. Ms. Smith provides her website and graphic services to customers regardless of their race, creed, sex, or sexual orientation. *Id.*, at 184a. But she has never created expressions that contradict her own views for anyone—whether that means generating works that encourage violence, demean another person, or defy her religious beliefs by, say, promoting atheism. See *ibid.*; see also Tr. of Oral Arg. 19–20. Ms. Smith does not wish to do otherwise now, but she worries Colorado has different plans. Specifically, she worries that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman. App. to Pet. for Cert. 177a–190a. Ms. Smith acknowledges that her views about marriage may not be popular in all quarters. But, she asserts, the First Amendment's Free Speech Clause protects her from being compelled to speak what she does not believe. The Constitution, she insists, protects her right to differ.

B

***5** **[1]** To clarify her rights, Ms. Smith filed a lawsuit in federal district court. In that suit, she sought an injunction to prevent the State from forcing her to create wedding websites celebrating marriages that defy her beliefs. App. 303–305. To secure relief, Ms. Smith first had to establish her standing to sue. That required her to show "a credible threat" existed that Colorado would, in fact, seek to compel speech from her that she did not wish to produce. *Susan B. Anthony List v. Driehaus*, 573 U. S. 149, 159, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014).

Toward that end, Ms. Smith began by directing the court to the Colorado Anti-Discrimination Act (CADA). That law defines a "public accommodation" broadly to include almost every public-facing business in the State. Colo. Rev. Stat. § 24–34–601(1) (2022). In what some call its "Accommodation Clause," the law prohibits a public accommodation from denying "the full and equal enjoyment" of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait. § 24–34–601(2)(a). Either state officials or private citizens may bring actions to enforce the law. §§ 24–34–306, 24–34–602(1). And a variety of penalties can follow. Courts can order fines up to $500 per violation. § 24–34–602(1)(a). The Colorado Commission on Civil Rights can issue cease-and-desist orders, § 24–34–306(9), and require violators to take various other "affirmative action[s]." § 24–34–605; § 24–34–306(9). In the past, these have included participation in mandatory educational programs and the submission of ongoing compliance reports to state officials. See *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ——, ——, 138 S.Ct. 1719, 1725, 201 L.Ed.2d 35 (2018). [1]

1 In addition to the Accommodation Clause, CADA contains a "Communication Clause" that prohibits a public accommodation from "publish[ing] ... any written ... communication" indicating that a person will be denied "the full and equal enjoyment" of services or that he will be "unwelcome, objectionable, unacceptable, or undesirable" based on a protected classification. Colo. Rev. Stat. § 24–34–601(2)(a) (2022). The Communication Clause, Ms. Smith notes, prohibits any speech inconsistent with the Accommodation Clause.

Because Colorado concedes that its authority to apply the Communication Clause to Ms. Smith stands or falls with its authority to apply the Accommodation Clause, see Brief for Respondents 44–45, we focus our attention on the Accommodation Clause.

In her lawsuit, Ms. Smith alleged that, if she enters the wedding website business to celebrate marriages she does endorse, she faces a credible threat that Colorado will seek to use CADA to compel her to create websites celebrating marriages she does not endorse. 6 F.4th 1160, 1173–1174 (CA10 2021). As evidence, Ms. Smith pointed to Colorado's record of past enforcement actions under CADA, including one that worked its way to this Court five years ago. See *Masterpiece Cakeshop*, 584 U. S., at ——, 138 S.Ct. at 1725; see also App. 25–155 (discussing Colorado's other past enforcement actions).

To facilitate the district court's resolution of the merits of her case, Ms. Smith and the State stipulated to a number of facts:

- Ms. Smith is "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender," and she "will gladly create custom graphics and websites" for clients of any sexual orientation. App. to Pet. for Cert. 184a.

***6** • She will not produce content that "contradicts biblical truth" regardless of who orders it. *Ibid.*

- Her belief that marriage is a union between one man and one woman is a sincerely held religious conviction. *Id.*, at 179a.

- All of the graphic and website design services Ms. Smith provides are "expressive." *Id.*, at 181a.

- The websites and graphics Ms. Smith designs are "original, customized" creations that "contribut[e] to the overall messages" her business conveys "through the websites" it creates. *Id.*, at 181a–182a.

- Just like the other services she provides, the wedding websites Ms. Smith plans to create "will be expressive in nature." *Id.*, at 187a.

- Those wedding websites will be "customized and tailored" through close collaboration with individual couples, and they will "express Ms. Smith's and 303 Creative's message celebrating and promoting" her view of marriage. *Id.*, at 186a–187a.

- Viewers of Ms. Smith's websites "will know that the websites are [Ms. Smith's and 303 Creative's] original artwork." *Id.*, at 187a.

- To the extent Ms. Smith may not be able to provide certain services to a potential customer, "[t]here are numerous companies in the State of Colorado and across the nation that offer custom website design services." *Id.*, at 190a.

C

Ultimately, the district court ruled against Ms. Smith. 405 F.Supp.3d 907, 912 (Colo. 2019). So did the Tenth Circuit. 6 F.4th at 1168. For its part, the Tenth Circuit held that Ms. Smith had standing to sue. In that court's judgment, she had established a credible threat that, if she follows through on her plans to offer wedding website services, Colorado will invoke CADA to force her to create speech she does not believe or endorse. *Id.*, at 1172–1175. The court pointed to the fact that "Colorado has a history of past enforcement against nearly identical conduct—*i.e.*, *Masterpiece Cakeshop*"; that anyone in the State may file a complaint against Ms. Smith and initiate "a potentially burdensome administrative hearing" process; and that "Colorado [has] decline[d] to disavow future enforcement" proceedings against her. *Id.*, at 1174. Before us, no party challenges these conclusions.

Turning to the merits, however, the Tenth Circuit held that Ms. Smith was not entitled to the injunction she sought. The court acknowledged that Ms. Smith's planned wedding websites qualify as "pure speech" protected by the First Amendment. *Id.*, at 1176. As a result, the court reasoned, Colorado had to satisfy "strict scrutiny" before compelling speech from her that she did not wish to create. *Id.*, at 1178. Under that standard, the court continued, the State had to show both that forcing Ms. Smith to create speech would serve a compelling governmental interest and that no less restrictive alternative exists to secure that interest. *Ibid.* Ultimately, a divided panel concluded that the State had carried these burdens. As the majority saw it, Colorado has a compelling interest in ensuring "equal access to publicly available goods and services," and no option short of coercing speech from Ms. Smith can satisfy that interest because she plans to offer "unique services" that are, "by definition, unavailable elsewhere." *Id.*, at 1179–1180 (internal quotation marks omitted).

***7** Chief Judge Tymkovich dissented. He observed that "ensuring access to a *particular* person's" voice, expression, or artistic talent has never qualified as "a compelling state interest" under this Court's precedents. *Id.*, at 1203. Nor, he submitted, should courts depart from those precedents now. "Taken to its logical end," Chief Judge Tymkovich warned, his colleagues' approach would permit the government to "regulate the messages communicated by *all* artists"—a result he called "unprecedented." *Id.*, at 1204.

We granted certiorari to review the Tenth Circuit's disposition. 595 U. S. ——, 142 S.Ct. 1106, 212 L.Ed.2d 6 (2022).

II

[2] **[3]** The framers designed the Free Speech Clause of the First Amendment to protect the "freedom to think as you will and to speak as you think." *Boy Scouts of America v. Dale*, 530 U. S. 640, 660–661, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) (internal quotation marks omitted). They did so because they saw the freedom of speech "both as an end and as a means." *Whitney v. California*, 274 U. S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring); see also 12 The Papers of James Madison 193–194 (C. Hobson & R. Rutland eds. 1979). An end because the freedom to think and speak is among our inalienable human rights. See, *e.g.*, 4 Annals of Cong. 934 (1794) (Rep. Madison). A means because the freedom of thought and speech is "indispensable to the discovery and spread of political truth." *Whitney*, 274 U. S., at 375, 47 S.Ct. 641 (Brandeis, J., concurring). By allowing all views to flourish, the framers understood, we may test and improve our own thinking both as individuals and as a Nation. For all these reasons, "[i]f there is any fixed star in our constitutional constellation," *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), it is the principle that the government may not interfere with "an uninhibited marketplace of ideas," *McCullen v. Coakley*, 573 U. S. 464, 476, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014) (internal quotation marks omitted).

From time to time, governments in this country have sought to test these foundational principles. In *Barnette*, for example, the Court faced an effort by the State of West Virginia to force schoolchildren to salute the Nation's flag and recite the Pledge of Allegiance. If the students refused, the State threatened to expel them and fine or jail their parents. Some families objected on the ground that the State sought to compel their children to express views at odds with their faith as Jehovah's Witnesses. When the dispute arrived here, this Court offered a firm response. In seeking to compel students to salute the flag and recite a pledge, the Court held, state authorities had "transcend[ed] constitutional limitations on their powers." 319 U.S. at 642, 63 S.Ct. 1178. Their dictates "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment ... to reserve from all official control." *Ibid.*

A similar story unfolded in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, Inc., 515 U. S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). There, veterans organizing a St. Patrick's Day parade in Boston refused to include a group of gay, lesbian, and bisexual individuals in their event. The group argued that Massachusetts's public accommodations statute entitled it to participate in the parade as a matter of law. *Id.*, at 560–561, 115 S.Ct. 2338. Lower courts agreed. *Id.*, at 561–566, 115 S.Ct. 2338. But this Court reversed. *Id.*, at 581, 115 S.Ct. 2338. Whatever state law may demand, this Court explained, the parade was constitutionally protected speech and requiring the veterans to include voices they wished to exclude would impermissibly require them to "alter the expressive content of their parade." *Id.*, at 572–573, 115 S.Ct. 2338. The veterans' choice of what to say (and not say) might have been unpopular, but they had a First Amendment right to present their message undiluted by views they did not share.

***8** Then there is *Boy Scouts of America* v. *Dale*. In that case, the Boy Scouts excluded James Dale, an assistant scoutmaster, from membership after learning he was gay. Mr. Dale argued that New Jersey's public accommodations law required the Scouts to reinstate him. 530 U.S. at 644–645, 120 S.Ct. 2446. The New Jersey Supreme Court sided with Mr. Dale, *id.*, at 646–647, 120 S.Ct. 2446, but again this Court reversed, *id.*, at 661, 120 S.Ct. 2446. The decision to exclude Mr. Dale may not have implicated pure speech, but this Court held that the Boy Scouts "is an expressive association" entitled to First Amendment protection. *Id.*, at 656, 120 S.Ct. 2446. And, the Court found, forcing the Scouts to include Mr. Dale would "interfere with [its] choice not to propound a point of view contrary to its beliefs." *Id.*, at 654, 120 S.Ct. 2446.

[4] **[5]** **[6]** **[7]** As these cases illustrate, the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply "misguided," *Hurley*, 515 U. S., at 574, 115 S.Ct. 2338, and likely to cause "anguish" or "incalculable grief," *Snyder v. Phelps*, 562 U. S.

443, 456, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). Equally, the First Amendment protects acts of expressive association. See, *e.g.*, *Dale*, 530 U. S., at 647–656, 120 S.Ct. 2446; *Hurley*, 515 U. S., at 568–570, 579, 115 S.Ct. 2338. Generally, too, the government may not compel a person to speak its own preferred messages. See *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 505–506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); see also, *e.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 256, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); *Wooley v. Maynard*, 430 U. S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ——, ——, 138 S.Ct. 2361, 2371, 201 L.Ed.2d 835 (2018) (*NIFLA*). Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include. See *Hurley,* 515 U. S., at 568–570, 576, 115 S.Ct. 2338; see also *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U. S. 47, 63–64, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (*FAIR*) (discussing cases). All that offends the First Amendment just the same.

III

[8] Applying these principles to this case, we align ourselves with much of the Tenth Circuit's analysis. The Tenth Circuit held that the wedding websites Ms. Smith seeks to create qualify as "pure speech" under this Court's precedents. 6 F.4th at 1176. We agree. It is a conclusion that flows directly from the parties' stipulations. They have stipulated that Ms. Smith's websites promise to contain "images, words, symbols, and other modes of expression." App. to Pet. for Cert. 181a. They have stipulated that every website will be her "original, customized" creation. *Id.*, at 181a–182a. And they have stipulated that Ms. Smith will create these websites to communicate ideas—namely, to "celebrate and promote the couple's wedding and unique love story" and to "celebrat[e] and promot[e]" what Ms. Smith understands to be a true marriage. *Id.*, at 186a–187a.

[9] A hundred years ago, Ms. Smith might have furnished her services using pen and paper. Those services are no less protected speech today because they are conveyed with a "voice that resonates farther than it could from any soapbox." *Reno v. American Civil Liberties Union*, 521 U. S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). All manner of speech—from "pictures, films, paintings, drawings, and engravings," to "oral utterance and the printed word"—qualify for the First Amendment's protections; no less can hold true when it comes to speech like Ms. Smith's conveyed over the Internet. *Kaplan v. California*, 413 U. S. 115, 119–120, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); see also *Shurtleff* v. *Boston*, 596 U. S. ——, —— – ——, 142 S.Ct. 1583, 1590–91 (2022) (flags); *Brown v. Entertainment Merchants Assn.*, 564 U. S. 786, 790, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (video games); *Hurley*, 515 U. S., at 568–570, 115 S.Ct. 2338 (parades); *Ward v. Rock Against Racism*, 491 U. S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (music); *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 501–502, 72 S.Ct. 777, 96 L.Ed. 1098 (1952) (movies).

***9** **[10]** **[11]** We further agree with the Tenth Circuit that the wedding websites Ms. Smith seeks to create involve *her* speech. 6 F.4th at 1181, and n. 5. Again, the parties' stipulations lead the way to that conclusion. See App. to Pet. for Cert. 181a, 187a. As the parties have described it, Ms. Smith intends to "ve[t]" each prospective project to determine whether it is one she is willing to endorse. *Id.*, at 185a. She will consult with clients to discuss "their unique stories as source material." *Id.*, at 186a. And she will produce a final story for each couple using her own words and her own "original artwork." *Id.*, at 182a–183a. Of course, Ms. Smith's speech may combine with the couple's in the final product. But for purposes of the First Amendment that changes nothing. An individual "does not forfeit constitutional protection simply by combining multifarious voices" in a single communication. *Hurley*, 515 U. S., at 569, 115 S.Ct. 2338.

[12] As surely as Ms. Smith seeks to engage in protected First Amendment speech, Colorado seeks to compel speech Ms. Smith does not wish to provide. As the Tenth Circuit observed, if Ms. Smith offers wedding websites celebrating marriages she endorses, the State intends to "forc[e her] to create custom websites" celebrating other marriages she does not. 6 F.4th at 1178. Colorado seeks to compel this speech in order to "excis[e] certain ideas or viewpoints from the public dialogue." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). Indeed, the Tenth Circuit recognized that the coercive "[e]liminati[on]" of dissenting "ideas" about marriage constitutes Colorado's "very purpose" in seeking to apply its law to Ms. Smith. 6 F.4th at 1178.

[13] We part ways with the Tenth Circuit only when it comes to the legal conclusions that follow. While that court thought

Colorado could compel speech from Ms. Smith consistent with the Constitution, our First Amendment precedents laid out above teach otherwise. In *Hurley*, the Court found that Massachusetts impermissibly compelled speech in violation of the First Amendment when it sought to force parade organizers to accept participants who would "affec[t] the[ir] message." 515 U.S. at 572, 115 S.Ct. 2338. In *Dale*, the Court held that New Jersey intruded on the Boy Scouts' First Amendment rights when it tried to require the group to "propound a point of view contrary to its beliefs" by directing its membership choices. 530 U.S. at 654, 120 S.Ct. 2446. And in *Barnette*, this Court found impermissible coercion when West Virginia required schoolchildren to recite a pledge that contravened their convictions on threat of punishment or expulsion. 319 U.S. at 626–629, 63 S.Ct. 1178. Here, Colorado seeks to put Ms. Smith to a similar choice: If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs, sanctions that may include compulsory participation in "remedial ... training," filing periodic compliance reports as officials deem necessary, and paying monetary fines. App. 120; *supra*, at ——. Under our precedents, that "is enough," more than enough, to represent an impermissible abridgment of the First Amendment's right to speak freely. *Hurley*, 515 U. S., at 574, 115 S.Ct. 2338.

[14] **[15]** Consider what a contrary approach would mean. Under Colorado's logic, the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait. 6 F.4th at 1198 (Tymkovich, C. J., dissenting). Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty. The government could require "an unwilling Muslim movie director to make a film with a Zionist message," or "an atheist muralist to accept a commission celebrating Evangelical zeal," so long as they would make films or murals for other members of the public with different messages. *Id*., at 1199. Equally, the government could force a male website designer married to another man to design websites for an organization that advocates against same-sex marriage. See Brief for Petitioners 26–27. Countless other creative professionals, too, could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so. See, *e.g.*, Brief for Creative Professionals et al. as *Amici Curiae* 5–10; Brief for First Amendment Scholars as *Amici Curiae* 19–22. As our precedents recognize, the First Amendment tolerates none of that.

***10** **[16]** **[17]** In saying this much, we do not question the vital role public accommodations laws play in realizing the civil rights of all Americans. This Court has recognized that governments in this country have a "compelling interest" in eliminating discrimination in places of public accommodation. *Roberts v. United States Jaycees*, 468 U. S. 609, 628, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); see also *Hurley*, 515 U. S., at 571–572, 115 S.Ct. 2338. This Court has recognized, too, that public accommodations laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 250, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (internal quotation marks omitted); see also, *e.g.*, *Katzenbach v. McClung*, 379 U. S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam*).

Over time, governments in this country have expanded public accommodations laws in notable ways too. Statutes like Colorado's grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants. *Dale*, 530 U. S., at 656–657, 120 S.Ct. 2446. Often, these enterprises exercised something like monopoly power or hosted or transported others or their belongings much like bailees. See, *e.g.*, *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 437, 9 S.Ct. 469, 32 L.Ed. 788 (1889); *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 14, 14 S.Ct. 1098, 38 L.Ed. 883 (1894). Over time, some States, Colorado included, have expanded the reach of these nondiscrimination rules to cover virtually every place of business engaged in any sales to the public. Compare 1885 Colo. Sess. Laws pp. 132–133 (a short list of entities originally bound by the State's public accommodations law) with Colo. Rev. Stat. § 24–34–601(1) (currently defining a public accommodation to include "any place of business engaged in any sales to the public").

[18] Importantly, States have also expanded their laws to prohibit more forms of discrimination. Today, for example, approximately half the States have laws like Colorado's that expressly prohibit discrimination on the basis of sexual orientation.[2] And, as we have recognized, this is entirely "unexceptional." *Masterpiece Cakeshop*, 584 U. S., at ——, 138 S.Ct. at 1728. States may "protect gay persons, just as

[they] can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment." *Ibid.*; see also *Hurley*, 515 U. S., at 571–572, 115 S.Ct. 2338; 6 F.4th at 1203 (Tymkovich, C. J., dissenting). Consistent with all of this, Ms. Smith herself recognizes that Colorado and other States are generally free to apply their public accommodations laws, including their provisions protecting gay persons, to a vast array of businesses. Reply Brief 15; see Tr. of Oral Arg. 45–46.

2 Besides Colorado, this includes Cal. Civ. Code Ann. § 51 (West 2020); Conn. Gen. Stat. § 46a–81d (2021); Del. Code Ann., Tit. 6, § 4504 (2019); Haw. Rev. Stat. § 489–3 (Cum. Supp. 2021); Ill. Comp. Stat., ch. 775, § 5/1–102 (West 2021); Iowa Code § 216.7 (2022); Me. Rev. Stat. Ann., Tit. 5, § 4591 (2013); Md. State Govt. Code Ann. § 20–304 (2021); Mass. Gen. Laws, ch. 272, § 98 (2021); Mich. Comp. Laws Ann. § 37.2302 (West 2013); Minn. Stat. § 363A.11 (2022); Nev. Rev. Stat. § 651.070 (2017); N. H. Rev. Stat. Ann. § 354–A:17 (2022); N. J. Stat. Ann. § 10:5–12 (West 2013); N. M. Stat. Ann. § 28–1–7 (2022); N. Y. Exec. Law Ann. § 291(2) (West 2019); Ore. Rev. Stat. § 659A.403 (2021); R. I. Gen. Laws § 11–24–2 (2002); Vt. Stat. Ann., Tit. 9, § 4502(a) (2020); Va. Code Ann. § 2.2–3904 (2022); Wash. Rev. Code § 49.60.215 (2022); Wis. Stat. § 106.52 (2019–2020). See also Brief for Local Governments et al. as *Amici Curiae* 5 (noting that many local governments have enacted similar rules).

***11** **[19]** **[20]** **[21]** At the same time, this Court has also recognized that no public accommodations law is immune from the demands of the Constitution. In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech. In *Hurley*, the Court commented favorably on Massachusetts' public accommodations law, but made plain it could not be "applied to expressive activity" to compel speech. 515 U. S. at 571, 578, 115 S.Ct. 2338. In *Dale*, the Court observed that New Jersey's public accommodations law had many lawful applications but held that it could "not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." 530 U.S. at 659, 120 S.Ct. 2446. And, once more, what was true in those cases must hold true here. When a state public accommodations law and the Constitution collide, there can be no question which must prevail. U. S. Const., Art. VI, cl. 2.

Nor is it any answer, as the Tenth Circuit seemed to suppose, that Ms. Smith's services are "unique." 6 F.4th at 1180. In some sense, of course, her voice is unique; so is everyone's. But that hardly means a State may coopt an individual's voice for its own purposes. In *Hurley*, the veterans had an "enviable" outlet for speech; after all, their parade was a notable and singular event. 515 U. S. at 560, 577–578, 115 S.Ct. 2338. In *Dale*, the Boy Scouts offered what some might consider a unique experience. 530 U.S. at 649–650, 120 S.Ct. 2446. But in both cases this Court held that the State could not use its public accommodations statute to deny speakers the right "to choose the content of [their] own message[s]." *Hurley*, 515 U. S., at 573, 115 S.Ct. 2338; see *Dale*, 530 U. S., at 650–656, 120 S.Ct. 2446. Were the rule otherwise, the better the artist, the finer the writer, the more unique his talent, the more easily his voice could be conscripted to disseminate the government's preferred messages. That would not respect the First Amendment; more nearly, it would spell its demise.

IV

Before us, Colorado appears to distance itself from the Tenth Circuit's reasoning. Now, the State seems to acknowledge that the First Amendment *does* forbid it from coercing Ms. Smith to create websites endorsing same-sex marriage or expressing any other message with which she disagrees. See Brief for Respondents 12 (disclaiming any interest in "interfer[ing] with [Ms. Smith's] choice to offer only websites of [her] own design"); see also Brief for United States as *Amicus Curiae* 19 (conceding that "constitutional concerns" would arise if Colorado "require[d] petitione[r] to design a website" that she "would not create or convey for any client"). Instead, Colorado devotes most of its efforts to advancing an alternative theory for affirmance.

The State's alternative theory runs this way. To comply with Colorado law, the State says, all Ms. Smith must do is repurpose websites she will create to celebrate marriages she *does* endorse for marriages she does *not*. She sells a product to some, the State reasons, so she must sell the same product to all. Brief for Respondents 15, 20. At bottom, Colorado's theory rests on a belief that the Tenth Circuit erred at the outset when it said this case implicates pure speech. *Id.*, at 19. Instead, Colorado says, this case involves only the sale of an ordinary commercial product and any burden on Ms.

Smith's speech is purely "incidental." *Id.*, at 18, 25–28; see Tr. of Oral Arg. 65, 97–98. On the State's telling, then, speech more or less vanishes from the picture—and, with it, any need for First Amendment scrutiny. In places, the dissent seems to advance the same line of argument. *Post*, at —— (opinion of SOTOMAYOR, J.).

This alternative theory, however, is difficult to square with the parties' stipulations. As we have seen, the State has stipulated that Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create "customized and tailored" speech for each couple. App. to Pet. for Cert. 181a, 187a. The State has stipulated that "[e]ach website 303 Creative designs and creates is an original, customized creation for each client." *Id.*, at 181a. The State has stipulated, too, that Ms. Smith's wedding websites "will be expressive in nature, using text, graphics, and in some cases videos to celebrate and promote the couple's wedding and unique love story." *Id.*, at 187a. As the case comes to us, then, Colorado seeks to compel just the sort of speech that it tacitly concedes lies beyond the reach of its powers.

***12** **[22]** Of course, as the State emphasizes, Ms. Smith offers her speech for pay and does so through 303 Creative LLC, a company in which she is "the sole member-owner." *Id.*, at 181a; see also *post*, at —— (opinion of SOTOMAYOR, J.) (emphasizing Ms. Smith's "commercial" activity). But none of that makes a difference. Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return? Or that a visual artist who accepts commissions from the public does the same? Many of the world's great works of literature and art were created with an expectation of compensation. Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech. This fact underlies our cases involving everything from movie producers to book publishers to newspapers. See, *e.g.*, *Joseph Burstyn, Inc.*, 343 U. S., at 497–503, 72 S.Ct. 777; *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 114–116, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); *Grosjean v. American Press Co.*, 297 U. S. 233, 240–241, 249, 56 S.Ct. 444, 80 L.Ed. 660 (1936).

[23] **[24]** Colorado next urges us to focus on the *reason* Ms. Smith refuses to offer the speech it seeks to compel. She refuses, the State insists, because she objects to the "protected characteristics" of certain customers. Brief for Respondents 16; see also *post*, at —— – ——, —— – —— (opinion of SOTOMAYOR, J.) (reciting the same argument). But once more, the parties' stipulations speak differently. The parties agree that Ms. Smith "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites" do not violate her beliefs. App. to Pet. for Cert. 184a. That is a condition, the parties acknowledge, Ms. Smith applies to "all customers." *Ibid.* Ms. Smith stresses, too, that she has not and will not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments. See Tr. of Oral Arg. 18–20. Nor, in any event, do the First Amendment's protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive. See *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U. S. 449, 468–469, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (opinion of ROBERTS, C. J.) (observing that "a speaker's motivation is entirely irrelevant" (internal quotation marks omitted)); *National Socialist Party of America v. Skokie*, 432 U. S. 43, 43–44, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (*per curiam*) (upholding free-speech rights of participants in a Nazi parade); *Snyder*, 562 U. S., at 456–457, 131 S.Ct. 1207 (same for protestors of a soldier's funeral). [3]

3 The dissent labels the distinction between status and message "amusing" and "embarrassing." *Post*, at ——. But in doing so, the dissent ignores a fundamental feature of the Free Speech Clause. While it does *not* protect status-based discrimination unrelated to expression, generally it *does* protect a speaker's right to control her own message—even when we may disapprove of the speaker's motive or the message itself. The dissent's derision is no answer to any of this. It ignores, too, the fact that Colorado *itself* has, in other contexts, distinguished status-based discrimination (forbidden) from the right of a speaker to control his own message (protected). See App. 131, 137, 140, 143–144, 149, 152, 154. (Truth be told, even the dissent acknowledges "th[is] distinction" elsewhere in its opinion. *Post*, at ——, n. 11.) Nor is the distinction unusual in societies committed both to nondiscrimination rules and free expression. See, *e.g.*, *Lee* v. *Ashers Baking Co. Ltd.*, [2018] UKSC 49, p. 14 ("The less favourable treatment was afforded to the message not to the man.").

Does the dissent really find all that amusing and embarrassing?

***13** Failing all else, Colorado suggests that this Court's decision in *FAIR* supports affirmance. See also *post*, at —— – —— (opinion of SOTOMAYOR, J.) (making the same argument). In *FAIR*, a group of schools challenged a law requiring them, as a condition of accepting federal funds, to permit military recruiters space on campus on equal terms with other potential employers. 547 U. S. at 51–52, 58, 126 S.Ct. 1297. The only expressive activity required of the law schools, the Court found, involved the posting of logistical notices along these lines: " 'The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m.' " *Id.*, at 61–62, 126 S.Ct. 1297. And, the Court reasoned, compelled speech of this sort was "incidental" and a "far cry" from the speech at issue in our "leading First Amendment precedents [that] have established the principle that freedom of speech prohibits the government from telling people what they must say." *Ibid.*; see also *NIFLA*, 585 U. S., at ——, 138 S.Ct. at 2371.

[25] **[26]** It is a far cry from this case too. To be sure, our cases have held that the government may sometimes "requir[e] the dissemination of purely factual and uncontroversial information," particularly in the context of "commercial advertising." *Hurley*, 515 U. S., at 573, 115 S.Ct. 2338 (internal quotation marks omitted); see also *NIFLA*, 585 U. S., at ——, 138 S.Ct. at 2373; *Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795–796, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). But this case involves nothing like that. Here, Colorado does not seek to impose an incidental burden on speech. It seeks to force an individual to "utter what is not in [her] mind" about a question of political and religious significance. *Barnette*, 319 U. S., at 634, 63 S.Ct. 1178. And that, *FAIR* reaffirmed, is something the First Amendment does not tolerate. No government, *FAIR* recognized, may affect a "speaker's message" by "forc[ing]" her to "accommodate" other views, 547 U.S. at 63, 126 S.Ct. 1297; no government may " 'alter' " the " 'expressive content' " of her message, *id.*, at 63–64, 126 S.Ct. 1297 (alteration omitted); and no government may "interfer[e] with" her "desired message," *id.*, at 64, 126 S.Ct. 1297.

V

It is difficult to read the dissent and conclude we are looking at the same case. Much of it focuses on the evolution of public accommodations laws, *post*, at —— – ——, and the strides gay Americans have made towards securing equal justice under law, *post*, at —— – ——. And, no doubt, there is much to applaud here. But none of this answers the question we face today: Can a State force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead?

When the dissent finally gets around to that question—more than halfway into its opinion—it reimagines the facts of this case from top to bottom. The dissent claims that Colorado wishes to regulate Ms. Smith's "conduct," not her speech. *Post*, at —— – ——. Forget Colorado's stipulation that Ms. Smith's activities are "expressive," App. to Pet. for Cert. 181a, and the Tenth Circuit's conclusion that the State seeks to compel "pure speech," 6 F.4th at 1176. The dissent chides us for deciding a pre-enforcement challenge. *Post*, at ——. But it ignores the Tenth Circuit's finding that Ms. Smith faces a credible threat of sanctions unless she conforms her views to the State's. 6 F.4th at 1172–1175. The dissent suggests (over and over again) that any burden on speech here is "incidental." *Post*, at ——, —— – ——, —— – ——. All despite the Tenth Circuit's finding that Colorado intends to force Ms. Smith to convey a message she does not believe with the "very purpose" of "[e]liminating ... ideas" that differ from its own. 6 F.4th at 1178. [4]

4 Perplexingly, too, the dissent suggests that, by recounting the Tenth Circuit's conclusion on this score, we "misunderstan[d] this case" and "invo[ke] ... Orwellian thought policing." *Post*, at ——, n. 14.

Nor does the dissent's reimagination end there. It claims that, "for the first time in its history," the Court "grants a business open to the public" a "right to refuse to serve members of a protected class." *Post*, at ——; see also *id.*, at 26, n. 10, 35, 14 S.Ct. 1098. Never mind that we do no such thing and Colorado *itself* has stipulated Ms. Smith will (as CADA requires) "work with all people regardless of ... sexual orientation." App. to Pet. for Cert. 184a. Never mind, too, that it is the dissent that would have this Court do something truly novel by allowing a government to coerce an individual to speak contrary to her beliefs on a significant issue of personal conviction, all in order to eliminate ideas that differ from its own.

***14** There is still more. The dissent asserts that we "sweep under the rug petitioners' challenge to CADA's Communication Clause." *Post*, at 26. This despite the fact the parties and the Tenth Circuit recognized that

Ms. Smith's Communication Clause challenge hinges on her Accommodation Clause challenge. (So much so that Colorado devoted less than two pages at the tail end of its brief to the Communication Clause and the Tenth Circuit afforded it just three paragraphs in its free-speech analysis. See Brief for Respondents 44–45; 6 F.4th at 1182–1183.)[5] The dissent even suggests that our decision today is akin to endorsing a "separate but equal" regime that would allow law firms to refuse women admission into partnership, restaurants to deny service to Black Americans, or businesses seeking employees to post something like a "White Applicants Only" sign. *Post*, at ——, —— – ——, —, —— – ——, ——, and n. 13, ——. Pure fiction all.

5 Why does the dissent try to refocus this case around the Communication Clause? Perhaps because the moment one acknowledges the parties' stipulations—and the fact Colorado seeks to use its Accommodation Clause to compel speech in order to ensure conformity to its own views on a topic of major significance—the First Amendment implications become obvious. As does the fact that our case is nothing like a typical application of a public accommodations law requiring an ordinary, non-expressive business to serve all customers or consider all applicants. Our decision today does not concern—much less endorse—anything like the " 'straight couples only' " notices the dissent conjures out of thin air. *Post*, at ——, n. 10. Nor do the parties discuss anything of the sort in their stipulations.

In some places, the dissent gets so turned around about the facts that it opens fire on its own position. For instance: While stressing that a Colorado company cannot refuse "the full and equal enjoyment of [its] services" based on a customer's protected status, *post*, at ——, the dissent assures us that a company selling creative services "to the public" *does* have a right "to decide what messages to include or not to include," *post*, at ——. But if that is true, what are we even debating?

Instead of addressing the parties' stipulations about the case actually before us, the dissent spends much of its time adrift on a sea of hypotheticals about photographers, stationers, and others, asking if they too provide expressive services covered by the First Amendment. *Post*, at —— – ——, —— – ——, ——. But those cases are not *this* case. Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity. And the Tenth Circuit has recognized her services involve "pure speech." See *supra*, at ——, ——. Nothing the dissent says can alter this—nor can it displace the First Amendment protections that follow.

[27] The dissent's treatment of precedent parallels its handling of the facts. Take its remarkable suggestion that a government forcing an individual to create speech on weighty issues with which she disagrees—all, as the Tenth Circuit found, with the goal of "[e]liminating" views it does not share, 6 F.4th at 1178—only "incidental[ly]" burdens First Amendment liberties. *Post*, at —— – ——. Far from embracing a notion like that, our cases have rejected it time after time—including in the context of public accommodations laws. See Parts II–IV, *supra*; *FAIR*, 547 U. S., at 61–64, 126 S.Ct. 1297 (no government may affect a "speaker's own message" by "forc[ing]" her to "accommodate" views she does not hold); *Hurley*, 515 U. S., at 563, 566, 115 S.Ct. 2338 (using a public accommodations law to compel parade organizers to include speech they did not believe was no mere " 'incidental' " infringement on First Amendment rights); *Dale*, 530 U. S., at 659, 120 S.Ct. 2446 (employing a public accommodations law to require the Boy Scouts to alter their admissions policies had more than "an incidental effect on protected speech").[6]

6 The dissent observes that public accommodations laws may sometimes touch on speech incidentally as they work to ensure ordinary, non-expressive goods and services are sold on equal terms. Cf. *post*, at —— – —— (citing *Sorrell v. IMS Health Inc.*, 564 U. S. 552, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011); *Rumsfeld* v. *FAIR*, 547 U. S. 47, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006); *United States v. O'Brien*, 391 U. S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). But as *Hurley* observed, there is nothing "incidental" about an infringement on speech when a public accommodations law is applied "peculiar[ly]" to compel expressive activity. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, Inc., 515 U. S. 557, 572, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). The dissent notes that our case law has not sustained every First Amendment objection to an antidiscrimination rule, as with a law firm that sought to exclude women from partnership. *Post*, at —— – —— (citing *Hishon v. King & Spalding*,

467 U. S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Roberts v. United States Jaycees*, 468 U. S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984)). But the dissent disregards *Dale*'s holding that context matters and that very different considerations come into play when a law is used to force individuals to toe the government's preferred line when speaking (or associating to express themselves) on matters of significance. *Boy Scouts of America v. Dale*, 530 U. S. 640, 648–653, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000).

***15** **[28]** When it finally gets around to discussing these controlling precedents, the dissent offers a wholly unpersuasive attempt to distinguish them. The First Amendment protections furnished in *Barnette*, *Hurley*, and *Dale*, the dissent declares, were limited to schoolchildren and "nonprofit[s]," and it is "dispiriting" to think they might also apply to Ms. Smith's "commercial" activity. *Post*, at —— – ——. But our precedents endorse nothing like the limits the dissent would project on them. Instead, as we have seen, the First Amendment extends to all persons engaged in expressive conduct, including those who seek profit (such as speechwriters, artists, and website designers). See *supra*, at —— – ——. If anything is truly dispiriting here, it is the dissent's failure to take seriously this Court's enduring commitment to protecting the speech rights of all comers, no matter how controversial—or even repugnant—many may find the message at hand.

Finally, the dissent comes out and says what it really means: Once Ms. Smith offers some speech, Colorado "would require [her] to create and sell speech, notwithstanding [her] sincere objection to doing so"—and the dissent would force her to comply with that demand. *Post*, at —— – ——. Even as it does so, however, the dissent refuses to acknowledge where its reasoning leads. In a world like that, as Chief Judge Tymkovich highlighted, governments could force "an unwilling Muslim movie director to make a film with a Zionist message," they could compel "an atheist muralist to accept a commission celebrating Evangelical zeal," and they could require a gay website designer to create websites for a group advocating against same-sex marriage, so long as these speakers would accept commissions from the public with different messages. 6 F.4th at 1199 (dissenting opinion). Perhaps the dissent finds these possibilities untroubling because it trusts state governments to coerce only "enlightened" speech. But if that is the calculation, it is a dangerous one indeed. [7]

7 Perhaps the dissent finds these possibilities untroubling for another reason. It asserts that CADA does not apply to "[m]any filmmakers, visual artists, and writers" because they do not "hold out" their services to the public. *Post*, at ——. But the dissent cites nothing to support its claim and instead, once more, fights the facts. As we have seen, Colorado's law today applies to "*any* place of business engaged in *any* sales to the public." Colo. Rev. Stat. § 24–34–601(1) (emphasis added); see also Part III, *supra*. And the dissent can hardly dispute that many artists and writers accept commissions from the public. Brief for Creative Professionals et al. as *Amici Curiae* 5–21. Certainly, Colorado does not advance anything like the dissent's argument; it calls any exemption to its law for "artists" and others who provide "custom" services "unworkable." Brief for Respondents 28–31 (internal quotation marks omitted).

The dissent is right about one thing—"[w]hat a difference" time can make. See *post*, at —— (internal quotation marks omitted). Eighty years ago in *Barnette*, this Court affirmed that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." 319 U.S. at 642, 63 S.Ct. 1178. The Court did so despite the fact that the speech rights it defended were deeply unpopular; at the time, the world was at war and many thought respect for the flag and the pledge "essential for the welfare of the state." *Id.*, at 662–663, 63 S.Ct. 1178 (Frankfurter, J., dissenting); see also *id.*, at 636, 640, 63 S.Ct. 1178 (majority opinion). Fifty years ago, this Court protected the right of Nazis to march through a town home to many Holocaust survivors and along the way espouse ideas antithetical to those for which this Nation stands. See *Skokie*, 432 U. S., at 43–44, 97 S.Ct. 2205; *supra*, at —— – ——. Five years ago, in a case the dissenters highlight at the outset of their opinion, the Court stressed that "it is not ... the role of the State or its officials to prescribe what shall be offensive." *Masterpiece Cakeshop*, 584 U. S., at ——, 138 S.Ct. at 1746. And just days ago, Members of today's dissent joined in holding that the First Amendment restricts how States may prosecute stalkers despite the "harm[ful]," "low-value," and "upsetting" nature of their speech. *Counterman* v. *Colorado*, 600 U. S. ——, ——, —— S.Ct. ——, ——. —— L.E.2d —— (2023) (slip op., at 6); *id.*, at ——, —— S.Ct. at —— (SOTOMAYOR, J., concurring in part and concurring in judgment) (slip op., at 5).

***16** **[29]** Today, however, the dissent abandons what this Court's cases have recognized time and time again: A

commitment to speech for only *some* messages and *some* persons is no commitment at all. By approving a government's effort to "[e]liminat[e]" disfavored "ideas," 6 F.4th at 1178, today's dissent is emblematic of an unfortunate tendency by some to defend First Amendment values only when they find the speaker's message sympathetic. But "[i]f liberty means anything at all, it means the right to tell people what they do not want to hear." 6 F.4th at 1190 (Tymkovich, C. J., dissenting) (quoting G. Orwell).

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[30] **[31]** In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance. In the past, other States in *Barnette*, *Hurley*, and *Dale* have similarly tested the First Amendment's boundaries by seeking to compel speech they thought vital at the time. But, as this Court has long held, the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong. Of course, abiding the Constitution's commitment to the freedom of speech means all of us will encounter ideas we consider "unattractive," *post*, at —— (opinion of SOTOMAYOR, J.), "misguided, or even hurtful," *Hurley*, 515 U. S., at 574, 115 S.Ct. 2338. But tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. Because Colorado seeks to deny that promise, the judgment is

Reversed.

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join, dissenting.

Five years ago, this Court recognized the "general rule" that religious and philosophical objections to gay marriage "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. ——, ——, 138 S.Ct. 1719, 1727, 201 L.Ed.2d 35 (2018). The Court also recognized the "serious stigma" that would result if "purveyors of goods and services who object to gay marriages for moral and religious reasons" were "allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages.' " *Id.*, at ——, 138 S.Ct. at 1728–29.

Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class. Specifically, the Court holds that the First Amendment exempts a website-design company from a state law that prohibits the company from denying wedding websites to same-sex couples if the company chooses to sell those websites to the public. The Court also holds that the company has a right to post a notice that says, " 'no [wedding websites] will be sold if they will be used for gay marriages.' " *Ibid.*

"What a difference five years makes." *Carson v. Makin*, 596 U. S. ——, ——, 142 S.Ct. 1987, 2014, 213 L.Ed.2d 286 (2022) (SOTOMAYOR, J., dissenting). And not just at the Court. Around the country, there has been a backlash to the movement for liberty and equality for gender and sexual minorities. New forms of inclusion have been met with reactionary exclusion. This is heartbreaking. Sadly, it is also familiar. When the civil rights and women's rights movements sought equality in public life, some public establishments refused. Some even claimed, based on sincere religious beliefs, constitutional rights to discriminate. The brave Justices who once sat on this Court decisively rejected those claims.

***17** Now the Court faces a similar test. A business open to the public seeks to deny gay and lesbian customers the full and equal enjoyment of its services based on the owner's religious belief that same-sex marriages are "false." The business argues, and a majority of the Court agrees, that because the business offers services that are customized and expressive, the Free Speech Clause of the First Amendment shields the business from a generally applicable law that prohibits discrimination in the sale of publicly available goods and services. That is wrong. Profoundly wrong. As I will explain, the law in question targets conduct, not speech, for regulation, and the *act* of discrimination has never constituted protected expression under the First Amendment. Our Constitution contains no right to refuse service to a disfavored group. I dissent.

I

A

A "public accommodations law" is a law that guarantees to every person the full and equal enjoyment of places of

public accommodation without unjust discrimination. The American people, through their elected representatives, have enacted such laws at all levels of government: The federal Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 prohibit discrimination by places of public accommodation on the basis of race, color, religion, national origin, or disability.[1] All but five States have analogous laws that prohibit discrimination on the basis of these and other traits, such as age, sex, sexual orientation, and gender identity.[2] And numerous local laws offer similar protections.

1 See 42 U.S.C. § 2000a *et seq.* (Title II of Civil Rights Act of 1964); 42 U.S.C. § 12181 *et seq.* (Title III of Americans with Disabilities Act of 1990).

2 See Alaska Stat. § 18.80.230 (2023); Ariz. Rev. Stat. Ann. § 41–1442 (2017); Ark. Code Ann. § 16–123–107 (Supp. 2021); Cal. Civ. Code Ann. § 51 (West 2020); Colo. Rev. Stat. § 24–34–601 (2022); Conn. Gen. Stat. §§ 46a–64, 46a–81d (Cum. Supp. 2023); Del. Code Ann., Tit. 6, § 4504 (Cum. Supp. 2022); Fla. Stat. §§ 413.08, 760.08 (2022); Haw. Rev. Stat. § 489–3 (Cum. Supp. 2021); Idaho Code Ann. § 67–5909 (2020); Ill. Comp. Stat., ch. 775, § 5/1–102 (West Supp. 2021); Ind. Code § 22–9–1–2 (2022); Iowa Code § 216.7 (2023); Kan. Stat. Ann. § 44–1001 (2021); Ky. Rev. Stat. Ann. §§ 344.120, 344.145 (West 2018); La. Rev. Stat. Ann. § 51:2247 (West Cum. Supp. 2023); Me. Rev. Stat. Ann., Tit. 5, § 4591 (Cum. Supp. 2023); Md. State Govt. Code Ann. § 20–304 (2021); Mass. Gen. Laws, ch. 272, § 98 (2020); Mich. Comp. Laws §§ 37.1102, 37.2302 (1981), as amended, 2023 Mich. Pub. Acts no. 6 (*sine die*); Minn. Stat. § 363A.11 (2022); Mo. Rev. Stat. § 213.065 (Cum. Supp. 2021); Mont. Code Ann. § 49–2–304 (2021); Neb. Rev. Stat. § 20–134 (2022); Nev. Rev. Stat. § 651.070 (2017); N. H. Rev. Stat. Ann. § 354–A:17 (2022); N. J. Stat. Ann. § 10:5–12 (West Cum. Supp. 2023); N. M. Stat. Ann. § 28–1–7 (2022); N. Y. Civ. Rights Law Ann. § 40 (West 2019); N. D. Cent. Code Ann. § 14–02.4–14 (2017); Ohio Rev. Code Ann. § 4112.02 (Lexis Supp. 2023); Okla. Stat., Tit. 25, § 1402 (2011); Ore. Rev. Stat. § 659A.403 (2021); Pa. Stat. Ann., Tit. 43, § 953 (Purdon 2020); R. I. Gen. Laws § 11–24–2 (2002); S. C. Code Ann. § 45–9–10 (2016); S. D. Codified Laws § 20–13–23 (2016); Tenn. Code Ann. § 4–21–501 (2021); Utah Code § 13–7–3 (2022); Vt. Stat. Ann., Tit. 9, § 4502 (2020); Va. Code Ann. § 2.2–3904 (2022); Wash. Rev. Code § 49.60.215 (2022); W. Va. Code Ann. § 5–11–2 (Lexis 2022); Wis. Stat. § 106.52 (2019–2020); Wyo. Stat. Ann. § 6–9–101 (2021).

The people of Colorado have adopted the Colorado Anti-Discrimination Act (CADA), which provides:

> "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colo. Rev. Stat. § 24–34–601(2)(a).

***18** This provision, known as the Act's "Accommodation Clause," applies to any business engaged in sales "to the public." § 24–34–601(1). The Accommodation Clause does not apply to any "church, synagogue, mosque, or other place that is principally used for religious purposes." *Ibid.*

In addition, CADA contains what is referred to as the Act's "Communication Clause," which makes it unlawful to advertise that services "will be refused, withheld from, or denied," or that an individual is "unwelcome" at a place of public accommodation, based on the same protected traits. § 24–34–601(2)(a). In other words, just as a business open to the public may not refuse to serve customers based on race, religion, or sexual orientation, so too the business may not hang a sign that says, "No Blacks, No Muslims, No Gays."

A public accommodations law has two core purposes. First, the law ensures "*equal access* to publicly available goods and services." *Roberts v. United States Jaycees, 468 U.* 468 U.S. 609, 624, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (emphasis added). For social groups that face discrimination, such access is vital. All the more so if the group is small in number or if discrimination against the group is widespread. Equal access is mutually beneficial: Protected persons receive "equally effective and meaningful opportunity to benefit from all aspects of life in America," 135 Cong. Rec. 8506 (1989) (remarks of Sen. Harkin) (Americans with Disabilities Act), and "society," in return, receives "the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U. S., at 625, 104 S.Ct. 3244.

Second, a public accommodations law ensures *equal dignity* in the common market. Indeed, that is the law's "fundamental object": "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' " *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 250, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16 (1964)). This purpose does not depend on whether goods or services are otherwise available. " 'Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his [social identity]. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment.' " 379 U.S. at 292, 85 S.Ct. 348 (Goldberg, J., concurring). When a young Jewish girl and her parents come across a business with a sign out front that says, " 'No dogs or Jews allowed,' "[3] the fact that another business might serve her family does not redress that "stigmatizing injury," *Roberts*, 468 U. S., at 625, 104 S.Ct. 3244. Or, put another way, "the hardship Jackie Robinson suffered when on the road" with his baseball team "was not an inability to find *some hotel* that would have him; it was the indignity of not being allowed to stay in the *same hotel* as his white teammates." J. Oleske, The Evolution of Accommodation, 50 Harv. Civ. Rights-Civ. Lib. L. Rev. 99, 138 (2015).

3 Hearings on the Nomination of Ruth Bader Ginsburg To Be Associate Justice of the Supreme Court of the United States before the Senate Committee on the Judiciary, 103d Cong., 1st Sess., 139 (1993).

***19** To illustrate, imagine a funeral home in rural Mississippi agrees to transport and cremate the body of an elderly man who has passed away, and to host a memorial lunch. Upon learning that the man's surviving spouse is also a man, however, the funeral home refuses to deal with the family. Grief stricken, and now isolated and humiliated, the family desperately searches for another funeral home that will take the body. They eventually find one more than 70 miles away. See First Amended Complaint in *Zawadski* v. *Brewer Funeral Services, Inc.*, No. 55CI1–17–cv–00019 (C. C. Pearl River Cty., Miss., Mar. 7, 2017), pp. 4–7.[4] This ostracism, this otherness, is among the most distressing feelings that can be felt by our social species. K. Williams, Ostracism, 58 Ann. Rev. Psychology 425, 432–435 (2007).

4 The men in this story are Robert "Bob" Huskey and John "Jack" Zawadski. Bob and Jack were a loving couple of 52 years. They moved from California to Colorado to care for Bob's mother, then to Wisconsin to farm apples and teach special education, and then to Mississippi to retire. Within weeks of this Court's decision in *Obergefell v. Hodges*, 576 U. S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), Bob and Jack got married. They were 85 and 81 years old on their wedding day. A few months later, Bob's health took a turn. He died the following spring. When Bob's family was forced to find an alternative funeral home more than an hour from where Bob and Jack lived, the lunch in Bob's memory had to be canceled. Jack died the next year.

Preventing the "unique evils" caused by "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages" is a compelling state interest "of the highest order." *Roberts*, 468 U. S., at 624, 628, 104 S.Ct. 3244; see *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U. S. 537, 549, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987). Moreover, a law that prohibits only such acts by businesses open to the public is narrowly tailored to achieve that compelling interest. The law "responds precisely to the substantive problem which legitimately concerns the State": the harm from status-based discrimination in the public marketplace. *Roberts*, 468 U. S., at 629, 104 S.Ct. 3244 (internal quotation marks omitted).

This last aspect of a public accommodations law deserves special emphasis: The law regulates only businesses that choose to sell goods or services "to the general public," *e.g.*, Va. Code Ann. § 2.2–3904, or "to the public," *e.g.*, Mich. Comp. Laws § 37.2301. Some public accommodations laws, such as the federal Civil Rights Act, list establishments that qualify, but these establishments are ones open to the public generally. See, *e.g.*, 42 U.S.C. § 2000a(b) (hotels, restaurants, gas stations, movie theaters, concert halls, sports arenas, stadiums). A public accommodations law does not force anyone to start a business, or to hold out the business's goods or services to the public at large. The law also does not compel any business to sell any particular good or service. But if a business chooses to profit from the public market, which is established and maintained by the state, the state may require the business to abide by a legal norm of nondiscrimination. In particular, the state may ensure that groups historically

marked for second-class status are not denied goods or services on equal terms.

The concept of a public accommodation thus embodies a simple, but powerful, social contract: A business that chooses to sell to the public assumes a duty to serve the public without unjust discrimination. J. Singer, No Right To Exclude: Public Accommodations and Private Property, 90 Nw. U. L. Rev. 1283, 1298 (1996) (Singer).

B

The legal duty of a business open to the public to serve the public without unjust discrimination is deeply rooted in our history. The true power of this principle, however, lies in its capacity to evolve, as society comes to understand more forms of unjust discrimination and, hence, to include more persons as full and equal members of "the public."

1

***20** "At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, Inc., 515 U. S. 557, 571, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (quoting *Lane* v. *Cotton*, 12 Mod. 472, 485, 88 Eng. Rep. 1458, 1465 (K. B. 1701) (Holt, C. J.)). "Public employment" meant a business "in which the owner has held himself out as ready to serve the public by exercising his trade." Singer 1307; see, *e.g.*, *Gisbourn* v. *Hurst*, 1 Salk. 249, 91 Eng. Rep. 220 (K. B. 1710). Take, for example, *Lane* v. *Cotton*, "[t]he leading English case" on the subject "cited over and over again in the nineteenth century in the United States." Singer 1304. There, Lord Chief Justice Holt explained:

> "[W]here-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him.... If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade." *Lane* v. *Cotton*, 12 Mod., at 484, 88 Eng. Rep., at 1464.

That is to say, a business's duty to serve all comers derived from its choice to hold itself out as ready to serve the public. This holding-out rationale became firmly established in early American law. See 2 J. Kent, Commentaries on American Law 464–465 (1827); J. Story, Commentaries on the Law of Bailments §§ 495, 591 (1832); see also, *e.g.*, *Markham v. Brown*, 8 N.H. 523, 528 (1837); *Jencks v. Coleman*, 13 F.Cas. 442, 443 (No. 7,258) (CC RI 1835) (Story, J.); *Dwight v. Brewster*, 18 Mass. 50, 53 (1822).

The majority is therefore mistaken to suggest that public accommodations or common carriers historically assumed duties to serve all comers because they enjoyed monopolies or otherwise had market power. *Ante*, at ——. Tellingly, the majority cites no common-law case espousing the monopoly rationale. [5] That is because nowhere in the relevant case law "is monopoly suggested as the distinguishing characteristic." E. Adler, Business Jurisprudence, 28 Harv. L. Rev. 135, 156 (1914) ("A distinction based on monopoly would require proof that the common carrier had some kind of a monopoly which the private carrier did not have, or that 'common' was synonymous with 'monopoly.' The plain meaning of the cases is [instead that] the common was the public, the professional, the business carrier or other trader"). [6]

5 For example, a case on which the majority relies found that it could "shortly dispos[e]" of the question whether a steamship company was a common carrier because the company was "the owner of a general ship, carrying goods for hire ... and perform[ing]" that service "regular[ly]." *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 437, 9 S.Ct. 469, 32 L.Ed. 788 (1889). No showing of market power was required. *Ibid.*

6 Nor does "host[ing] or transport[ing] others and their belongings," *ante*, at ——, explain the right of access. Smiths, for instance, did not always practice their trade by holding property for others. And even when they did, any duty of care resulting from such bailment cannot explain the duty to serve all comers, which logically must be assumed beforehand. See *Lane* v. *Cotton*, 12 Mod. 472, 484, 88 Eng. Rep. 1458, 1464 (K. B. 1701) (Holt, C. J.). That duty instead came from somewhere

else, and the weight of authority indicates that it came from a business's act of holding itself out to the public as ready to serve anyone who would hire it. Singer 1304–1330; 3 W. Blackstone, Commentaries on the Laws of England 164 (1768); J. Story, Commentaries on the Law of Bailments §§ 495, 591 (1837); 1 T. Parsons, Law of Contracts 639, 643, 649 (1853).

2

***21** After the Civil War, some States codified the common-law duty of public accommodations to serve all comers. See M. Konvitz & T. Leskes, A Century of Civil Rights 155–157 (1961). Early state public accommodations statutes prohibited discrimination based on race or color. Yet the principle was at times stated more broadly: to provide "a remedy against any unjust discrimination to the citizen in all public places." *Ferguson v. Gies*, 82 Mich. 358, 365, 46 N.W. 718, 720 (1890). In 1885, Colorado adopted " 'An Act to Protect All Citizens in Their Civil Rights,' which guaranteed 'full and equal enjoyment' of certain public facilities to 'all citizens,' 'regardless of race, color or previous condition of servitude.' " *Masterpiece Cakeshop*, 584 U. S., at —— – ——, 138 S.Ct. at 1725 (quoting 1885 Colo. Sess. Laws p. 132). "A decade later, the [State] expanded the requirement to apply to 'all other places of public accommodation.' " 584 U. S., at ——, 138 S.Ct. at 1725 (quoting 1895 Colo. Sess. Laws ch. 61, p. 139). Congress, too, passed the Civil Rights Act of 1875, which established "[t]hat all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement ... applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Act of Mar. 1, 1875, § 1, 18 Stat. 336.

This Court, however, struck down the federal Civil Rights Act of 1875 as unconstitutional. *Civil Rights Cases*, 109 U. S. 3, 25, 3 S.Ct. 18, 27 L.Ed. 835 (1883). Southern States repealed public accommodations statutes and replaced them with Jim Crow laws. And state courts construed any remaining right of access in ways that furthered *de jure* and *de facto* racial segregation. [7] Full and equal enjoyment came to mean "separate but equal" enjoyment. The result of this backsliding was "the replacement of a general right of access with a general right to exclude ... in order to promote a racial caste system." Singer 1295.

7 Compare, *e.g.*, *Chesapeake, O. & S. R. Co. v. Wells*, 85 Tenn. 613, 615, 4 S.W. 5 (1887) (rejecting Ida B. Wells's claim that she was denied " 'accommodations equal in all respects,' " when she tried to enter a train car "set apart for white ladies and their gentlemen" on account of tobacco smoke in her car, and was forcibly removed), with *Memphis & C. R. Co. v. Benson*, 85 Tenn. 627, 632, 4 S.W. 5, 7 (1887) (accepting that a white man would be permitted to ride standing in the ladies' car on account of tobacco smoke in his car).

In time, the civil rights movement of the mid-20th century again demanded racial equality in public places. In 1963, two decades after then–Howard University law student Pauli Murray organized sit-ins at cafeterias in Washington, D. C., a diverse group of students and faculty from Tougaloo College sat at Woolworth's lunch counter in Jackson, Mississippi. For doing so, they were violently attacked by a white mob. See A. Moody, Coming of Age in Mississippi 235–240 (1992). Around the country, similar acts of protest against racial injustice, some big and some small, sought "to create such a crisis and foster such a tension" that the country would be "forced to confront the issue." M. King, Letter from a Birmingham Jail, Apr. 16, 1963. That year, Congress once more set out to eradicate "discrimination ... in places of accommodation and public facilities," *Heart of Atlanta Motel*, 379 U. S., at 246, 85 S.Ct. 348, notwithstanding this Court's previous declaration of a federal public accommodations law to be unconstitutional.

Congress believed, rightly, that discrimination in places of public accommodation—"the injustice of being arbitrarily denied equal access to those facilities and accommodations which are otherwise open to the general public"—had "no place" in this country, the country "of the melting pot, of equal rights, of one nation and one people." S. Rep. No. 872, at 8–9 (quoting President Kennedy, June 19, 1963). It therefore passed Title II of the Civil Rights Act of 1964, which declares: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation ... without discrimination ... on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a. In enacting this landmark civil rights statute, Congress invoked the holding-out rationale from antebellum common law: "one who employed his private property for purposes of

commercial gain by offering goods or services to the public must stick to his bargain." S. Rep. No. 872, at 22; see also *id.*, at 9–10 (endorsing Lord Holt's view in *Lane* v. *Cotton*).

***22** This bargain, America would soon realize, had long excluded half of society. Women, though having won the right to vote half a century earlier, were not equal in public. Instead, a "separate-spheres ideology" had "assigned women to the home and men to the market." E. Sepper & D. Dinner, Sex in Public, 129 Yale L. J. 78, 83, 88–90 (2019) (Sepper & Dinner). Women were excluded from restaurants, bars, civic and professional organizations, financial institutions, and sports. "Just as it did for the civil rights struggle, public accommodations served as kindling for feminist mobilization." *Id.*, at 83, 97–104; cf. S. Mayeri, Reasoning From Race: Feminism, Law, and the Civil Rights Revolution 9–40 (2011). In response to a movement for women's liberation, numerous States banned discrimination in public accommodations on the basis of "sex." See Sepper & Dinner 104, nn. 145–147 (collecting statutes). Colorado was the first State to do so. See 1969 Colo. Sess. Laws ch. 74, p. 200.

In the decades that followed, the Nation opened its eyes to another injustice. People with disabilities, though inherently full and equal members of the public, had been excluded from many areas of public life. This exclusion worked harms not only to disabled people's standards of living, but to their dignity too. So Congress, responding once again to a social movement, this time against the subordination of people with disabilities, banned discrimination on that basis and secured by law disabled people's equal access to public spaces. See S. Bagenstos, Law and the Contradictions of the Disability Rights Movement 13–20 (2009); R. Colker, The Disability Pendulum 22–68 (2005). The centerpiece of this political and social action was the Americans with Disabilities Act of 1990 (ADA). Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a).

Not only have public accommodations laws expanded to recognize more forms of unjust discrimination, such as discrimination based on race, sex, and disability, such laws have also expanded to include more goods and services as "public accommodations." What began with common inns, carriers, and smiths has grown to include restaurants, bars, movie theaters, sports arenas, retail stores, salons, gyms, hospitals, funeral homes, and transportation networks. See nn. 1–2, *supra*; L. Lerman & A. Sanderson, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws, 7 N. Y. U. Rev. L. & Soc. Change 215, 217 (1978) (" 'Public accommodations' is a term of art which was developed by the drafters of discrimination laws to refer to [public] places other than schools, work places, and homes"). Today, laws like Colorado's cover "any place of business engaged in any sales to the public and any place offering services ... to the public." Colo. Rev. Stat. § 24–34–601(1); see also, *e.g.*, Ohio Rev. Code Ann. § 4112.01(9). Numerous other States extend such protections to businesses offering goods or services to "the general public." Ariz. Rev. Stat. Ann. § 41–1441(2); see also, *e.g.*, Mass. Gen. Laws, ch. 272, § 92A.

This broader scope, though more inclusive than earlier state public accommodations laws, is in keeping with the fundamental principle—rooted in the common law, but alive and blossoming in statutory law—that the duty to serve without unjust discrimination is owed to everyone, and it extends to any business that holds itself out as ready to serve the public. If you have ever taken advantage of a public business without being denied service because of who you are, then you have come to enjoy the dignity and freedom that this principle protects.

3

Lesbian, gay, bisexual, and transgender (LGBT) people, no less than anyone else, deserve that dignity and freedom. The movement for LGBT rights, and the resulting expansion of state and local laws to secure gender and sexual minorities' full and equal enjoyment of publicly available goods and services, is the latest chapter of this great American story.

***23** LGBT people have existed for all of human history. And as sure as they have existed, others have sought to deny their existence, and to exclude them from public life. Those who would subordinate LGBT people have often done so with the backing of law. For most of American history, there were laws criminalizing same-sex intimacy. *Obergefell v. Hodges*, 576 U. S. 644, 660–661, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). "Gays and lesbians were [also] prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate." *Id.*, at 661, 135 S.Ct. 2584. "These policies worked to create and reinforce the

belief that gay men and lesbians" constituted "an inferior class." Brief for Organization of American Historians as *Amicus Curiae* in *Obergefell v. Hodges*, O. T. 2014, No. 14556, p. 3.

State-sponsored discrimination was compounded by discrimination in public accommodations, though the two often went hand in hand. The police raided bars looking for gays and lesbians so often that some bars put up signs saying, " 'We Do Not Serve Homosexuals.' " *Id.*, at 13 (quoting G. Chauncey, Why Marriage 8 (2004)). LGBT discrimination in public accommodations has continued well into the 21st century. See UCLA School of Law Williams Institute, C. Mallory & B. Sears, Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity (2016).

A social system of discrimination created an environment in which LGBT people were unsafe. Who could forget the brutal murder of Matthew Shepard? Matthew was targeted by two men, tortured, tied to a buck fence, and left to die for who he was. See K. Drake, Gay Man Beaten, Burned and Left Tied to Fence, Casper Star-Tribune, Oct. 10, 1998, p. A1. Or the Pulse nightclub massacre, the second-deadliest mass shooting in U. S. history? See S. Stolberg, For Gays Across America, a Massacre Punctuates Fitful Gains, N. Y. Times, June 13, 2016, p. A1. Rates of violent victimization are still significantly higher for LGBT people, with transgender persons particularly vulnerable to attack. See Dept. of Justice, J. Truman & R. Morgan, Violent Victimization by Sexual Orientation and Gender Identity, 2017–2020 (2022).

Determined not to live as "social outcasts," *Masterpiece Cakeshop*, 584 U. S., at ——, 138 S.Ct. at 1727, LGBT people have risen up. The social movement for LGBT rights has been long and complex. See L. Faderman, The Gay Revolution (2015) (Faderman). But if there ever was an "earthquake," it occurred in the final days of June in 1969 at the Stonewall Inn in Greenwich Village. *Id.*, at 169. The Stonewall Inn was a gay bar with a "varied and lively clientele." *Id.*, at 171. Its " 'unruly' element" made it "an especially inviting target" for police raids. J. D'Emilio, Sexual Politics, Sexual Communities 231 (1983) (D'Emilio). "Patrons of the Stonewall tended to be young and nonwhite. Many were drag queens...." *Ibid.* Just before midnight on June 27, the New York police's Public Morals Squad showed up to the bar and started making arrests. Drag queens, for example, were arrested for offenses like being "disguised" in "unnatural attire." N. Y. Penal Law Ann. § 240.35(4) (West 1967).

What started out as a fairly routine police raid, however, became anything but. Outside the Stonewall Inn, patrons who had been thrown out started to form a crowd. "Jeers and catcalls arose from the onlookers when a paddy wagon departed with the bartender, the Stonewall's bouncer, and three drag queens." D'Emilio 231. "A few minutes later, an officer attempted to steer the last of the patrons, a lesbian, through the bystanders to a nearby patrol car." *Id.*, at 231–232. When she started to struggle, protests erupted. They lasted into the night and continued into the next. News of the Stonewall protests "spread rapidly," and "within a year gay liberation groups had sprung into existence on college campuses and in cities around the nation." *Id.*, at 233. From there, the path to LGBT rights has not been quick or easy. Nor is it over. Still, change has come: change in social attitudes, in representation, and in legal institutions. Faderman 535–629.

***24** One significant change has been the addition of sexual orientation and gender identity to public accommodations laws. State and local legislatures took note of the failure of such laws to protect LGBT people and, in response, acted to guarantee them "all the privileges ... of any other member of society." Hearings on S. B. 200 before the House Judiciary Committee, 66th Gen. Assem., 2d Reg. Sess., 4, 11–12 (Colo. 2008) (remarks of Sen. Judd). Colorado thus amended its antidiscrimination law in 2008 to prohibit the denial of publicly available goods or services on the basis of "sexual orientation." 2008 Colo. Sess. Laws. ch. 341, pp. 1596–1597. About half of the States now provide such protections. [8] It is " 'unexceptional' " that they may do so. *Ante*, at —— (quoting *Masterpiece Cakeshop*, 584 U. S., at ——, 138 S.Ct. at 1728). "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U. S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). LGBT people do not seek any special treatment. All they seek is to exist in public. To inhabit public spaces on the same terms and conditions as everyone else.

8 See Cal. Civ. Code Ann. § 51; Colo. Rev. Stat. § 24–34–601; Conn. Gen. Stat. § 46a–81d; Del. Code Ann., Tit. 6, § 4504; Haw. Rev. Stat. § 489–3; Ill. Comp. Stat., ch. 775, § 5/1–102; Iowa Code § 216.7; Me. Rev. Stat. Ann., Tit. 5, § 4591; Md. State Govt. Code Ann. § 20–304; Mass. Gen. Laws, ch. 272, § 98; Mich. Comp. Laws § 37.2302, as

amended; Minn. Stat. § 363A.11; Nev. Rev. Stat. § 651.070; N. H. Rev. Stat. Ann. § 354–A:17; N. J. Stat. Ann. § 10:5–12; N. M. Stat. Ann. § 28–1–7; N. Y. Civ. Rights Law Ann. § 40; Ore. Rev. Stat. § 659A.403; R. I. Gen. Laws § 11–24–2; Vt. Stat. Ann., Tit. 9, § 4502; Va. Code Ann. § 2.2–3904; Wash. Rev. Code § 49.60.215; Wis. Stat. § 106.52.

C

Yet for as long as public accommodations laws have been around, businesses have sought exemptions from them. The civil rights and women's liberation eras are prominent examples of this. Backlashes to race and sex equality gave rise to legal claims of rights to discriminate, including claims based on First Amendment freedoms of expression and association. This Court was unwavering in its rejection of those claims, as invidious discrimination "has never been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U. S. 455, 470, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973). In particular, the refusal to deal with or to serve a class of people is not an expressive interest protected by the First Amendment.

1

Opponents of the Civil Rights Act of 1964 objected that the law would force business owners to defy their beliefs. Cf. *ante*, at ——. They argued that the Act would deny them "any freedom to speak or to act on the basis of their religious convictions or their deep-rooted preferences for associating or not associating with certain classifications of people." 110 Cong. Rec. 7778 (1964) (remarks of Sen. Tower). Congress rejected those arguments. Title II of the Act, in particular, did not invade "rights of privacy [or] of free association," Congress concluded, because the establishments covered by the law were "those regularly held open to the public in general." H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 9 (1963); see also S. Rep. No. 872, at 92.

Having failed to persuade Congress, opponents of Title II turned to the federal courts. In *Heart of Atlanta Motel*, one of several arguments made by the plaintiff motel owner was that Title II violated his Fifth Amendment due process rights by "tak[ing] away the personal liberty of an individual to run his business as he sees fit with respect to the selection and service of his customers." Brief for Appellant, O. T. 1964, No. 515, p. 32. This Court disagreed, based on "a long line of cases" holding that "prohibition of racial discrimination in public accommodations" did not "interfer[e] with personal liberty." 379 U.S. at 260, 85 S.Ct. 348.

In *Katzenbach v. McClung*, 379 U. S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964), the owner of Ollie's Barbecue (Ollie McClung) likewise argued that Title II's application to his business violated the "personal rights of persons in their personal convictions" to deny services to Black people. Brief for Appellees, O. T. 1964, No. 543, p. 33 (citing, *inter alia*, *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)). Note that McClung did not refuse to *transact* with Black people. Oh, no. He was willing to offer them take-out service at a separate counter. See Brief for NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* in *Katzenbach* v. *McClung*, p. 4, n. 5. Only integrated table service, you see, violated McClung's core beliefs. So he claimed a constitutional right to offer Black people a limited menu of his services. This Court rejected that claim, citing its decision in *Heart of Atlanta Motel*. See 379 U. S. at 298, n. 1, 85 S.Ct. 377.

***25** Next is *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam*), in which the owner of a chain of drive-in establishments asserted that requiring him to "contribut[e]" to racial integration in any way violated the First Amendment by interfering with his religious liberty. App. to Pet. for Cert., O. T. 1967, No. 339, p. 21a. Title II could not be applied to his business, he argued, because that would " 'controven[e] the will of God.' " 390 U. S. at 402–403, n. 5, 88 S.Ct. 964. The Court found this argument "patently frivolous." *Ibid.*

Last but not least is *Runyon v. McCrary*, 427 U. S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), a case the majority studiously avoids. In *Runyon*, the Court confronted the question whether "commercially operated" schools had a First Amendment right to exclude Black children, notwithstanding a federal law against racial discrimination in contracting. *Id.*, at 168, 96 S.Ct. 2586; see 42 U.S.C. § 1981. The schools in question offered "educational services" for sale to "the general public." 427 U.S. at 172, 96 S.Ct. 2586. They argued that the law, as applied to them, violated their First Amendment rights of "freedom of speech, and association." Pet. for Cert., O. T. 1976, No. 7562, p. 6; see also Brief for Petitioners, O. T. 1976, No. 7562, p. 12 ("Freedom to teach, to express ideas"). The Court, however, reasoned that the schools' "*practice*" of denying educational services to racial minorities was not shielded by the First

Amendment, for two reasons: First, "the Constitution places no value on discrimination." 427 U.S. at 176, 96 S.Ct. 2586 (alterations and internal quotations marks omitted). Second, the government's regulation of conduct did not "inhibit" the schools' ability to teach its preferred "ideas or dogma." *Ibid.* (internal quotation marks omitted). Requiring the schools to abide by an antidiscrimination law was not the same thing as compelling the schools to express teachings contrary to their sincerely held "belief that racial segregation is desirable." *Ibid*.

2

First Amendment rights of expression and association were also raised to challenge laws against sex discrimination. In *Roberts* v. *United States Jaycees*, the United States Jaycees sought an exemption from a Minnesota law that forbids discrimination on the basis of sex in public accommodations. The U. S. Jaycees was a civic organization, which until then had denied admission to women. The organization alleged that applying the law to require it to include women would violate its "members' constitutional rights of free speech and association." 468 U.S. at 615, 104 S.Ct. 3244. "The power of the state to change the membership of an organization is inevitably the power to *change the way in which it speaks*," the Jaycees argued. Brief for Appellee, O. T. 1983, No. 83–724, p. 19 (emphasis added). Thus, "the right of the Jaycees to decide its own membership" was "inseparable," in its view, "from its ability to freely express itself." *Ibid.*

This Court took a different view. The Court held that the "application of the Minnesota statute to compel the Jaycees to accept women" did not infringe the organization's First Amendment "freedom of expressive association." *Roberts*, 468 U. S., at 622, 104 S.Ct. 3244. That was so because the State's public accommodations law did "not aim at the suppression of speech" and did "not distinguish between prohibited and permitted activity on the basis of viewpoint." *Id.*, at 623–624, 104 S.Ct. 3244. If the State had applied the law "for the *purpose* of hampering the organization's ability to express its views," that would be a different matter. *Id.*, at 624, 104 S.Ct. 3244 (emphasis added). "Instead," the law's purpose was "eliminating discrimination and assuring [the State's] citizens equal access to publicly available goods and services." *Ibid.* "That goal," the Court reasoned, "was unrelated to the suppression of expression" and "plainly serves compelling state interests of the highest order." *Ibid.*

***26** Justice O'Connor concurred in part and concurred in the judgment. See *id.*, at 631, 104 S.Ct. 3244. She stressed that the U. S. Jaycees was a predominantly commercial entity open to the public. And she took the view that there was a First Amendment "dichotomy" between rights of commercial and expressive association. *Id.*, at 634, 104 S.Ct. 3244. The State, for example, was "free to impose any rational regulation" on commercial transactions themselves. "A shopkeeper," Justice O'Connor explained, "has no constitutional right to deal only with persons of one sex." *Ibid.*

To wit, the Court had just decided in *Hishon v. King & Spalding*, 467 U. S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), that a law partnership had no constitutional right to discriminate on the basis of sex in violation of Title VII. The law partnership was an act of association. Its services (legal advocacy) were expressive; indeed, they consisted of speech. So the law firm argued that requiring it to consider a woman for the partnership violated its First Amendment rights "of free expression" and "of commercial association." Brief for Respondent, O. T. 1983, No. 82–940, pp. 14–18. This Court rejected that argument. The application of Title VII did not "infringe constitutional rights of expression or association," the Court held, because compliance with Title VII did not "inhibi[t]" the partnership's ability to advocate for certain "ideas and beliefs." 467 U.S. at 78, 104 S.Ct. 2229 (internal quotation marks omitted); see also *supra*, at —— (discussing *Runyon*, 427 U. S., at 176, 96 S.Ct. 2586). The Court reiterated: " '[I]nvidious private discrimination ... has never been accorded affirmative constitutional protections.' " 467 U.S. at 78, 104 S.Ct. 2229 (quoting *Norwood*, 413 U. S., at 470, 93 S.Ct. 2804).

II

Battling discrimination is like "battling the Hydra." *Shelby County v. Holder*, 570 U. S. 529, 560, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (Ginsburg, J., dissenting). Whenever you defeat "one form of ... discrimination," another "spr[ings] up in its place." *Ibid.* Time and again, businesses and other commercial entities have claimed constitutional rights to discriminate. And time and again, this Court has courageously stood up to those claims—until today. Today, the Court shrinks. A business claims that it would like to sell wedding websites to the general public, yet deny those same websites to gay and lesbian couples. Under state law, the business is free to include, or not to include, any lawful message it wants in its wedding websites. The only thing the business may not

do is deny whatever websites it offers on the basis of sexual orientation. This Court, however, grants the business a broad exemption from state law and allows the business to post a notice that says: Wedding websites will be refused to gays and lesbians. The Court's decision, which conflates denial of service and protected expression, is a grave error.

A

303 Creative LLC is a limited liability company that sells graphic and website designs for profit. Lorie Smith is the company's founder and sole member-owner. Smith believes same-sex marriages are "false," because " 'God's true story of marriage' " is a story of a " 'union between one man and one woman.' " Brief for Petitioners 4, 6–7 (quoting App. to Pet. for Cert. 188a, 189a); Tr. of Oral Arg. 36, 40–41. Same-sex marriage, according to her, "violates God's will" and "harms society and children." App. to Pet. for Cert. 186a.

303 Creative has never sold wedding websites. Smith now believes, however, that "God is calling her 'to explain His true story about marriage.' " Brief for Petitioners 7 (quoting App. to Pet. for Cert. 188a). For that reason, she says, she wants her for-profit company to enter the wedding website business. There is only one thing: Smith would like her company to sell wedding websites "to the public," App. to Pet. for Cert. 189a; Colo. Rev. Stat. § 24–34–601(1), but not to same-sex couples. She also wants to post a notice on the company's website announcing this intent to discriminate. App. to Pet. for Cert. 188a–189a. In Smith's view, "it would violate [her] sincerely held religious beliefs to create a wedding website for a same-sex wedding because, by doing so, [she] would be expressing a message celebrating and promoting a conception of marriage that [she] believe[s] is contrary to God's design." *Id.*, at 189a.

***27** Again, Smith's company has never sold a wedding website to any customer. Colorado, therefore, has never had to enforce its antidiscrimination laws against the company. As the majority puts it, however, Smith "worries that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman." *Ante*, at ——. So Smith and her company, the petitioners here, sued the State in federal court. They sought a court decree giving them a special exemption from CADA's Accommodation Clause (which, remember, makes it unlawful for a business to hold itself out to the public yet deny to any individual, because of sexual orientation, the full and equal enjoyment of the business's goods or services, see *supra*, at —— – ——) and CADA's Communication Clause (which makes it unlawful to advertise that goods or services will be denied because of sexual orientation, see *supra*, at ——). App. 303–304.

The breadth of petitioners' pre-enforcement challenge is astounding. According to Smith, the Free Speech Clause of the First Amendment entitles her company to refuse to sell *any* "websites for same-sex weddings," even though the company plans to offer wedding websites to the general public. *Ibid.*; see also Brief for Petitioners 22–23, and n. 2; Tr. of Oral Arg. 37–38. In other words, the company claims a categorical exemption from a public accommodations law simply because the company sells expressive services. The sweeping nature of this claim should have led this Court to reject it.

B

The First Amendment does not entitle petitioners to a special exemption from a state law that simply requires them to serve all members of the public on equal terms. Such a law does not directly regulate petitioners' speech at all, and petitioners may not escape the law by claiming an expressive interest in discrimination. The First Amendment likewise does not exempt petitioners from the law's prohibition on posting a notice that they will deny goods or services based on sexual orientation.

1

This Court has long held that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U. S. 552, 567, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011). "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 62, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (*FAIR*). This principle explains "why an ordinance against outdoor fires might forbid burning a flag and why antitrust laws can prohibit agreements in restraint of trade."

Sorrell, 564 U. S., at 567, 131 S.Ct. 2653 (citation and internal quotation marks omitted).

Consider *United States v. O'Brien*, 391 U. S., 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). In that case, the Court upheld the application of a law against the destruction of draft cards to a defendant who had burned his draft card to protest the Vietnam War. The protester's conduct was indisputably expressive. Indeed, it was political expression, which lies at the heart of the First Amendment. *Whitney v. California*, 274 U. S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). Yet the *O'Brien* Court focused on whether the Government's interest in regulating the conduct was to burden expression. Because it was not, the regulation was subject to lesser constitutional scrutiny. 391 U. S., at 376–377, 381–382, 88 S.Ct. 1673; *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 294, 299, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). The *O'Brien* standard is satisfied if a regulation is unrelated to the suppression of expression and " 'promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *FAIR*, 547 U. S., at 67, 126 S.Ct. 1297 (quoting *United States v. Albertini*, 472 U. S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)). [9]

9 The majority commits a fundamental error in suggesting that a law does not regulate conduct if it ever applies to expressive activities. See *ante*, at ——, ——. This would come as a great surprise to the *O'Brien* Court.

***28** *FAIR* confronted the interaction between this principle and an equal-access law. The law at issue was the Solomon Amendment, which prohibits an institution of higher education in receipt of federal funding from denying a military recruiter "the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access." 547 U.S. at 55, 126 S.Ct. 1297; see 10 U.S.C. § 983(b). A group of law schools challenged the Solomon Amendment based on their sincere objection to the military's "Don't Ask, Don't Tell" policy. For those who are too young to know, "Don't Ask, Don't Tell" was a homophobic policy that barred openly LGBT people from serving in the military. LGBT people could serve only if they kept their identities secret. The idea was that their open existence was a threat to the military.

The law schools in *FAIR* claimed that the Solomon Amendment infringed the schools' First Amendment freedom of speech. The schools provided recruiting assistance in the form of emails, notices on bulletin boards, and flyers. 547 U. S.,. at 60–61, 126 S.Ct. 1297. As the Court acknowledged, those services "clearly involve speech." *Id.*, at 60, 126 S.Ct. 1297. And the Solomon Amendment required "schools offering such services to other recruiters" to provide them equally "on behalf of the military," even if the school deeply objected to creating such speech. *Id.*, at 61, 126 S.Ct. 1297. But that did not transform the equal provision of services into "compelled speech" of the kind barred by the First Amendment, because the school's speech was "only 'compelled' if, and to the extent, the school provides such speech for other recruiters." *Id.*, at 62, 126 S.Ct. 1297. Thus, any speech compulsion was "plainly incidental to the Solomon Amendment's regulation of conduct." *Ibid.*

2

The same principle resolves this case. The majority tries to sweep under the rug petitioners' challenge to CADA's Communication Clause, so I will start with it. Recall that Smith wants to post a notice on her company's homepage that the company will refuse to sell any website for a same-sex couple's wedding. This Court, however, has already said that "a ban on race-based hiring may require employers to remove 'White Applicants Only' signs." *Sorrell*, 564 U. S., at 567, 131 S.Ct. 2653 (quoting *FAIR*, 547 U. S., at 62, 126 S.Ct. 1297; some internal quotation marks omitted); see *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 389, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973). So petitioners concede that they are not entitled to an exemption from the Communication Clause unless they are also entitled to an exemption from the Accommodation Clause. Brief for Petitioners 34–35. That concession is all but fatal to their argument, because it shows that even "pure speech" may be burdened incident to a valid regulation of conduct. [10]

10 The majority appears to find this discussion of the Communication Clause upsetting. See *ante*, at ——–——, and n. 5. It is easy to understand why: The Court's prior First Amendment cases clearly explain that a ban on discrimination may require a business to take down a sign that expresses the business owner's intent to discriminate. See, *e.g.*, *FAIR*, 547 U. S., at 62, 126 S.Ct. 1297. This principle is deeply inconsistent with the majority's position. Thus, a "straight couples only" notice, like the one the Court today allows, see App. to

Pet. for Cert. 188a–189a, is itself a devastating indictment of the majority's logic.

CADA's Accommodation Clause and its application here are valid regulations of conduct. It is well settled that a public accommodations law like the Accommodation Clause does not "target speech or discriminate on the basis of its content." *Hurley*, 515 U. S., at 572, 115 S.Ct. 2338. Rather, "the focal point of its prohibition" is "on the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Ibid.* (emphasis added). The State confirms this reading of CADA. The law applies only to status-based refusals to provide the full and equal enjoyment of whatever services petitioners choose to sell to the public. See Brief for Respondents 15–18.

***29** Crucially, the law "does not dictate the content of speech at all, which is only 'compelled' if, and to the extent," the company offers "such speech" to other customers. *FAIR*, 547 U. S., at 62, 126 S.Ct. 1297. Colorado does not require the company to "speak [the State's] preferred message." *Ante*, at ——. Nor does it prohibit the company from speaking the company's preferred message. The company could, for example, offer only wedding websites with biblical quotations describing marriage as between one man and one woman. Brief for Respondents 15. (Just as it could offer only t-shirts with such quotations.) The company could also refuse to include the words "Love is Love" if it would not provide those words to any customer. All the company has to do is offer its services without regard to customers' protected characteristics. *Id.*, at 15–16. Any effect on the company's speech is therefore "incidental" to the State's content-neutral regulation of conduct. *FAIR*, 547 U. S., at 62, 126 S.Ct. 1297; see *Hurley*, 515 U. S., at 572–573, 115 S.Ct. 2338.

Once these features of the law are understood, it becomes clear that petitioners' freedom of speech is not abridged in any meaningful sense, factual or legal. Petitioners remain free to advocate the idea that same-sex marriage betrays God's laws. *FAIR*, 547 U. S., at 60, 126 S.Ct. 1297; *Hishon*, 467 U. S., at 78, 104 S.Ct. 2229; *Runyon*, 427 U. S., at 176, 96 S.Ct. 2586. Even if Smith believes God is calling her to do so through her for-profit company, the company need not hold out its goods or services to the public at large. Many filmmakers, visual artists, and writers never do. (That is why the law does not require Steven Spielberg or Banksy to make films or art for anyone who asks. But cf. *ante*, at ——, —— – ——.) Finally, and most importantly, even if the company offers its goods or services to the public, it remains free under state law to decide what messages to include or not to include. To repeat (because it escapes the majority): The company can put whatever "harmful" or "low-value" speech it wants on its websites. It can "tell people what they do not want to hear." *Ante*, at —— (internal quotation marks and brackets omitted). All the company may not do is offer wedding websites to the public yet refuse those same websites to gay and lesbian couples. See *Runyon*, 427 U. S., at 176, 96 S.Ct. 2586 (distinguishing between schools' ability to express their bigoted view "that racial segregation is desirable" and the schools' proscribable "*practice* of excluding racial minorities").

Another example might help to illustrate the point. A professional photographer is generally free to choose her subjects. She can make a living taking photos of flowers or celebrities. The State does not regulate that choice. If the photographer opens a portrait photography business to the public, however, the business may not deny to any person, because of race, sex, national origin, or other protected characteristic, the full and equal enjoyment of whatever services the business chooses to offer. That is so even though portrait photography services are customized and expressive. If the business offers school photos, it may not deny those services to multiracial children because the owner does not want to create any speech indicating that interracial couples are acceptable. If the business offers corporate headshots, it may not deny those services to women because the owner believes a woman's place is in the home. And if the business offers passport photos, it may not deny those services to Mexican Americans because the owner opposes immigration from Mexico.

The same is true for sexual-orientation discrimination. If a photographer opens a photo booth outside of city hall and offers to sell newlywed photos captioned with the words "Just Married," she may not refuse to sell that service to a newlywed gay or lesbian couple, even if she believes the couple is not, in fact, just married because in her view their marriage is "false." Tr. of Oral Arg. 36, 40–41.

3

***30** Because any burden on petitioners' speech is incidental to CADA's neutral regulation of commercial conduct, the regulation is subject to the standard set forth in *O'Brien*. That standard is easily satisfied here because the law's application "promotes a substantial government interest that would be achieved less effectively absent the regulation." *FAIR*, 547 U. S., at 67, 126 S.Ct. 1297 (internal quotation

marks omitted). Indeed, this Court has already held that the State's goal of "eliminating discrimination and assuring its citizens equal access to publicly available goods and services" is "unrelated to the suppression of expression" and "plainly serves compelling state interests of the highest order." *Roberts*, 468 U. S., at 624, 104 S.Ct. 3244. The Court has also held that by prohibiting only "*acts* of invidious discrimination in the distribution of *publicly available* goods, services, and other advantages," the law "responds precisely to the substantive problem which legitimately concerns the State and abridges no more speech ... than is necessary to accomplish that purpose." *Id.*, at 628–629, 104 S.Ct. 3244 (emphasis added; internal quotation marks omitted); see *supra*, at —— – ——.

C

The Court reaches the wrong answer in this case because it asks the wrong questions. The question is not whether the company's products include "elements of speech." *FAIR*, 547 U. S., at 61, 126 S.Ct. 1297. (They do.) The question is not even whether CADA would require the company to create and sell speech, notwithstanding the owner's sincere objection to doing so, if the company chooses to offer "such speech" to the public. *Id.*, at 62, 126 S.Ct. 1297 . (It would.) These questions do not resolve the First Amendment inquiry any more than they did in *FAIR*. Instead, the proper focus is on the character of state action and its relationship to expression. Because Colorado seeks to apply CADA only to the refusal to provide same-sex couples the full and equal enjoyment of the company's publicly available services, so that the company's speech "is only 'compelled' if, and to the extent," the company chooses to offer "such speech" to the public, any burden on speech is "plainly incidental" to a content-neutral regulation of conduct. *Ibid.*

The majority attempts to distinguish this clear holding of *FAIR* by suggesting that the compelled speech in *FAIR* was "incidental" because it was "logistical" (*e.g.*, "The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m."). *Ante*, at —— (internal quotation marks omitted). This attempt fails twice over. First, the law schools in *FAIR* alleged that the Solomon Amendment required them to create and disseminate speech propagating the military's message, which they deeply objected to, and to include military speakers in on- and off-campus forums (if the schools provided equally favorable services to other recruiters). 547 U.S. at 60–61, 126 S.Ct. 1297; App. 27 and Brief for Respondents 5–8 in *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, O. T. 2005, No. 04–1152. The majority simply skips over the Court's key reasoning for why any speech compulsion was nevertheless "incidental" to the Amendment's regulation of conduct: It would occur only "if, and to the extent," the regulated entity provided "such speech" to others. *FAIR*, 547 U. S., at 62, 126 S.Ct. 1297. Likewise in *O'Brien*, the reason the burden on O'Brien's expression was incidental was not because his message was factual or uncontroversial. But cf. *ante*, at ——. O'Brien burned his draft card to send a political message, and the burden on his expression was substantial. Still, the burden was "incidental" because it was ancillary to a regulation that did not aim at expression. 391 U.S. at 377, 88 S.Ct. 1673.

Second, the majority completely ignores the categorical nature of the exemption claimed by petitioners. Petitioners maintain, as they have throughout this litigation, that they will refuse to create *any* wedding website for a same-sex couple. Even an announcement of the time and place of a wedding (similar to the majority's example from *FAIR*) abridges petitioners' freedom of speech, they claim, because "the announcement of the wedding itself is a concept that [Smith] believes to be false." Tr. of Oral Arg. 41. Indeed, petitioners here concede that if a same-sex couple came across an opposite-sex wedding website created by the company and requested an identical website, with only the names and date of the wedding changed, petitioners would refuse. *Id.*, at 37–38. [11] That is status-based discrimination, plain and simple.

11 Because petitioners have never sold a wedding website to anyone, the record contains only a mockup website. The mockup confirms what you would expect: The website provides details of the event, a form to RSVP, a gift registry, etc. See App. 51–72. The customization of these elements pursuant to a content-neutral regulation of conduct does not unconstitutionally intrude upon any protected expression of the website designer. Yet Smith claims a First Amendment right to refuse to provide *any* wedding website for a same-sex couple. Her claim therefore rests on the idea that her act of service is itself a form of protected expression. In granting Smith's claim, the majority collapses the distinction between status-based and message-based refusals of service. The history shows just how profoundly wrong that is. See *Runyon v. McCrary*, 427 U. S. 160, 176, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976); *Hishon v. King*

& Spalding, 467 U. S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Roberts v. United States Jaycees*, 468 U. S. 609, 622–629, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

***31** Oblivious to this fact, the majority insists that petitioners discriminate based on message, not status. The company, says the majority, will not sell same-sex wedding websites to anyone. *Ante*, at ——. It will sell only opposite-sex wedding websites; that is its service. Petitioners, however, "cannot define their service as 'opposite-sex wedding [websites]' any more than a hotel can recast its services as 'whites-only lodgings.' " *Telescope Media Group v. Lucero*, 936 F.3d 740, 769 (CA8 2019) (Kelly, J., concurring in part and dissenting in part). To allow a business open to the public to define the expressive quality of its goods or services to exclude a protected group would nullify public accommodations laws. It would mean that a large retail store could sell "passport photos for white people."

The majority protests that Smith will gladly sell her goods and services to anyone, including same-sex *couples*. *Ante*, at ——, ——. She just will not sell websites for same-sex *weddings*. Apparently, a gay or lesbian couple might buy a wedding website for their straight friends. This logic would be amusing if it were not so embarrassing. [12] I suppose the Heart of Atlanta Motel could have argued that Black people may still rent rooms for their white friends. Smith answers that she will sell other websites for gay or lesbian clients. But then she, like Ollie McClung, who would serve Black people take-out but not table service, discriminates against LGBT people by offering them a limited menu. [13] This is plain to see, for all who do not look the other way.

12 The majority tacitly acknowledges the absurdity. At the start of its opinion, it explains that Smith "decided to expand her offerings to include services for couples seeking websites for *their* weddings." *Ante*, at —— (emphasis added).

13 What is " 'embarrassing' " about this reasoning is not, as the Court claims, the "distinction between status and message." *Ante*, at ——, n. 3. It is petitioners' contrivance, embraced by the Court, that a prohibition on status-based discrimination can be avoided by asserting that a group can always buy services on behalf of others, or else that the group can access a "separate but equal" subset of the services made available to everyone else.

The majority, however, analogizes this case to *Hurley* and *Boy Scouts of America v. Dale*, 530 U. S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). The law schools in *FAIR* likewise relied on *Hurley* and *Dale* to argue that the Solomon Amendment violated their free-speech rights. *FAIR* confirmed, however, that a neutral regulation of conduct imposes an incidental burden on speech when the regulation grants a right of equal access that requires the regulated party to provide speech only if, and to the extent, it provides such speech for others. *Supra*, at —— – ——, —— – ——.

Hurley and *Dale*, by contrast, involved "peculiar" applications of public accommodations laws, not to "the act of discriminating ... in the provision of publicly available goods" by "clearly commercial entities," but rather to private, nonprofit expressive associations in ways that directly burdened speech. *Hurley*, 515 U. S., at 572, 115 S.Ct. 2338 (private parade); *Dale*, 530 U. S., at 657, 120 S.Ct. 2446 (Boy Scouts). The Court in *Hurley* and *Dale* stressed that the speech burdens in those cases were not incidental to prohibitions on status-based discrimination because the associations did not assert that "mere acceptance of a member from a particular group would impair [the association's] message." *Dale*, 530 U. S., at 653, 120 S.Ct. 2446; see also *ibid.* (reasoning that Dale was excluded for being a gay rights activist, not for being gay); *ibid.* (explaining that in *Hurley*, "the parade organizers did not wish to exclude the GLIB [Irish-American gay, lesbian, and bisexual group] members because of their sexual orientations, but because they wanted to march behind a GLIB banner"); *Hurley*, 515 U. S., at 572–573, 115 S.Ct. 2338.

***32** Here, the opposite is true. 303 Creative LLC is a "clearly commercial entit[y]." *Dale*, 530 U. S., at 657, 120 S.Ct. 2446. The company comes under the regulation of CADA only if it sells services to the public, and only if it denies the equal enjoyment of such services because of sexual orientation. The State confirms that the company is free to include or not to include any message in whatever services it chooses to offer. *Supra*, at —— – ——. And the company confirms that it plans to engage in status-based discrimination. *Supra*, at —— – ——, —— – ——. Therefore, any burden on the company's expression is incidental to the State's content-neutral regulation of commercial conduct.

Frustrated by this inescapable logic, the majority dials up the rhetoric, asserting that "Colorado seeks to compel [the company's] speech in order to excise certain ideas or viewpoints from the public dialogue." The State's "very

purpose in seeking to apply its law," in the majority's view, is "the coercive elimination of dissenting ideas about marriage." *Ante*, at —— – —— (internal quotation marks and brackets omitted). [14] That is an astonishing view of the law. It is contrary to the fact that a law requiring public-facing businesses to accept all comers "is textbook viewpoint neutral," *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez*, 561 U. S. 661, 695, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010); contrary to the fact that the Accommodation Clause and the State's application of it here allows Smith to include in her company's goods and services whatever "dissenting views about marriage" she wants; and contrary to this Court's clear holdings that the purpose of a public accommodations law, as applied to the commercial act of discrimination in the sale of publicly available goods and services, is to ensure equal access to and equal dignity in the public marketplace, *supra*, at —— – ——.

14 The majority's repeated invocation of this Orwellian thought policing is revealing of just how much it misunderstands this case. See *ante*, at —— – ——, —— – ——, —— – —— (claiming that the State seeks to "eliminate ideas" and that it will punish Smith unless she "conforms her views to the State's").

So it is dispiriting to read the majority suggest that this case resembles *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). A content-neutral equal-access policy is "a far cry" from a mandate to "endorse" a pledge chosen by the Government. *FAIR*, 547 U. S., at 62, 126 S.Ct. 1297. This Court has said "it trivializes the freedom protected in *Barnette*" to equate the two. *Ibid.* Requiring Smith's company to abide by a law against invidious discrimination in commercial sales to the public does not conscript her into espousing the government's message. It does not "invad[e]" her "sphere of intellect" or violate her constitutional "right to differ." *Ante*, at ——, —— (internal quotation marks omitted). All it does is require her to stick to her bargain: "The owner who hangs a shingle and offers her services to the public cannot retreat from the promise of open service; to do so is to offer the public marked money. It is to convey the promise of a free and open society and then take the prize away from the despised few." J. Singer, We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom, 95 B. U. L. Rev. 929, 949 (2015).

III

Today is a sad day in American constitutional law and in the lives of LGBT people. The Supreme Court of the United States declares that a particular kind of business, though open to the public, has a constitutional right to refuse to serve members of a protected class. The Court does so for the first time in its history. By issuing this new license to discriminate in a case brought by a company that seeks to deny same-sex couples the full and equal enjoyment of its services, the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status. In this way, the decision itself inflicts a kind of stigmatic harm, on top of any harm caused by denials of service. The opinion of the Court is, quite literally, a notice that reads: "Some services may be denied to same-sex couples."

***33** "The truth is," these "affronts and denials" "are intensely human and personal." S. Rep. No. 872, at 15 (internal quotation marks omitted). Sometimes they may "harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity." *Ibid.* To see how, imagine a same-sex couple browses the public market with their child. The market could be online or in a shopping mall. Some stores sell products that are customized and expressive. The family sees a notice announcing that services will be refused for same-sex weddings. What message does that send? It sends the message that we live in a society with social castes. It says to the child of the same-sex couple that their parents' relationship is not equal to others'. And it reminds LGBT people of a painful feeling that they know all too well: There are some public places where they can be themselves, and some where they cannot. K. Yoshino, Covering 61–66 (2006). Ask any LGBT person, and you will learn just how often they are forced to navigate life in this way. They must ask themselves: If I reveal my identity to this co-worker, or to this shopkeeper, will they treat me the same way? If I hold the hand of my partner in this setting, will someone stare at me, harass me, or even hurt me? It is an awful way to live. Freedom from this way of life is the very object of a law that declares: All members of the public are entitled to inhabit public spaces on equal terms.

This case cannot be understood outside of the context in which it arises. In that context, the outcome is even more distressing. The LGBT rights movement has made historic strides, and I am proud of the role this Court recently played in that history. Today, however, we are taking steps backward.

A slew of anti-LGBT laws have been passed in some parts of the country, [15] raising the specter of a "bare ... desire to harm a politically unpopular group." *Romer*, 517 U. S., at 634, 116 S.Ct. 1620 (internal quotation marks omitted). This is especially unnerving when "for centuries there have been powerful voices to condemn" this small minority. *Lawrence v. Texas*, 539 U. S. 558, 571, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). In this pivotal moment, the Court had an opportunity to reaffirm its commitment to equality on behalf of all members of society, including LGBT people. It does not do so.

15 These laws variously censor discussion of sexual orientation and gender identity in schools, see, *e.g.*, 2023 Ky. Acts pp. 775–779, and ban drag shows in public, see 2023 Tenn. Pub. Acts ch. 2. Yet we are told that the real threat to free speech is that a commercial business open to the public might have to serve all members of the public.

Although the consequences of today's decision might be most pressing for the LGBT community, the decision's logic cannot be limited to discrimination on the basis of sexual orientation or gender identity. The decision threatens to balkanize the market and to allow the exclusion of other groups from many services. A website designer could equally refuse to create a wedding website for an interracial couple, for example. How quickly we forget that opposition to interracial marriage was often because " 'Almighty God ... did not intend for the races to mix.' " *Loving v. Virginia*, 388 U. S. 1, 3, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Yet the reason for discrimination need not even be religious, as this case arises under the Free Speech Clause. A stationer could refuse to sell a birth announcement for a disabled couple because she opposes their having a child. A large retail store could reserve its family portrait services for "traditional" families. And so on. [16]

16 The potential implications of the Court's logic are deeply troubling. Would *Runyon* v. *McCrary* have come out differently if the schools had argued that accepting Black children would have required them to create original speech, like lessons, report cards, or diplomas, that they deeply objected to? What if the law firm in *Hishon* v. *King & Spalding* had argued that promoting a woman to the partnership would have required it to alter its speech, like letterhead or court filings, in ways that it would rather not? Once you look closely, "compelled speech" (in the majority's facile understanding of that concept) is everywhere.

Wedding websites, birth announcements, family portraits, epitaphs. These are not just words and images. They are the most profound moments in a human's life. They are the moments that give that life personal and cultural meaning. You already heard the story of Bob and Jack, the elderly gay couple forced to find a funeral home more than an hour away. *Supra*, at ——— – ———, and n. 4. Now hear the story of Cynthia and Sherry, a lesbian couple of 13 years until Cynthia died from cancer at age 35. When Cynthia was diagnosed, she drew up a will, which authorized Sherry to make burial arrangements. Cynthia had asked Sherry to include an inscription on her headstone, listing the relationships that were important to her, for example, "daughter, granddaughter, sister, and aunt." After Cynthia died, the cemetery was willing to include those words, but not the words that described Cynthia's relationship to Sherry: " 'beloved life partner.' " N. Knauer, Gay and Lesbian Elders 102 (2011). There are many such stories, too many to tell here. And after today, too many to come.

***34** I fear that the symbolic damage of the Court's opinion is done. But that does not mean that we are powerless in the face of the decision. The meaning of our Constitution is found not in any law volume, but in the spirit of the people who live under it. Every business owner in America has a choice whether to live out the values in the Constitution. Make no mistake: Invidious discrimination is not one of them. "[D]iscrimination in any form and in any degree has no justifiable part whatever in our democratic way of life." *Korematsu v. United States*, 323 U. S. 214, 242, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (Murphy, J., dissenting). "It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States." *Ibid.*

The unattractive lesson of the majority opinion is this: What's mine is mine, and what's yours is yours. The lesson of the history of public accommodations laws is altogether different. It is that in a free and democratic society, there can be no social castes. And for that to be true, it must be true in the public market. For the "promise of freedom" is an empty one if the Government is "powerless to assure that a dollar in the hands of [one person] will purchase the same thing as a dollar in the hands of a[nother]." *Jones v. Alfred H. Mayer Co.*, 392 U. S. 409, 443, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). Because the Court today retreats from that promise, I dissent.

All Citations

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EXHIBIT B

2023 WL 4187751
Only the Westlaw citation is currently available.
Supreme Court of the United States.

Billy Raymond COUNTERMAN, Petitioner
v.
COLORADO

No. 22-138
|
Argued April 19, 2023
|
Decided June 27, 2023

Synopsis
Background: Defendant was convicted in the Colorado District Court, Arapahoe County, F. Stephen Collins, J., of stalking (serious emotional distress) and harassment. Defendant appealed. The Colorado Court of Appeals, 497 P.3d 1039, affirmed, and the Colorado Supreme Court denied certiorari review. The United States Supreme Court granted defendant's certiorari petition.

Holdings: The Supreme Court, Justice Kagan, held that:

[1] the First Amendment requires proof in a criminal action regarding a true threat that the defendant had some subjective understanding of the threatening nature of his statements; abrogating *People v. Cross*, 127 P. 3d 71; *In re R. D.*, 464 P. 3d 717; and

[2] recklessness is the appropriate mens rea, consistent with the First Amendment, for a criminal conviction for communications constituting a true threat.

Vacated and remanded.

Chief Justice Roberts, Justice Alito, Justice Kavanaugh, and Justice Jackson joined the opinion of the Court.

Justice Sotomayor filed an opinion concurring in part and concurring in the judgment which Justice Gorsuch joined in part.

Justice Thomas filed a dissenting opinion.

Justice Barrett filed a dissenting opinion which Justice Thomas joined.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (32)

[1] **Constitutional Law** True threats

True threats of violence lie outside the bounds of the First Amendment's protection. U.S. Const. Amend. 1.

[2] **Constitutional Law** True threats

A statement can count as a true threat of violence, outside the bounds of the First Amendment, based solely on its objective content. U.S. Const. Amend. 1.

[3] **Constitutional Law** Incitement or encouragement of crime or lawless action

First Amendment permits restrictions on incitement, or statements directed at producing imminent lawless action and likely to do so. U.S. Const. Amend. 1.

[4] **Constitutional Law** Defamation

First Amendment permits restrictions on defamation, or false statements of fact harming another's reputation. U.S. Const. Amend. 1.

1 Case that cites this headnote

[5] **Constitutional Law** Obscenity in General

First Amendment permits restrictions on obscenity, or valueless material appealing to the prurient interest and describing sexual conduct in a patently offensive way. U.S. Const. Amend. 1.

[6] **Constitutional Law** Particular Issues and Applications in General

Categories of speech historically unprotected by the First Amendment have been described as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in their proscription. U.S. Const. Amend. 1.

[7] **Constitutional Law** True threats

"True threats" historically unprotected by the First Amendment are serious expressions conveying that a speaker means to commit an act of unlawful violence. U.S. Const. Amend. 1.

[8] **Threats, Stalking, and Harassment** Intent; knowledge

Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat.

[9] **Threats, Stalking, and Harassment** Intent; knowledge

Threats, Stalking, and Harassment Apprehension of harm

The existence of a threat depends not on the mental state of the author, but on what the statement conveys to the person on the other end.

[10] **Constitutional Law** True threats

When the statement is understood as a true threat, all the harms that have long made threats unprotected by the First Amendment naturally follow. U.S. Const. Amend. 1.

[11] **Constitutional Law** True threats

"True threats," which are outside First Amendment protection, subject individuals to fear of violence and to the many kinds of disruption that fear engenders. U.S. Const. Amend. 1.

[12] **Constitutional Law** Freedom of Speech, Expression, and Press

Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. U.S. Const. Amend. 1.

[13] **Constitutional Law** Defamation

False and defamatory statements of fact have no First Amendment value. U.S. Const. Amend. 1.

[14] **Libel and Slander** Criticism and comment on public matters and publication of news

A public figure cannot recover for the injury a false and defamatory statement causes unless the speaker acted with knowledge that it was false or with reckless disregard of whether it was false or not; that rule is based on fear of "self-censorship," or the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers from making even truthful statements. U.S. Const. Amend. 1.

[15] **Constitutional Law** Defamation

The First Amendment requires the protection of some falsehood from a defamation claim in order to protect speech that matters. U.S. Const. Amend. 1.

[16] **Constitutional Law** Incitement or encouragement of crime or lawless action

Like threats, incitement inheres in particular words used in particular contexts: its harm can arise even when a clueless speaker fails to grasp his expression's nature and consequence. U.S. Const. Amend. 1.

[17] **Constitutional Law** Particular Issues and Applications in General

Constitutional Law Incitement or encouragement of crime or lawless action

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The First Amendment precludes punishment for incitement, whether civil or criminal, unless the speaker's words were intended, not just likely, to produce imminent disorder. U.S. Const. Amend. 1.

[18] **Constitutional Law** Incitement or encouragement of crime or lawless action

Mere advocacy of illegal acts is a kind of speech falling within the First Amendment's core. U.S. Const. Amend. 1.

[19] **Constitutional Law** Obscenity in General

The First Amendment demands proof of a defendant's mindset to make out an obscenity case. U.S. Const. Amend. 1.

[20] **Obscenity** Definitions; Test for Obscenity

Obscenity is obscenity, whatever the purveyor's mental state.

[21] **Obscenity** Knowledge or intent

Punishment of obscenity depends on a vital element of scienter, often described as the defendant's awareness of the character and nature of the materials he distributed.

[22] **Constitutional Law** Obscenity in General

While obscene speech and writings are not protected, punishing their distribution without regard to scienter would have the collateral effect of inhibiting expression protected by the First Amendment; given the ambiguities inherent in the definition of obscenity, the First Amendment requires proof of scienter to avoid the hazard of self-censorship. U.S. Const. Amend. 1.

[23] **Constitutional Law** True threats

First Amendment requires proof in a criminal action regarding a true threat that the defendant had some subjective understanding of the threatening nature of his statements; abrogating *People v. Cross,* 127 P. 3d 71, and *In re R. D.*, 464 P. 3d 717. U.S. Const. Amend. 1.

[24] **Criminal Law** Criminal Intent and Malice

Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest to prove.

[25] **Criminal Law** Criminal Intent and Malice

A person acts "purposefully," for mens rea purposes, when he consciously desires a result.

[26] **Criminal Law** Criminal Intent and Malice

A person acts "knowingly," for mens rea purposes, when he is aware that a result is practically certain to follow.

[27] **Criminal Law** Negligence; recklessness

A person acts "recklessly," in the most common mens rea formulation, when he consciously disregards a substantial and unjustifiable risk that the conduct will cause harm to another; that standard involves insufficient concern with risk, rather than awareness of impending harm.

[28] **Criminal Law** Negligence; recklessness

"Recklessness," as mens rea, is morally culpable conduct, involving a deliberate decision to endanger another.

[29] **Threats, Stalking, and Harassment** Intent; knowledge

In the threats context, "recklessness" means that a speaker is aware that others could regard his statements as threatening violence and delivers them anyway.

[30] **Criminal Law** Negligence; recklessness

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For mens rea purposes, a person acts "negligently" if he is not but should be aware of a substantial risk.

[31] **Constitutional Law** True threats
Threats, Stalking, and Harassment Intent; knowledge

Recklessness is the appropriate mens rea, consistent with the First Amendment, for a criminal conviction for communications constituting a true threat; the State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence, but need not prove any more demanding form of subjective intent to threaten another. U.S. Const. Amend. 1.

[32] **Constitutional Law** Stalking
Threats, Stalking, and Harassment Intent; knowledge

To convict defendant under Colorado stalking statute prohibiting communication causing serious emotional distress, the State not only had to show only that a reasonable person would understand defendant's statements as threats, but also had to show awareness on his part that the statements could be understood that way in order to satisfy the recklessness mens rea required by the First Amendment. U.S. Const. Amend. 1; Colo. Rev. Stat. Ann. § 18-3-602(1)(c).

Syllabus *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

***1** From 2014 to 2016, petitioner Billy Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. did not respond. In fact, she tried repeatedly to block him, but each time, Counterman created a new Facebook account and resumed contacting C. W. Several of his messages envisaged violent harm befalling her. Counterman's messages put C. W. in fear and upended her daily existence: C. W. stopped walking alone, declined social engagements, and canceled some of her performances. C. W. eventually contacted the authorities. The State charged Counterman under a Colorado statute making it unlawful to "[r]epeatedly ... make[ ] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ... to suffer serious emotional distress." Colo. Rev. Stat. § 18–3–602(1)(c). Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and therefore could not form the basis of a criminal prosecution. Following Colorado law, the trial court rejected that argument under an objective standard, finding that a reasonable person would consider the messages threatening. Counterman appealed, arguing that the First Amendment required the State to show not only that his statements were objectively threatening, but also that he was aware of their threatening character. The Colorado Court of Appeals disagreed and affirmed his conviction. The Colorado Supreme Court denied review.

Held: The State must prove in true-threats cases that the defendant had some subjective understanding of his statements' threatening nature, but the First Amendment requires no more demanding a showing than recklessness. Pp. ——— – ———.

(a) The First Amendment permits restrictions upon the content of speech in a few limited areas. Among these historic and traditional categories of unprotected expression is true threats. True threats are "serious expression[s]" conveying that a speaker means to "commit an act of unlawful violence." *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535. The existence of a threat depends not on "the mental state of the author," but on "what the statement conveys" to the person on the receiving end. *Elonis v. United States*, 575 U.S. 723, 733, 135 S.Ct. 2001, 192 L.Ed.2d 1. Yet the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. That is because bans on speech have the potential to chill, or deter, speech outside their boundaries. An important tool to prevent that outcome is to condition liability on the State's showing of a culpable mental state. *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460. That kind of "strategic protection" features in this Court's precedent

concerning the most prominent categories of unprotected speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789. With regard to defamation, a public figure cannot recover for the injury such a statement causes unless the speaker acted with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S.Ct. 710, 11 L.Ed.2d 686. The same idea arises in the law respecting obscenity and incitement to unlawful conduct. See, *e.g., Hess v. Indiana*, 414 U.S. 105, 109, 94 S.Ct. 326, 38 L.Ed.2d 303; *Hamling v. United States*, 418 U.S. 87, 122–123, 94 S.Ct. 2887, 41 L.Ed.2d 590. And that same reasoning counsels in favor of requiring a subjective element in a true-threats case. A speaker's fear of mistaking whether a statement is a threat, fear of the legal system getting that judgment wrong, and fear of incurring legal costs all may lead a speaker to swallow words that are in fact not true threats. Insistence on a subjective element in unprotected-speech cases, no doubt, has a cost: Even as it lessens chill of protected speech, it makes prosecution of otherwise proscribable, and often dangerous, communications harder. But a subjective standard is still required for true threats, lest prosecutions chill too much protected, non-threatening expression. Pp. ——–——.

***2** (b) In this context, a recklessness standard—*i.e.,* a showing that a person "consciously disregard[ed] a substantial [and unjustifiable] risk that [his] conduct will cause harm to another," *Voisine v. United States*, 579 U.S. 686, 691, 136 S.Ct. 2272, 195 L.Ed.2d 736—is the appropriate *mens rea*. Requiring purpose or knowledge would make it harder for States to counter true threats—with diminished returns for protected expression. Using a recklessness standard also fits with this Court's defamation decisions, which adopted a recklessness rule more than a half-century ago. The Court sees no reason to offer greater insulation to threats than to defamation. While this Court's incitement decisions demand more, the reason for that demand—the need to protect from legal sanction the political advocacy a hair's-breadth away from incitement—is not present here. For true threats, recklessness strikes the right balance, offering "enough 'breathing space' for protected speech," without sacrificing too many of the benefits of enforcing laws against true threats. *Elonis*, 575 U.S. at 748, 135 S.Ct. 2001. Pp. ——–——.

(c) The State prosecuted Counterman in accordance with an objective standard and did not have to show any awareness on Counterman's part of his statements' threatening character. That is a violation of the First Amendment. P. ——.

497 P.3d 1039, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, KAVANAUGH, and JACKSON, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined as to Parts I, II, III–A, and III–B. THOMAS, J., filed a dissenting opinion. BARRETT, J., filed a dissenting opinion, in which THOMAS, J., joined.

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Opinion

Justice KAGAN delivered the opinion of the Court.

True threats of violence are outside the bounds of First Amendment protection and punishable as crimes. Today we consider a criminal conviction for communications falling within that historically unprotected category. The question

presented is whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another.

I

From 2014 to 2016, petitioner Billy Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. never responded. In fact, she repeatedly blocked Counterman. But each time, he created a new Facebook account and resumed his contacts. Some of his messages were utterly prosaic ("Good morning sweetheart"; "I am going to the store would you like anything?")—except that they were coming from a total stranger. 3 App. 465. Others suggested that Counterman might be surveilling C. W. He asked "[w]as that you in the white Jeep?"; referenced "[a] fine display with your partner"; and noted "a couple [of] physical sightings." 497 P.3d 1039, 1044 (Colo. App. 2021). And most critically, a number expressed anger at C. W. and envisaged harm befalling her: "Fuck off permanently." *Ibid.* "Staying in cyber life is going to kill you." *Ibid.* "You're not being good for human relations. Die." *Ibid.*

The messages put C. W. in fear and upended her daily existence. She believed that Counterman was "threat[ening her] life"; "was very fearful that he was following" her; and was "afraid [she] would get hurt." 2 App. 177, 181, 193. As a result, she had "a lot of trouble sleeping" and suffered from severe anxiety. *Id.*, at 200; see *id.*, at 194–198. She stopped walking alone, declined social engagements, and canceled some of her performances, though doing so caused her financial strain. See *id.*, at 182–183, 199, 201–206, 238–239. Eventually, C. W. decided that she had to contact the authorities. *Id.*, at 184.

***3** Colorado charged Counterman under a statute making it unlawful to "[r]epeatedly ... make[ ] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ... to suffer serious emotional distress." Colo. Rev. Stat. § 18–3–602(1)(c) (2022). The only evidence the State proposed to introduce at trial were his Facebook messages. [1]

1 The statute Counterman was charged with violating is titled a "stalking" statute and also prohibits "[r]epeatedly follow[ing], approach[ing], contact[ing], [or] plac[ing] under surveillance" another person. § 18–3–602(1)(c). But the State had no evidence, beyond what Counterman claimed, that he actually had followed or surveilled C. W. For example, C. W. had never noticed anything of that kind. So the prosecution based its case solely on Counterman's "[r]epeated[ ] ... communication[s]" with C. W. *Ibid.*

Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and therefore could not form the basis of a criminal prosecution. In line with Colorado law, the trial court assessed the true-threat issue using an "objective 'reasonable person' standard." *People v. Cross*, 127 P.3d 71, 76 (Colo. 2006). Under that standard, the State had to show that a reasonable person would have viewed the Facebook messages as threatening. By contrast, the State had no need to prove that Counterman had any kind of "subjective intent to threaten" C. W. *In re R. D.*, 464 P.3d 717, 731, n. 21 (Colo. 2020). The court decided, after "consider[ing] the totality of the circumstances," that Counterman's statements "r[o]se to the level of a true threat." 497 P.3d at 1045. Because that was so, the court ruled, the First Amendment posed no bar to prosecution. The court accordingly sent the case to the jury, which found Counterman guilty as charged.

The Colorado Court of Appeals affirmed. Counterman had urged the court to hold that the First Amendment required the State to show that he was aware of the threatening nature of his statements. Relying on its precedent, the court turned the request down: It "decline[d] today to say that a speaker's subjective intent to threaten is necessary" under the First Amendment to procure a conviction for threatening communications. *Id.*, at 1046 (quoting *R. D.*, 464 P.3d at 731, n. 21). Using the established objective standard, the court then approved the trial court's ruling that Counterman's messages were "true threats" and so were not protected by the First Amendment. 497 P.3d at 1050. The Colorado Supreme Court denied review.

Courts are divided about (1) whether the First Amendment requires proof of a defendant's subjective mindset in true-

threats cases, and (2) if so, what *mens rea* standard is sufficient. We therefore granted certiorari. 598 U. S. ——, 143 S.Ct. 644, 214 L.Ed.2d 382 (2023).

II

[1] **[2]** True threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection. And a statement can count as such a threat based solely on its objective content. The first dispute here is about whether the First Amendment nonetheless demands that the State in a true-threats case prove that the defendant was aware in some way of the threatening nature of his communications.[2] Colorado argues that there is no such requirement. Counterman contends that there is one, based mainly on the likelihood that the absence of such a *mens rea* requirement will chill protected, non-threatening speech. Counterman's view, we decide today, is the more consistent with our precedent. To combat the kind of chill he references, our decisions have often insisted on protecting even some historically unprotected speech through the adoption of a subjective mental-state element. We follow the same path today, holding that the State must prove in true-threats cases that the defendant had some understanding of his statements' threatening character. The second issue here concerns what precise *mens rea* standard suffices for the First Amendment purpose at issue. Again guided by our precedent, we hold that a recklessness standard is enough. Given that a subjective standard here shields speech not independently entitled to protection—and indeed posing real dangers—we do not require that the State prove the defendant had any more specific intent to threaten the victim.

2 A preliminary clarification may be useful, concerning the difference between awareness of a communication's contents and awareness of its threatening nature. Everyone agrees, again, that the State must prove the former—and Colorado law appears to hold as much. See Colo. Rev. Stat. § 18–3–602(1)(c); Brief for Respondent 18. So, for example, if a defendant delivers a sealed envelope without knowing that a threatening letter is inside, he cannot be liable for the communication. So too (though this common example seems fairly preposterous) if a "foreigner, ignorant of the English language, who would not know the meaning of the words," somehow manages to convey an English-language threat. *Elonis v. United States*, 575 U.S. 723, 738, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015) (internal quotation marks omitted). The question in this case arises when the defendant (unlike in those hypotheticals) understands the content of the words, but may not grasp that others would find them threatening. Must he do so, under the First Amendment, for a true-threats prosecution to succeed?

A

***4** **[3]** **[4]** **[5]** **[6]** "From 1791 to the present," the First Amendment has "permitted restrictions upon the content of speech in a few limited areas." *United States v. Stevens*, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). These "historic and traditional categories" are "long familiar to the bar" and perhaps, too, the general public. *Ibid.* One is incitement—statements "directed [at] producing imminent lawless action," and likely to do so. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*). Another is defamation—false statements of fact harming another's reputation. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Still a third is obscenity—valueless material "appeal[ing] to the prurient interest" and describing "sexual conduct" in "a patently offensive way." *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). This Court has "often described [those] historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest" in their proscription. *Stevens*, 559 U.S. at 470, 130 S.Ct. 1577 (internal quotation marks omitted; emphasis deleted).

[7] **[8]** **[9]** **[10]** **[11]** "True threats" of violence is another historically unprotected category of communications. *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); see *United States v. Alvarez*, 567 U.S. 709, 717–718, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (plurality opinion). The "true" in that term distinguishes what is at issue from jests, "hyperbole," or other statements that when taken in context do not convey a real possibility that violence will follow (say, "I am going to kill you for showing up late"). *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*). True threats are "serious expression[s]" conveying that a speaker means to "commit an act of unlawful violence." *Black*, 538 U.S. at 359, 123 S.Ct. 1536. Whether the speaker is aware of, and intends

to convey, the threatening aspect of the message is not part of what makes a statement a threat, as this Court recently explained. See *Elonis v. United States*, 575 U.S. 723, 733, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015). The existence of a threat depends not on "the mental state of the author," but on "what the statement conveys" to the person on the other end. *Ibid.* When the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow. True threats subject individuals to "fear of violence" and to the many kinds of "disruption that fear engenders." *Black*, 538 U.S. at 360, 123 S.Ct. 1536 (internal quotation marks omitted). The facts of this case well illustrate how. [3]

3 The concurrence relies on *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), to argue that the category of true threats itself incorporates a *mens rea* element. See *post*, at —— – ——, —— (SOTOMAYOR, J., concurring in part and concurring in judgment). But that claim is based on a misreading. The statements the concurrence quotes merely reflect that the statute involved in the case required a showing of intent. *Black* did not address whether the First Amendment demands such a showing, or why it might do so. See *United States v. Jeffries*, 692 F.3d 473, 479–480 (C.A.6 2012) (SUTTON, J.); see also *post*, at —— – ——, and n. 4 (BARRETT, J., dissenting) (explaining that *Black* concerned a different part of the statute, preventing consideration of contextual factors in assessing whether a statement was a threat).

[12] Yet the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. The reason relates to what is often called a chilling effect. Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is "self-censorship" of speech that could not be proscribed—a "cautious and restrictive exercise" of First Amendment freedoms. *Gertz*, 418 U.S. at 340, 94 S.Ct. 2997. And an important tool to prevent that outcome—to stop people from steering "wide[ ] of the unlawful zone"—is to condition liability on the State's showing of a culpable mental state. *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). Such a requirement comes at a cost: It will shield some otherwise proscribable (here, threatening) speech because the State cannot prove what the defendant thought. But the added element reduces the prospect of chilling fully protected expression. As this Court has noted, the requirement lessens "the hazard of self-censorship" by "compensat[ing]" for the law's uncertainties. *Mishkin v. New York*, 383 U.S. 502, 511, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966). Or said a bit differently: "[B]y reducing an honest speaker's fear that he may accidentally [or erroneously] incur liability," a *mens rea* requirement "provide[s] 'breathing room' for more valuable speech." *Alvarez*, 567 U.S. at 733, 132 S.Ct. 2537 (BREYER, J., concurring in judgment).

***5** **[13]** **[14]** **[15]** That kind of "strategic protection" features in our precedent concerning the most prominent categories of historically unprotected speech. *Gertz*, 418 U.S. at 342, 94 S.Ct. 2997. Defamation is the best known and best theorized example. False and defamatory statements of fact, we have held, have "no constitutional value." *Id.*, at 340, 94 S.Ct. 2997; see *Alvarez*, 567 U.S. at 718–719, 132 S.Ct. 2537 (plurality opinion). Yet a public figure cannot recover for the injury such a statement causes unless the speaker acted with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); see *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) (using the same standard for criminal libel). That rule is based on fear of "self-censorship"—the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers from making even truthful statements. *Sullivan*, 376 U.S. at 279, 84 S.Ct. 710. The First Amendment, we have concluded, "requires that we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U.S. at 341, 94 S.Ct. 2997.

[16] **[17]** **[18]** **[19]** **[20]** **[21]** **[22]** The same idea arises in the law respecting obscenity and incitement to unlawful conduct. Like threats, incitement inheres in particular words used in particular contexts: Its harm can arise even when a clueless speaker fails to grasp his expression's nature and consequence. But still, the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were "intended" (not just likely) to produce imminent disorder. *Hess v. Indiana*, 414 U.S. 105, 109, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (*per curiam*); see *Brandenburg*, 395 U.S. at 447, 89 S.Ct. 1827; *NAACP v.*

Claiborne Hardware Co., 458 U.S. 886, 927–929, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). That rule helps prevent a law from deterring "mere advocacy" of illegal acts—a kind of speech falling within the First Amendment's core. *Brandenburg*, 395 U.S. at 449, 89 S.Ct. 1827. And for a similar reason, the First Amendment demands proof of a defendant's mindset to make out an obscenity case. Obscenity is obscenity, whatever the purveyor's mental state. But we have repeatedly recognized that punishment depends on a "vital element of scienter"—often described as the defendant's awareness of "the character and nature" of the materials he distributed. *Hamling v. United States*, 418 U.S. 87, 122–123, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); see *Elonis*, 575 U.S. at 739, 135 S.Ct. 2001 (reiterating *Hamling*). The rationale should by now be familiar. Yes, "obscene speech and writings are not protected." *Smith v. California*, 361 U.S. 147, 152, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). But punishing their distribution without regard to scienter would "have the collateral effect of inhibiting" protected expression. *Id.*, at 151, 80 S.Ct. 215. Given "the ambiguities inherent in the definition of obscenity," the First Amendment "requires proof of scienter to avoid the hazard of self-censorship." *Mishkin*, 383 U.S. at 511, 86 S.Ct. 958.[4]

4 The dissent, in urging an objective standard here, reads the obscenity decisions as requiring merely that the defendant know "what the material depicts" (as a speaker must know a communication's contents). *Post*, at —— – —— (opinion of BARRETT, J.) (relying on *Hamling*, 418 U.S. at 120–123, 94 S.Ct. 2887). But see the statements quoted above: That is not what they say. And indeed, this Court recently rejected the dissent's revisionist reading, explaining in detail—and in response to a near-identical argument—that the obscenity decisions demand awareness of "the *character* of [the materials,] not simply [their] contents." *Elonis*, 575 U.S. at 739–740, 135 S.Ct. 2001 (discussing *Hamling*, 418 U.S. at 120–123, 94 S.Ct. 2887, and *Mishkin*, 383 U.S. at 510, 86 S.Ct. 958).

The dissent's use of two other First Amendment categories—fighting words and false commercial speech—to support an objective test also falls flat. See *post*, at —— – —— (opinion of BARRETT, J.). This Court has not upheld a conviction under the fighting-words doctrine in 80 years. At the least, that doctrine is today a poor candidate for spinning off other First Amendment rules. False commercial speech is also a poor analog, though for different reasons. Put aside that the line of cases the dissent invokes has never been listed among the historically unprotected categories of speech. See, *e.g.*, *United States v. Stevens*, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010); see *supra*, at ——. Yet more relevant, the Court has often noted that commercial speech is less vulnerable to chill than most other speech is. See, *e.g.*, *Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 481, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). And it is the fear of chill that has led to state-of-mind requirements in the context of unprotected speech.

***6** **[23]** The same reasoning counsels in favor of requiring a subjective element in a true-threats case. This Court again must consider the prospect of chilling non-threatening expression, given the ordinary citizen's predictable tendency to steer "wide[ ] of the unlawful zone." *Speiser*, 357 U.S. at 526, 78 S.Ct. 1332. The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs—all those may lead him to swallow words that are in fact not true threats. Some 50 years ago, Justice Marshall made the point when reviewing a true-threats prosecution arguably involving only political hyperbole. See *Rogers v. United States*, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975). The Court in *Rogers* reversed the conviction on other grounds, but Justice Marshall focused on the danger of deterring non-threatening speech. An objective standard, turning only on how reasonable observers would construe a statement in context, would make people give threats "a wide berth." *Id.*, at 47, 95 S.Ct. 2091 (concurring opinion). And so use of that standard would discourage the "uninhibited, robust, and wide-open debate that the First Amendment is intended to protect." *Id.*, at 48, 95 S.Ct. 2091 (quoting *Sullivan*, 376 U.S. at 270, 84 S.Ct. 710).

The reasoning—and indeed some of the words—came straight from this Court's decisions insisting on a subjective element in other unprotected-speech cases, whether involving defamation, incitement, or obscenity. No doubt, the approach in all of those cases has a cost: Even as it lessens chill of protected speech, it makes prosecution of otherwise proscribable, and often dangerous, communications harder. And the balance between those two effects may play out differently in different contexts, as the next part of this opinion discusses. But the ban on an objective standard remains the same, lest true-threats prosecutions chill too much protected, non-threatening expression.

B

[24] [25] [26] [27] [28] [29] [30] The next question concerns the type of subjective standard the First Amendment requires. The law of *mens rea* offers three basic choices. Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest to prove. A person acts purposefully when he "consciously desires" a result—so here, when he wants his words to be received as threats. *United States v. Bailey*, 444 U.S. 394, 404, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). Next down, though not often distinguished from purpose, is knowledge. *Ibid.* A person acts knowingly when "he is aware that [a] result is practically certain to follow"—so here, when he knows to a practical certainty that others will take his words as threats. *Ibid.* (internal quotation marks omitted). A greater gap separates those two from recklessness. A person acts recklessly, in the most common formulation, when he "consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another." *Voisine v. United States*, 579 U.S. 686, 691, 136 S.Ct. 2272, 195 L.Ed.2d 736 (2016) (internal quotation marks omitted). That standard involves insufficient concern with risk, rather than awareness of impending harm. See *Borden v. United States*, 593 U. S. ——, ——, 141 S.Ct. 1817, 1823–1824, 210 L.Ed.2d 63 (2021) (plurality opinion). But still, recklessness is morally culpable conduct, involving a "deliberate decision to endanger another." *Voisine*, 579 U.S. at 694, 136 S.Ct. 2272. In the threats context, it means that a speaker is aware "that others could regard his statements as" threatening violence and "delivers them anyway." *Elonis*, 575 U.S. at 746, 135 S.Ct. 2001 (ALITO, J., concurring in part and dissenting in part). [5]

5 Just to complete the *mens rea* hierarchy, the last level is negligence—but that is an objective standard, of the kind we have just rejected. A person acts negligently if he is not but should be aware of a substantial risk—here, that others will understand his words as threats. See *Borden*, 593 U. S., at ——, 141 S.Ct., at 1823–1824 (plurality opinion). That makes liability depend not on what the speaker thinks, but instead on what a reasonable person would think about whether his statements are threatening in nature. See *Elonis*, 575 U.S. at 738, 135 S.Ct. 2001 ("Having liability turn on whether a reasonable person regards the communication as a threat—regardless of what the defendant thinks—reduces culpability ... to negligence" (internal quotation marks omitted)).

***7** Among those standards, recklessness offers the right path forward. We have so far mostly focused on the constitutional interest in free expression, and on the correlative need to take into account threat prosecutions' chilling effects. But the precedent we have relied on has always recognized—and insisted on "accommodat[ing]"—the "competing value[ ]" in regulating historically unprotected expression. *Gertz*, 418 U.S. at 348, 94 S.Ct. 2997. Here, as we have noted, that value lies in protecting against the profound harms, to both individuals and society, that attend true threats of violence—as evidenced in this case. See *supra*, at ——, ——. The injury associated with those statements caused history long ago to place them outside the First Amendment's bounds. When despite that judgment we require use of a subjective mental-state standard, we necessarily impede some true-threat prosecutions. And as we go up the subjective *mens rea* ladder, that imposition on States' capacity to counter true threats becomes still greater—and, presumably, with diminishing returns for protected expression. In advancing past recklessness, we make it harder for a State to substantiate the needed inferences about *mens rea* (absent, as is usual, direct evidence). And of particular importance, we prevent States from convicting morally culpable defendants. See *Elonis*, 575 U.S. at 745, 135 S.Ct. 2001 (opinion of ALITO, J.). For reckless defendants have done more than make a bad mistake. They have consciously accepted a substantial risk of inflicting serious harm.

Using a recklessness standard also fits with the analysis in our defamation decisions. As noted earlier, the Court there adopted a recklessness rule, applicable in both civil and criminal contexts, as a way of accommodating competing interests. See *supra*, at —— – ——. In the more than half-century in which that standard has governed, few have suggested that it needs to be higher—in other words, that still more First Amendment "breathing space" is required. *Gertz*, 418 U.S. at 342, 94 S.Ct. 2997. And we see no reason to offer greater insulation to threats than to defamation. See *Elonis*, 575 U.S. at 748, 135 S.Ct. 2001 (opinion of ALITO, J.). The societal interests in countering the former are at least as high. And the protected speech near the borderline of true threats (even though sometimes political, as in *Rogers*) is, if anything, further from the First Amendment's central concerns than the chilled speech in *Sullivan*-type cases (*i.e.*, truthful reputation-damaging statements about public officials and figures).

It is true that our incitement decisions demand more—but the reason for that demand is not present here. When incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge. See *Hess*, 414 U.S. at 109, 94 S.Ct. 326; *supra*, at ——. In doing so, we recognized that incitement to disorder is commonly a hair's-breadth away from political "advocacy"—and particularly from strong protests against the government and prevailing social order. *Brandenburg*, 395 U.S. at 447, 89 S.Ct. 1827. Such protests gave rise to all the cases in which the Court demanded a showing of intent. See *ibid.*; *Hess*, 414 U.S. at 106, 94 S.Ct. 326; *Claiborne Hardware Co.*, 458 U.S. at 888, 928, 102 S.Ct. 3409. And the Court decided those cases against a resonant historical backdrop: the Court's failure, in an earlier era, to protect mere advocacy of force or lawbreaking from legal sanction. See, *e.g.*, *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927); *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *Abrams v. United States*, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919). A strong intent requirement was, and remains, one way to guarantee history was not repeated. It was a way to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core. But the potency of that protection is not needed here. For the most part, the speech on the other side of the true-threats boundary line—as compared with the advocacy addressed in our incitement decisions—is neither so central to the theory of the First Amendment nor so vulnerable to government prosecutions. It is not just that our incitement decisions are distinguishable; it is more that they compel the use of a distinct standard here. [6]

6 Our obscenity decisions are of no help in this inquiry, because the Court has never determined the precise *mens rea* needed to impose punishment. In arguing to the contrary, the concurrence relies mainly on *Hamling*. *Post*, at —— – —— (opinion of SOTOMAYOR, J.). But if the dissent is wrong in saying that *Hamling* (and other obscenity decisions) allowed an objective inquiry, see *supra*, at ——, n. 4, the concurrence is wrong in suggesting that it required use of a purpose or knowledge standard. As to the concurrence's claim, *Hamling* held only that a statute with that standard was "constitutionally sufficient." 418 U.S. at 123, 94 S.Ct. 2887. The decision said nothing about whether it was constitutionally necessary, or instead whether a recklessness standard would suffice as well.

***8** **[31]** That standard, again, is recklessness. It offers "enough 'breathing space' for protected speech," without sacrificing too many of the benefits of enforcing laws against true threats. *Elonis*, 575 U.S. at 748, 135 S.Ct. 2001 (opinion of ALITO, J.). As with any balance, something is lost on both sides: The rule we adopt today is neither the most speech-protective nor the most sensitive to the dangers of true threats. But in declining one of those two alternative paths, something more important is gained: Not "having it all"—because that is impossible—but having much of what is important on both sides of the scale. [7]

7 The dissent accuses the Court of making a "Goldilocks judgment" in favoring a recklessness standard. *Post*, at —— (opinion of BARRETT, J.). But in law, as in life, there are worse things than being "just right."

III

[32] It is time to return to Counterman's case, though only a few remarks are necessary. Counterman, as described above, was prosecuted in accordance with an objective standard. See *supra*, at ——. The State had to show only that a reasonable person would understand his statements as threats. It did not have to show any awareness on his part that the statements could be understood that way. For the reasons stated, that is a violation of the First Amendment.

We accordingly vacate the judgment of the Colorado Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, with whom Justice GORSUCH joins as to Parts I, II, III–A, and III–B, concurring in part and concurring in the judgment.

When the government seeks to punish speech based on its content, the First Amendment typically imposes stringent requirements. This ensures that the government, even when pursuing compelling objectives, does not unduly burden our Nation's commitment to free expression. "From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas."

United States v. Stevens, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (internal quotation marks omitted). These categories must be "well-defined and narrowly limited" in light of the serious consequences that flow from carving out speech from ordinary First Amendment protections. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

"True threats" are one such category, and there is a tradition of criminalizing threats stretching back centuries. This includes punishing single utterances based on the message conveyed. One paradigmatic example of this would be writing and mailing a letter threatening to assassinate the President. Such laws are plainly important. There is no longstanding tradition, however, of punishing speech merely because it is unintentionally threatening. Instead, this Court's precedent, along with historical statutes and cases, reflect a commonsense understanding that threatening someone is an intentional act. As to what intent is needed, "[t]raditionally, one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts." *Tison v. Arizona*, 481 U.S. 137, 150, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (internal quotation marks omitted). This does not require showing that an individual intends to carry through with the threat. But it does require showing that an individual desires to threaten or is substantially certain that her statements will be understood as threatening.

Today, unfortunately, the Court unnecessarily departs from this traditional understanding. That is not to say that I disagree with the Court on everything. Far from it. I join the Court's conclusion that some subjective *mens rea* is required in true-threats cases. I also agree that in this particular case, where petitioner was prosecuted for stalking that involved threatening statements, a *mens rea* of recklessness is amply sufficient. Where I part ways with the Court is that I would not reach the distinct and more complex question whether a *mens rea* of recklessness is sufficient for true-threats prosecutions generally. Further, requiring nothing more than a *mens rea* of recklessness is inconsistent with precedent, history, and the commitment to even harmful speech that the First Amendment enshrines. I therefore respectfully concur only in part and in the judgment.

I

***9** As an initial matter, I do not believe that this Court should reach the question whether recklessness is sufficient for true-threats prosecutions. A key conceptual distinction is helpful for explaining why. On the one hand, there are statements that are objectively threatening. In some cases, such statements can be punished because they fall into the unprotected category of "true threats." Yet such statements can also be punished if they fall into another category of unprotected speech, such as speech integral to criminal conduct. Or they might warrant less First Amendment protection for other reasons. On the other hand, there is the question of what constitutes the well-defined and longstanding category of unprotected true threats. It is with this latter question that I do not see the need to address whether a *mens rea* of recklessness is sufficient across the board.

First, the courts below did not address whether recklessness was sufficient to prosecute true threats and neither of the actual parties have advocated a recklessness standard. Colorado disclaimed the idea that recklessness was required, and petitioner asserted, correctly, that recklessness had not been raised under traditional principles of party presentation. The briefing on recklessness consists almost entirely of a few pages of an argument in the alternative at the tail end of an *amicus* brief filed by the United States.

Second, because petitioner was prosecuted for stalking involving threatening speech, this case does not require resort to the true-threats exemption to the First Amendment.

True-threats doctrine covers content-based prosecutions for single utterances of "pure speech," which need not even be communicated to the subject of the threat. *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*). The First Amendment would normally place strict limits on such prosecutions. So there is typically a need to determine whether the speech in question falls within the traditionally unprotected category of true threats.

This is not such a case, however. Petitioner was convicted for "stalking [causing] serious emotional distress" for a combination of threatening statements and repeated, unwanted, direct contact with C. W. 497 P.3d 1039, 1043 (Colo. App. 2021).[1] This kind of prosecution raises fewer First Amendment concerns for a variety of reasons. Stalking can be carried out through speech but need not be, which requires less First Amendment scrutiny when speech is swept in. See, *e.g.*, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62,

126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). The content of the repeated communications can sometimes be irrelevant, such as persistently calling someone and hanging up, or a stream of "utterly prosaic" communications. *Ante*, at ——. Repeatedly forcing intrusive communications directly into the personal life of "an unwilling recipient" also enjoys less protection. *Rowan v. Post Office Dept.*, 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). Finally, while there is considerable risk with a single intemperate utterance that a speaker will "accidentally or erroneously incur liability," *ante*, at —— (internal quotation marks and alterations omitted), that risk is far reduced with a course of repeated unwanted contact. Take, for example, petitioner continuously contacting C. W. despite her blocking him.

1 The statute of conviction applies to someone who "[r]epeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person ... in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ... serious emotional distress." Colo. Rev. Stat. § 18–3–602(1)(c) (2022).

Given this, prosecuting threatening statements made as part of a course of stalking does not squarely present the hardest questions about the *mens rea* required to prosecute isolated utterances based solely on their content.[2] True-threats doctrine came up below only because of the lower courts' doubtful assumption that petitioner could be prosecuted only if his actions fell under the true-threats exception. I do not think that is accurate, given the lessened First Amendment concerns at issue. In such cases, recklessness is amply sufficient. And I would stop there. There is simply no need to reach out in this stalking case to determine whether anything more than recklessness is needed for punishing true threats generally.

2 For these reasons, stalking prosecutions that do not rely on the content of communications would raise even fewer First Amendment concerns.

II

***10** Lest there be any doubt, the First Amendment stakes around the definition of "true threats" are high indeed. The First Amendment's mantle covers speech that is "vituperative, abusive and inexact." *Watts*, 394 U.S. at 708, 89 S.Ct. 1399. "It might be tempting to dismiss" seemingly low-value speech "as unworthy of ... robust First Amendment protections." *Mahanoy Area School Dist.* v. *B. L.*, 594 U. S. ——, ——, 141 S.Ct. 2038, 2048, 210 L.Ed.2d 403 (2021). Yet "[m]ost of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from Government regulation." *Stevens*, 559 U.S. at 479, 130 S.Ct. 1577 (emphasis deleted). First Amendment vigilance is especially important when speech is disturbing, frightening, or painful, because the undesirability of such speech will place a heavy thumb in favor of silencing it. In response, the Court has upheld First Amendment rights in the context of gruesome animal cruelty videos, *id.*, at 472, 130 S.Ct. 1577; cross burning, *Virginia v. Black*, 538 U.S. 343, 347–348, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); hateful rhetoric in protests of the funerals of fallen soldiers, *Snyder v. Phelps*, 562 U.S. 443, 448–449, 458, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011); and computer-generated images of child pornography, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239–240, 258, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

The risk of overcriminalizing upsetting or frightening speech has only been increased by the internet. Our society's discourse occurs more and more in "the 'vast democratic forums of the Internet' in general, and social media in particular." *Packingham v. North Carolina*, 582 U.S. 98, 104, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017) (citation omitted). "Rapid changes in the dynamics of communication and information transmission" have led to equally rapid and ever-evolving changes "in what society accepts as proper behavior." *Ontario v. Quon*, 560 U.S. 746, 759, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010). Different corners of the internet have considerably different norms around appropriate speech. Online communication can also lack many normal contextual clues, such as who is speaking, tone of voice, and expression. Moreover, it is easy for speech made in a one context to inadvertently reach a larger audience.

Without sufficient protection for unintentionally threatening speech, a high school student who is still learning norms around appropriate language could easily go to prison for sending another student violent music lyrics, or for unreflectingly using language he read in an online forum. "[A] drunken joke" in bad taste can lead to criminal prosecution. *Perez* v. *Florida*, 580 U. S. 1187, 137 S.Ct. 853, 197 L.Ed.2d 480 (2017) (SOTOMAYOR, J., concurring in denial of certiorari). In the heat of the moment, someone may post an enraged comment under a news story about a controversial

topic. Another person might reply equally heatedly. In a Nation that has never been timid about its opinions, political or otherwise, this is commonplace.

Many of this Court's true-threats cases involve such charged political speech. See *Black*, 538 U.S. at 348–349, 123 S.Ct. 1536 (Ku Klux Klan rally); *Watts*, 394 U.S. at 707, 89 S.Ct. 1399 (antiwar protest); *Rogers v. United States*, 422 U.S. 35, 41–42, 47–48, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (MARSHALL, J., concurring) (opposition to Nixon's policies toward China). *Amici* give further contemporary examples of such speech from across the political spectrum. See, *e.g.*, Brief for American Civil Liberties Union et al. as *Amici Curiae* 24–29. Much of this speech exists in a gray area where it will be quite hard to predict whether a jury would find it threatening. And the ubiquity of such speech raises the possibility of highly discretionary enforcement.

The burdens of overcriminalization will fall hardest on certain groups. A jury's determination of when angry hyperbole crosses the line will depend on amorphous norms around language, which will vary greatly from one discursive community to another. Juries' decisions will reflect their "background knowledge and media consumption." *Minnesota Voters Alliance* v. *Mansky*, 585 U. S. ——, ——, 138 S.Ct. 1876, 1890, 201 L.Ed.2d 201 (2018). "[S]peakers whose ideas or views occupy the fringes of our society have more to fear, for their violent and extreme rhetoric, even if intended simply to convey an idea or express displeasure, is more likely to strike a reasonable person as threatening." *United States v. White*, 670 F.3d 498, 525 (C.A.4 2012) (FLOYD, J., concurring in part and dissenting in part). Members of certain groups, including religious and cultural minorities, can also use language that is more susceptible to being misinterpreted by outsiders. And unfortunately yet predictably, racial and cultural stereotypes can also influence whether speech is perceived as dangerous. See, *e.g.*, A. Dunbar, C. Kubrin, & N. Scurich, The Threatening Nature of "Rap" Music, 22 J. Psychol. Pub. Pol'y & L. 281, 281–282, 288–290 (2016).

***11** On the other hand, the internet has also made stalking and harassment even easier. Stalking can be devastating and dangerous. See Brief for First Amendment Scholars as *Amici Curiae* 7–8. Lives can be ruined, and in the most tragic instances, lives are lost. *Ibid.* Harassers can hide behind online anonymity while tormenting others. This happens in the context of intimate relationships and it happens with strangers. Overly constraining our society's ability to respond to stalking would come at a real cost. For the reasons given, however, a *mens rea* standard for true threats would not hinder stalking prosecutions. See *supra,* at —— – ——.

Even isolated threatening speech can do real harm. Such speech not only disrupts lives, it can silence the speech of others who become afraid to speak out. A *mens rea* requirement would not, however, present an uncommon or insurmountable barrier to true-threats prosecutions.[3] Nonetheless, under such a standard, there will be some speech that some find threatening that will not and should not land anyone in prison.

3 Intent requirements are common, including for incitement that results in actual violence, not just the threat of it. See *infra*, at —— – ——. For that reason there are longstanding frameworks for determining when someone is not guilty by reason of insanity, and when delusions do (and do not) defeat a showing of intent. See, *e.g.*, 1 W. LaFave, Substantive Criminal Law §§ 7.1(a), (b) (3d ed. 2018); 2 *id.*, § 9.2.

III

These high First Amendment stakes are further reason for caution when delineating the boundaries of what constitutes a true threat. In undertaking that analysis, the Court and I part ways on the order of operations. The Court begins by defining true threats as all objectively threatening speech, entirely independent of whether the speaker intended to be threatening, *ante*, at ——, and the lead dissent agrees, *post*, at —— – —— (opinion of BARRETT, J.). The Court gets there by relying on this Court's interpretation of the word "threat" in a federal statute. *Ante*, at —— (citing *Elonis v. United States*, 575 U.S. 723, 733, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015)). The Court declares all such speech categorically unprotected, and then asks what "buffer zone" is needed in order to protect other, unthreatening speech. See *ante*, at —— – ——.

Respectfully, I see the analysis differently. The first step in the analysis should instead be to ask about the scope of the well-defined and narrow category of "true threats" as a constitutional matter. This Court has already warned about the danger of creating new categories of "unprotected speech" exempt from the ordinary First Amendment framework for balancing our society's commitment to free expression with other interests. *Stevens*, 559 U.S. at 470, 130 S.Ct. 1577. If

courts were at liberty to redefine what counts as a "threat" or "defamation" at will, this would achieve the same results as creating new categories of unprotected speech.

Thus, the Court must first ask whether there is a long-standing tradition of punishing inadvertent threats as "true threats." This Court's prior definition of the word "threat" in a federal statute, looking primarily to dictionaries, *Elonis*, 575 U.S. at 733, 135 S.Ct. 2001, does not tell us the scope of "true threats" for First Amendment purposes. *Elonis* itself made clear that it did "not ... consider any First Amendment issues." *Id.*, at 740, 135 S.Ct. 2001. Instead, a careful examination of this Court's true-threats precedent and the history of threat crimes does not support a long-settled tradition of punishing inadvertently threatening speech.

A

A natural place to begin, one might think, would be with this Court's most recent decision involving the First Amendment, *mens rea*, and true threats. Yet to read the Court's decision, one would have little idea that in a seminal 2003 decision, this Court held that a threat conviction could not stand because of an insufficient *mens rea* requirement. See *Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535. *Black* plainly sets out a conception of true threats as including a *mens rea* requirement.

***12** In *Black*, the Court confronted the constitutionality of a Virginia statute that prohibited burning a cross with intent to intimidate. Only part of the decision in *Black* is contained in a five-Justice majority opinion. The other relevant parts of the decision were written by the Members of that majority, who split into a four-Justice plurality and Justice Scalia's partial concurrence in judgment.

The majority explained why a prohibition on cross burning with intent to threaten was constitutional, beginning by defining the category of true threats. " 'True threats,' " the majority explained "encompass those statements where the speaker *means to* communicate a serious expression of an intent to commit an act of unlawful violence." *Id.*, at 359, 123 S.Ct. 1536 (emphasis added). However, "[t]he speaker need not actually intend to carry out the threat," as true threats also include intimidation alone. *Id.*, at 359–360, 123 S.Ct. 1536. And "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of* placing the victim in fear of bodily harm or death." *Id.*, at 360, 123 S.Ct. 1536 (emphasis added).

To the extent the Virginia statute covered intentionally threatening cross burning, it was thus tailored to cover only true threats. Critically, however, the statute also provided that " '[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate.' " *Id.*, at 348, 123 S.Ct. 1536. In other words, the all-important intent requirement could be satisfied by the mere conduct itself.

Consistent with the majority's definition of true threats, both the plurality and Justice Scalia agreed that the lack of a sufficient intent requirement meant that a conviction under the statute could not stand. *Id.*, at 367, 379, 123 S.Ct. 1536. For the plurality, the intent requirement was "the very reason why a State may ban cross burning" because it "distinguish[ed]" between the constitutionally unprotected true threat of burning a cross with intent to intimidate and "cross burning [as] a statement of ideology." *Id.*, at 365–366, 123 S.Ct. 1536.[4] For Justice Scalia, the "plurality [was] correct in all of this." *Id.*, at 372, 123 S.Ct. 1536 (opinion concurring in part, concurring in judgment in part, and dissenting in part). There was a constitutional need for a distinction between cross burning " 'intended to intimidate' " and cross burning as " 'a statement of ideology.' " *Ibid.* The plurality and Justice Scalia only parted ways as to whether to hold that the statute was "facially invalid," *id.*, at 367, 123 S.Ct. 1536 (plurality opinion), or just that the jury instructions made it unclear "whether the jury has rendered its verdict (*as it must*)" with sufficient consideration of "intent to intimidate," *id.*, at 380, 123 S.Ct. 1536 (opinion of SCALIA, J.) (emphasis added).

4 The lead dissent asserts that the *Black* plurality's decision was based on how the statute " 'ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning' was covered by the statute." *Post*, at —— (opinion of BARRETT, J.) (quoting 538 U.S. at 367, 123 S.Ct. 1536 (plurality opinion)). But some context is missing from this reading itself. The full sentence is "all of the contextual factors that are necessary to decide whether a particular cross burning *is intended to intimidate*." *Id.*, at 367, 123 S.Ct. 1536 (emphasis added). The plurality was thus concerned with context to the extent it was relevant to the *mens rea* requirement needed to render the

statute constitutional. *Id.*, at 365–366, 123 S.Ct. 1536.

***13** The through-line is not hard to discern. First, unprotected true threats include a subjective *mens rea* requirement. *Id.*, at 360, 123 S.Ct. 1536 (majority opinion). Second, as a result, "Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." *Id.*, at 362, 123 S.Ct. 1536 (majority opinion). Third, a conviction could not stand if it had categorically dispensed with that intent requirement, *id.*, at 365–366, 123 S.Ct. 1536 (plurality opinion), or if the jury had insufficiently considered "intent to intimidate," *id.*, at 380, 123 S.Ct. 1536 (opinion of SCALIA, J.).

In sum, all five Justices in the *Black* majority agreed that a true-threats prosecution could not stand under the First Amendment without a sufficient subjective *mens rea* requirement. [5]

5 According to the Court today and the lead dissent, however, *Black* somehow managed not to say anything about the First Amendment *mens rea* requirement for true-threats prosecutions—while striking down a true-threat conviction under the First Amendment for an insufficient *mens rea* requirement. On this reading, *Black* only discussed intent because "the statute involved in the case required a showing of intent." *Ante*, at ——, n. 3; *post*, at ——, n. 4 (discussion of intent was "a reference to the *statutory* requirements for a conviction, not the *constitutional* requirements"). This puzzling interpretation does not explain why an illusory *mens rea* requirement in a Virginia law would pose any First Amendment problems if the Amendment did not impose a *mens rea* requirement of this kind. After all, "[w]hy would the First Amendment care how a jury goes about finding an [intent] element that is a matter of indifference to the Amendment?" *United States v. Heineman*, 767 F.3d 970, 980 (C.A.10 2014). The obvious answer, from *Black*'s reasoning to its holding, is that such a *mens rea* requirement was necessary for the statute to target true threats.

B

In defining true threats as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," *id.*, at 359, 123 S.Ct. 1536, the Court in *Black* echoed the traditional understanding of threats. Historically, threat crimes covered the same kind of subjectively threatening speech *Black* invoked.

In reviewing this history, it is also vital to keep in mind the nature of the inquiry. Removing speech from normal First Amendment scrutiny is a major shift in the balance of expression and public interest that our Constitution generally strikes. The inquiry is therefore whether there is a "long-settled tradition" of prohibiting inadvertently threatening speech. *Stevens*, 559 U.S. at 469, 130 S.Ct. 1577. None of the other opinions, however, identify a historical case that expressly raised the question whether a subjective *mens rea* is required and held that it is not. That is a remarkable thing when one considers that the sample size consists of decisions from both sides of the Atlantic across centuries.

There was a long tradition of crimes for threatening another person in order to extort them. See, *e.g.*, 1796 N. J. Laws § 57, p. 108. Colorado and the United States admit that this core category of threat crimes required intent.

Even beyond that, a subjective *mens rea* remained a key component of threat offenses. An 18th-century English statute made it a capital offense to "knowingly send any letter ... threatening to kill or murder any of his Majesty's subject or subjects" or to threaten arson. 27 Geo. II, c. 15, in 21 Eng. Stat. at Large 184 (1754). A leading treatise explained that the statute was "levelled against such whose *intention* it was [to] obtain their object by creating terror in [the victim's] mind." 2 W. Russell & D. Davis, Crimes & Misdemeanors *1845 (emphasis added).

***14** Consistent with this, defendants were convicted of "knowingly, wilfully, and feloniously" sending threatening letters. *Rex* v. *Tyler*, 1 Mood. 428, 168 Eng. Rep. 1330 (1835); *Rex* v. *Paddle*, Russ. & Ry. 484, 168 Eng. Rep. 910 (1822) (indictment for "knowingly, unlawfully, wickedly, and feloniously" sending a threatening letter); see also *King* v. *Girdwood*, 1 Leach 142, 168 Eng. Rep. 173 (1776) (indictment for "feloniously" sending a threatening letter). " '[K]nowingly and wilfully' effecting any result applies to those who know that the acts performed will have that effect, and perform them with the intention that such shall be their operation." 12 American and English Encyclopaedia of Law 522–524 (J. Merrill ed. 1890); see also J. Boag, Imperial Lexicon of the English Language 530 (1850) (defining

"felonious" as "with the deliberate purpose to commit a crime").

The necessary *mens rea* could sometimes be inferred from the content of the letter, but could be rebutted by other evidence. See *King* v. *Philipps*, 6 East 464, 475, 102 Eng. Rep. 1365, 1369 (1805). Courts thus considered "the threat intended to be made by the prisoner" and "what he meant by what he had written" in determining whether he had violated the statute. *Regina* v. *Hill*, 5 Cox 233, 235 (Crim. Cas. 1851); see also *King* v. *John and Mary Hammond*, 1 Leach 444, 446, 168 Eng. Rep. 324, 325 (1787) (describing the offense of sending a threatening letter "to the party whose fears the threat it contains was calculated to alarm").

Threat laws in the United States were of a piece. Some state laws about threats expressly required maliciousness. See Me. Rev. Stat., Tit. 12, ch. 154, § 26 (1840); 1884 La. Acts No. 64, § 1, p. 86. Courts more generally emphasized the importance of a *mens rea* requirement. See, *e.g.*, *State v. Benedict*, 11 Vt. 236, 239 (1839). The North Carolina Supreme Court, for example, singled out threats as quintessential examples of offenses where it is "necessary" to prove the "*intent* of the particular letter." *State v. Murphy*, 84 N.C. 742, 743–744 (1881). And where state statutes may have been silent on intent to threaten, courts read such requirements in. See *Commonwealth v. Morton*, 140 Ky. 628, 631, 131 S.W. 506, 507–508 (1910) (letter must be "calculated to alarm, disturb, intimidate, or injure"); see also *State v. Stewart*, 90 Mo. 507, 512, 2 S.W. 790, 792 (1887) (jury instruction requiring that " 'defendant intended to threaten' ").

Leading treatises also explained the importance of *mens rea*. See 25 American and English Encyclopaedia of Law 1071 (C. Williams ed. 1894) (when there is a question as to "whether or not the letter contains the threat alleged, the intent is a question for the jury"); see also 2 R. Anderson, Wharton's Criminal Law and Procedure § 803, pp. 659–660 (1957) (threats must be "intended to put the person threatened in fear of bodily harm"); 2 J. Bishop, Commentaries on the Criminal Law § 1201, p. 664 (6th ed. 1877) ("The intent, both under the unwritten law and under the statutes, must be evil").

Against that backdrop, I return to the inquiry at hand: whether there is a "long-settled" or "well-established" history of prosecuting inadvertently threatening speech. There is no line of cases or pattern of statutes affirmatively stating that an objective standard is sufficient.

C

Put together, *Black* and the history point to an intent requirement. When *Black* defined and analyzed true threats in terms of intent, there is no reason to think the Court used intent to mean anything less than its traditional definition of purpose or knowledge. See, *e.g.*, *Tison*, 481 U.S. at 150, 107 S.Ct. 1676. Nor would a recklessness standard play the necessary role of distinguishing between cross burning that is " 'intended to intimidate' ... and nonintimidating cross burning [that] cannot be prohibited." 538 U.S. at 372, 123 S.Ct. 1536 (opinion of SCALIA, J.). Given the violent history of the symbol, it is hard to imagine that any politically motivated cross burning done within view of the public could be carried out without awareness of some risk a reasonable spectator would feel threatened. See *id.*, at 388–391, 123 S.Ct. 1536 (THOMAS, J., dissenting). Recklessness, which turns so heavily on an objective person standard, would not have been enough.

***15** As to the history, it is true that over time courts have often used a wide variety of terms to describe mental states. See, *e.g.*, *Morissette v. United States*, 342 U.S. 246, 252, 72 S.Ct. 240, 96 L.Ed. 288 (1952). Yet "[t]he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness." *United States v. United States Gypsum Co.*, 438 U.S. 422, 445, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); see also *Tison*, 481 U.S. at 150, 107 S.Ct. 1676; *Carter v. United States*, 530 U.S. 255, 270, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (describing "feloniously" as equivalent to " 'intent' "). And at the very least, there is no well-settled history showing that it is enough for a defendant to be merely aware of some risk that their statements could be threatening. See, *e.g.*, *Borden* v. *United States*, 593 U. S. ——, ——, 141 S.Ct. 1817, 1824, 210 L.Ed.2d 63 (2021) (plurality opinion) (recklessness requires awareness of a level of risk that "need not come anywhere close to a likelihood"). The history is, instead, replete with the enduring and commonsense pairing of threats and intent.

D

The Court, eschewing *Black* and history, instead reaches its result based on the need for a "buffer zone" drawn by analogy to other categories of unprotected speech. *Ante*, at ——. For the reasons above, I do not think we can leap ahead to

this question. With that caveat, I agree with the Court that precedent in other areas of unprotected speech and concerns about chilling support a subjective *mens rea* requirement for true threats. Yet these same chilling concerns only further buttress the conclusion that true threats should be limited to intentionally threatening speech. Indeed, in the concurrence by Justice Marshall that the Court invokes, *ante*, at ——– ——, he advocated "requir[ing] proof that the speaker intended his statement to be taken as a threat," based on concerns about punishing "pure speech." *Rogers*, 422 U.S. at 47–48, 95 S.Ct. 2091. In determining the appropriate *mens rea*, the Court analogizes to three categories of traditionally unprotected speech: incitement, obscenity, and defamation. None of these warrants expanding the narrow boundaries of true threats.

1

Speech inciting harm is the closest cousin to speech threatening harm. Both incitement and threats put other people at risk, and both "sprin[g] from [Justice] Holmes's 'clear and present danger' test." G. Blakey & B. Murray, Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law, 2002 B. Y. U. L. Rev. 829, 1069 (2002). Like true threats, incitement's scope is defined in terms of both intention and effect, covering speech "[1] intended to produce, and [2] likely to produce, *imminent* disorder." *Hess v. Indiana*, 414 U.S. 105, 109, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (*per curiam*).

Despite their similar nature and source, the Court today draws a hard line between the two. Incitement requires " 'inten[t].' " *Ante*, at ——. While for threats, the speaker need only be "aware that others could regard his statements as threatening violence and delive[r] them anyway." *Ante*, at —— (internal quotation marks omitted). The Court justifies this asymmetry by the idea "that incitement to disorder is commonly a hair's-breadth away from political 'advocacy,' " *ante*, at ——, and the lead dissent says much the same, *post*, at —— (opinion of BARRETT, J.). These opinions offer little basis for distinguishing threats on this ground, as this Court's own cases show time and again how true-threats prosecutions sweep in political speech. See *Black*, 538 U.S. at 348–349, 123 S.Ct. 1536; *Watts*, 394 U.S. at 707, 89 S.Ct. 1399 (antiwar protest); *Rogers*, 422 U.S. at 41–42, 95 S.Ct. 2091 (MARSHALL, J., concurring) (opposition to Nixon's policies toward China).[6] Not only that, but incitement itself is often only a hair's-breadth away from threats.

6 Nor is this limited to decisions by this Court. Threats cases sweep in political speech. See, *e.g.*, *State v. Taylor*, 379 N.C. 589, 590, 866 S.E.2d 740, 744 (2021). Incitement cases can sweep in nonpolitical speech. See, *e.g.*, *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 264, n. 11, 267 (C.A.4 1997). And still other cases show how incitement and threats can often go hand in hand. See, *e.g.*, *State v. Carroll*, 456 N.J.Super. 520, 544–545, 196 A.3d 106, 120–121 (2018).

***16** Take the seminal incitement case *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). During a civil rights boycott, NAACP leader Charles Evers, brother of the murdered civil rights hero Medgar Evers, gave a series of heated speeches. See *id.*, at 898–902, 102 S.Ct. 3409. He intoned that "boycott violators would be 'disciplined' " and that " '[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck.' " *Id.*, at 902, 102 S.Ct. 3409. The Court acknowledged that in this charged context, these speeches "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence." *Id.*, at 927, 102 S.Ct. 3409. Yet inflammatory and threatening as these speeches were, they did not constitute incitement. That was because "there [was] no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence." *Id.*, at 929, 102 S.Ct. 3409. His speeches were thus not " 'directed to inciting or producing imminent lawless action' " and he had not "specifically intended to further an unlawful goal." *Id.*, at 925, n. 68, 928, 102 S.Ct. 3409.

Under a recklessness rule, *Claiborne* would have come out the other way. So long as Evers had some subjective awareness of some risk that a reasonable person could regard his statements as threatening, that would be sufficient. It would be quite troubling indeed to adopt a rule rendering this Court's admirable defense of the First Amendment wrongly decided. Nor is *Claiborne* the only example. The foundational incitement case, *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*), extended First Amendment protections to armed Klan members uttering racial slurs, a warning that "there might have to be some revengeance taken," and plans for a " 'four hundred thousand strong' " march in two cities. *Id.*, at 446, 89 S.Ct. 1827. Then, as now, there would be at least some risk that a reasonable resident of those cities could feel threatened.

These concrete examples illustrate a more general principle. Speech inciting imminent and dangerous unlawful activity will reasonably be threatening to those who would be harmed by that illegality. In all such cases, whether seminal decisions by this Court or guilty pleas that barely see the inside of a courtroom, the Court's decision effectively downgrades to recklessness the *mens rea* required for incitement of unlawful force; prosecutors could now simply charge such offenses as true threats. This is particularly worrisome because the standard for recklessness decreases the lower the "social utility" of the conduct. 1 W. LaFave, Substantive Criminal Law § 5.4(f) (3d ed. 2018). That is a troubling standard for juries in a polarized nation to apply in cases involving heated political speech. This collateral damage can be avoided, however, if intent to threaten is understood as part of a true threat, just like intent to incite is part of incitement.

2

While obscenity is a step further afield of true threats and incitement, examination of this Court's obscenity case law further supports an intent requirement for prosecutions of true threats.

The Constitution " 'requires proof of scienter' " in part " 'to compensate for the ambiguities inherent in the definition of obscenity.' " *Hamling v. United States*, 418 U.S. 87, 123, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). This is in line with this Court's more general observation that "vagueness" of "content-based regulation of speech" is of "special concern" when it comes to "criminal statute[s]." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871–872, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). [7]

7 Analogously, the Court's civil defamation case law recognizes that heightened liability can require a heightened *mens rea*; even as to nonpublic figures, a higher standard must be met for punitive damages in certain cases. See, *e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349–350, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

Specifically, the Court has held that a "knowledge" *mens rea* is sufficient for obscenity: "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Hamling*, 418 U.S. at 123, 94 S.Ct. 2887. This ensures that "not innocent but *calculated purveyance* of filth ... is exorcised." *Id.*, at 122, 94 S.Ct. 2887 (internal quotation marks omitted). While the Court today asserts that this Court has "never determined the precise *mens rea*" for obscenity, *ante*, at ——, n. 6, the Court has cited a knowledge standard approvingly for half a century, see *Hamling*, 418 U.S. at 123, 94 S.Ct. 2887; *Elonis*, 575 U.S. at 739, 135 S.Ct. 2001. [8] Applying that standard to threats, the " 'calculated purveyance' of a threat would require that [a defendant] know the threatening nature of his communication." *Id.*, at 739, 135 S.Ct. 2001.

8 The Court has held, however, that recklessness is sufficient for child pornography. See *Osborne v. Ohio*, 495 U.S. 103, 115, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). This Court has emphasized time and again how child pornography is "a special case" because "[t]he market for child pornography [is] 'intrinsically related' to the underlying abuse" and thus " 'an integral part of the production of such materials, an activity illegal throughout the Nation.' " *United States v. Stevens*, 559 U.S. 460, 471, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (quoting *New York v. Ferber*, 458 U.S. 747, 759, 761, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)); see also *Osborne*, 495 U.S. at 110–111, 110 S.Ct. 1691. Child pornography, with its integral ties to separate criminal conduct, is not a strong analogue for threats, which can be fleeting statements in total isolation from any other criminality (though it is a stronger analogy to threats as part of an unlawful course of stalking). Yet the Court's decision today puts child pornography on a First Amendment par with overheated political speech or violent song lyrics.

***17** The considerations that drove this Court to approve a higher *mens rea* for obscenity apply here as well. With obscenity, the ambiguity comes partly from the reliance on " 'contemporary community standards' " to define what is obscene. *Hamling*, 418 U.S. at 129, 94 S.Ct. 2887. Such a standard is notoriously amorphous, and will change a great deal between communities and over time. The same chilling concerns apply to true threats. A recklessness standard based on what a reasonable person could find threatening will depend on ever-shifting community norms around language and when heated speech crosses the line from overly aggressive to criminal. See *supra*, at —— – ——. [9]

9 There is a further safeguard in obscenity cases. Something is obscene if "taken as a whole, [it] lacks serious literary, artistic, political, or scientific value." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 574, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (internal quotation marks omitted). An intent requirement can provide a similar safeguard for threats. As *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), explained, requiring intent distinguishes between speech intended to intimidate and speech intended to express a political statement. *Id.*, at 365–366, 123 S.Ct. 1536 (plurality opinion); *id.*, at 372, 123 S.Ct. 1536 (opinion of SCALIA, J.).

3

Finally, the Court relies heavily upon this Court's framework for defamation. Specifically, the Court analogizes to the "reckless disregard" standard for defamation of public figures or punitive damages for certain claims involving private figures. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

Yet while civil defamation may be "the best known and best theorized example" of unprotected speech, *ante*, at ——, the same does not go for criminal prosecution of defamation. It is true that this Court in 1964 invalidated a prosecution for criminal libel for failing to apply the *Sullivan* standard, which covers "only those false statements made with a high degree of awareness of their probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). Yet the Court expressed strong skepticism of the very concept of criminal prosecutions for libel and noted the salutary trend of its "virtual disappearance." *Id.*, at 69–70, 85 S.Ct. 209. The Court approvingly cited the Model Penal Code's recommendation that criminal libel be limited to speech likely to cause a breach of the peace and "calculated" to do so. *Id.*, at 70, 85 S.Ct. 209. This is not a promising theoretical springboard for determining the *mens rea* required to criminalize other speech.

If the Court were correct that the *Sullivan* standard is the appropriate analogy, however, then this standard should guide how to analyze recklessness in true-threats prosecutions. The generic formulation of recklessness requires that an individual disregard a relatively unspecified level of risk that the harm in question will occur. See *Borden*, 593 U.S., at ——, 141 S.Ct., at 1823–1824 (plurality opinion). Within that potentially broad range, *Sullivan* provides a more definite and demanding level of risk, reflecting the First Amendment concerns at stake. The Court has "made clear that the defendant must have made the false publication with a high degree of awareness of probable falsity or must have entertained serious doubts as to the truth." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) (internal quotation marks and ellipsis omitted). This makes sense. Allowing liability for awareness of a small chance that a story may be false would undermine the very shield *Sullivan* erects.

For similar reasons, after today's ruling, future courts grappling with how to articulate the appropriate level of recklessness in true-threats cases would be well served to consult the *Sullivan* standard. The equivalent to *Sullivan* for true threats would require a high degree of awareness that a statement was probably threatening or serious doubts as to the threatening nature of the statement. This could avoid the chilling that would arise from a more amorphous and easily satisfied standard.

4

***18** This Court's various frameworks for unprotected speech do not speak with one voice, as perhaps befits the First Amendment. The above survey does not, however, give reason to depart from the traditional understanding of true threats. To the contrary, this case law supports keeping true threats within their traditional bounds. Incitement similarly requires intent. The same chilling concerns that have led this Court to approve a knowledge requirement for obscenity are present with true threats. And to the extent the civil defamation context is relevant, at the very least, it points to a precise and demanding form of recklessness. [10]

10 The lead dissent headlines its analysis by pointing to this Court's case law on "fighting words." *Post*, at —— – —— (opinion of BARRETT, J.). This is an unlikely candidate for a broader theory of the First Amendment. For "nearly three-quarters of a century ... the Court has never ... upheld a fighting words conviction" and "[t]he cumulative impact of [the Court's] decisions is to make it unlikely that a fighting words law could survive." E. Chemerinsky, The First Amendment 1094 (6th

ed. 2019). It is not hard to see why such convictions would be unlikely to pass First Amendment muster; the leading case involved a Jehovah's Witness distributing literature who was arrested for breach of the peace for calling a public official a " 'damned Fascist.' " *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 573–574, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). Drawing upon a conviction like the one in *Chaplinksy* as the proper model for criminalizing political speech is proof itself of the serious risks with the lead dissent's approach. In any event, as to the question at hand, when such breach of the peace offenses involved threats, intent to threaten was required. See 2 R. Anderson, Wharton's Criminal Law and Procedure § 803, pp. 659–660 (1957).

IV

Maintaining true threats doctrine within its traditional boundaries will guard against the overcriminalization of a wide range of political, artistic, and everyday speech based on its content alone. This does not mean that unintentionally threatening communications are exempt from regulation, far from it. As explained above, there are far fewer First Amendment concerns with stalking laws that punish repeated, targeted, unwanted conduct and accompanying speech. For that reason, recklessness is quite sufficient. As to true threats, intent is neither an unusual nor an insurmountable bar. "[C]ourts and juries every day pass upon knowledge, belief and intent ... having before them no more than evidence of ... words and conduct, from which, in ordinary human experience, mental condition can be inferred." *American Communications Assn. v. Douds*, 339 U.S. 382, 411, 70 S.Ct. 674, 94 L.Ed. 925 (1950).

* * *

I agree with the Court's conclusion that the First Amendment requires a subjective *mens rea* in true-threats cases, and I also agree that recklessness is amply sufficient for this case. Yet I would stop there, leaving for another day the question of the specific *mens rea* required to prosecute true threats generally. If that question is reached, however, the answer is that true threats encompass a narrow band of intentional threats. Especially in a climate of intense polarization, it is dangerous to allow criminal prosecutions for heated words based solely on an amorphous recklessness standard. Our society has often concluded that an intent standard sets a proper balance between safety and the need for a guilty mind, even in cases that do not involve the First Amendment. Surely when the power of the State is called upon to imprison someone based on the content of their words alone, this standard cannot be considered excessive. Because I part ways with the Court on this score, I respectfully concur only in part and in the judgment.

Justice THOMAS, dissenting.

***19** I join Justice BARRETT's dissent in full. I write separately to address the majority's surprising and misplaced reliance on *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). In *New York Times*, this Court held that the First Amendment bars public figures from recovering damages for defamation unless they can show that the statement at issue 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 280, 84 S.Ct. 710. Like the majority's decision today, "*New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law." *McKee* v. *Cosby*, 586 U. S. ——, ——, 139 S.Ct. 675, 676, 203 L.Ed.2d 247 (2019) (THOMAS, J., concurring in denial of certiorari). Instead of simply applying the First Amendment as it was understood at the time of the Founding, "the Court fashioned its own ' "federal rule[s]" ' by balancing the 'competing values at stake in defamation suits.' " *Ibid.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334, 348, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)); see also *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501–502, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (acknowledging that "the rule enunciated in the *New York Times* case" is "largely a judge-made rule of law," the "content" of which is "given meaning through the evolutionary process of common-law adjudication"). "The constitutional libel rules adopted by this Court in *New York Times* and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law." *McKee*, 586 U. S., at ——, 139 S.Ct., at 678 (opinion of THOMAS, J.). Thus, as I have previously noted, "[w]e should reconsider our jurisprudence in this area." *Id.*, at ——, 139 S.Ct., at 682; see also *Berisha* v. *Lawson*, 594 U. S. ——, 141 S.Ct. 2424, 210 L.Ed.2d 991 (2021) (THOMAS, J., dissenting from denial of certiorari).

I am far from alone. Many Members of this Court have questioned the soundness of *New York Times* and its numerous extensions. See, *e.g.*, *Berisha*, 594 U. S., at —— – ——, 141 S.Ct., at 2428–2430 (GORSUCH, J., dissenting from

denial of certiorari); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 476 U.S. 1187, 106 S.Ct. 2927, 91 L.Ed.2d 554 (1986) (BURGER, C. J., joined by REHNQUIST, J., dissenting from denial of certiorari); *Gertz*, 418 U.S. at 370, 94 S.Ct. 2997 (WHITE, J., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 62, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) (HARLAN, J., dissenting); *id.*, at 78, 91 S.Ct. 1811 (MARSHALL, J., dissenting); *Rosenblatt v. Baer*, 383 U.S. 75, 92, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966) (STEWART, J., concurring); see also E. Kagan, A Libel Story: *Sullivan* Then and Now, 18 L. & Soc. Inquiry 197, 207 (1993); J. Lewis & B. Ottley, *New York Times v. Sullivan* at 50, 64 DePaul L. Rev. 1, 35–36 (2014) (collecting statements from Justice SCALIA); cf. *Tah v. Global Witness Publishing, Inc.*, 991 F.3d 231, 251–256 (CADC 2021) (SILBERMAN, J., dissenting in part) (questioning the doctrine). It is thus unfortunate that the majority chooses not only to prominently and uncritically invoke *New York Times*, but also to extend its flawed, policy-driven First Amendment analysis to true threats, a separate area of this Court's jurisprudence.

Justice BARRETT, with whom Justice THOMAS joins, dissenting.

Billy Counterman was convicted under a Colorado law that prohibits true threats. As everyone agrees, the statute requires that the speaker understand the meaning of his words. *Ante*, at ——, n. 1. The question is what more the First Amendment requires. Colorado maintains that an *objective* standard is enough—that is, the government must show that a reasonable person would regard the statement as a threat of violence. Counterman, however, argues that the First Amendment requires a *subjective* test—that is, the speaker himself must intend or know the threatening nature of the statement.

It should be easy to choose between these positions. True threats do not enjoy First Amendment protection, and nearly every other category of unprotected speech may be restricted using an objective standard. Nonetheless, the Court adopts a subjective standard, though not quite the one advanced by Counterman. The Court holds that speakers must recklessly disregard the threatening nature of their speech to lose constitutional protection. Because this unjustifiably grants true threats preferential treatment, I respectfully dissent.

I

Since the founding, the First Amendment has allowed the government to regulate certain "areas of speech" "because of their constitutionally proscribable content." *R.A.V. v. St. Paul*, 505 U.S. 377, 382–383, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (emphasis deleted). This includes true threats, which are "serious expression[s] of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); see also *R. A. V.*, 505 U.S. at 388, 112 S.Ct. 2538 ("[T]hreats of violence are outside the First Amendment"). True threats carry little value and impose great cost. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) ("[A]ny benefit that may be derived from [true threats] is clearly outweighed by the social interest in order and morality"). "[B]y their very utterance," true threats "inflict injury." *Ibid.* They provoke "the fear of violence," create "disruption," give rise to "the possibility that the threatened violence will occur"—and the list goes on. *Black*, 538 U.S. at 360, 123 S.Ct. 1536 (internal quotation marks omitted). [1]

1 Indeed, the Colorado Legislature considered these very harms when it enacted the statute at issue here. The statutory findings explain that stalking, harassment, and threats have "an immediate and long-lasting impact on quality of life as well as risks to security and safety of the victim and persons close to the victim." Colo. Rev. Stat. §§ 18–3–601(1)(f), 18–3–602(1) (2022). So the legislature passed the statute to "encourag[e] and authoriz[e] effective intervention" before the covered conduct could "escalate into behavior that has even more serious consequences." § 18–3–601(2).

***20** The nature of a true threat points to an objective test for determining the scope of First Amendment protection: Neither its "social value" nor its potential for "injury" depends on the speaker's subjective intent. *Chaplinsky*, 315 U.S. at 572, 62 S.Ct. 766. They can relate, of course—a speaker who does not intend to threaten is less likely to utter a statement that could be taken that way. But the Constitution ultimately declines to protect true threats for objective reasons, not subjective ones. So an objective test "complements the explanation for excluding threats of violence from First Amendment protection in the first place." *United States v. Jeffries*, 692 F.3d 473, 480 (C.A.6 2012).

II

The Court agrees that "[t]he existence of a threat depends not on 'the mental state of the author,' but on 'what the statement conveys' to the person on the other end." *Ante*, at ——. And it acknowledges that "[w]hen the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow." *Ibid.* Nonetheless, the Court holds Colorado's statute unconstitutional. Why? Because the Court installs a prophylactic buffer zone to avoid chilling protected speech—a buffer zone that protects true threats unless the speaker "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Ante*, at ——, —— – ——. That reasoning is flawed.

A

The Court's first error is awarding true threats "pride of place among unprotected speech." *Elonis v. United States*, 575 U.S. 723, 767, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015) (THOMAS, J., dissenting). We have held that nearly every category of unprotected speech may be regulated using an objective test. In concluding otherwise, the Court neglects certain cases and misreads others.

Start with fighting words—a category of unprotected speech that the Court skips past. Fighting words are "personally abusive epithets" that are "inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Under our precedent, legislatures may regulate fighting words even when the speaker does not intend to provoke the listener (or does not recklessly disregard that possibility). *Chaplinsky*, 315 U.S. at 572–573, 62 S.Ct. 766 (rejecting First Amendment challenge to a state law punishing "fighting words" according to a reasonable-person standard); *Cantwell v. Connecticut*, 310 U.S. 296, 309–310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (statements unprotected when they are "likely to provoke violence and disturbance of good order, even though no such eventuality be intended"). Instead, we ask only whether "the ordinary citizen," using her "common knowledge," would reasonably understand the statement as a "direct personal insult." *Cohen*, 403 U.S. at 20, 91 S.Ct. 1780; see also *Texas v. Johnson*, 491 U.S. 397, 409, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

The Court similarly overlooks the category of "false, deceptive, or misleading" commercial speech. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *In re R. M. J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982) ("Truthful advertising ... is entitled to the protections of the First Amendment," but "[m]isleading advertising may be prohibited entirely"); *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 142, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994) ("[F]alse, deceptive, or misleading commercial speech may be banned"). Here, too, our cases suggest that First Amendment protection depends on objective falsity rather than the speaker's intention. See *In re R. M. J.*, 455 U.S. at 202, 102 S.Ct. 929 ("[R]egulation—and imposition of discipline—are permissible where the particular advertising is *inherently likely to deceive* or where the record indicates that a particular form or method of advertising has *in fact been deceptive*" (emphasis added)); see also *Milavetz, Gallop & Milavetz, P. A. v. United States*, 559 U.S. 229, 250–253, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010). Thus, the government is "free to prevent the dissemination of commercial speech that is false, deceptive, or misleading," without regard to whether the speaker knew that the recipient would be deceived or misled. *Zauderer*, 471 U.S. at 638, 105 S.Ct. 2265.

***21** Or take obscenity, which we have long held is "not protected by the freedoms of speech and press." *Roth v. United States*, 354 U.S. 476, 481, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). Speech qualifies as obscene if the " 'average person, applying contemporary community standards,' " would conclude that "the work, taken as a whole, appeals to the prurient interest." *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The jury must also make an objective judgment about whether the speech "depicts or describes" sexual conduct "in a patently offensive way," and whether it "lacks serious literary, artistic, political, or scientific value." *Ibid.* The speaker's " 'belief as to the obscenity or non-obscenity of the material is irrelevant.' " *Hamling v. United States*, 418 U.S. 87, 120–121, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). So long as the defendant has "knowledge of the contents of the materials," her speech may be constitutionally regulated. *Id.*, at 123, 94 S.Ct. 2887. An objective, reasonable-person standard applies.

In an effort to bolster its position, the Court floats a different standard for obscenity laws, asserting that "the First Amendment demands proof of a defendant's mindset to make out an obscenity case." *Ante*, at ——. By "mindset,"

the Court apparently means that the defendant must have some awareness that an average person would consider the materials obscene. But the Court draws this conclusion from cases rejecting a *strict liability* standard—for example, we have held that the proprietor of a bookstore cannot be liable for possessing an obscene book unless he knew what was in it. *Smith v. California*, 361 U.S. 147, 149, 155, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); *Mishkin v. New York*, 383 U.S. 502, 510–512, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966); see also *Ginsberg v. New York*, 390 U.S. 629, 643–644, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). [2] Knowing what the material depicts is not the same as knowing how the average person would react to it—just as there is an important difference between Counterman's knowledge of what his words meant and his knowledge of how they would be perceived. Though the Court conflates the two, our obscenity cases have repeatedly refused to require the latter as a matter of constitutional law. *Hamling*, 418 U.S. at 120–123, 94 S.Ct. 2887; *Rosen v. United States*, 161 U.S. 29, 41–42, 16 S.Ct. 480, 40 L.Ed. 606 (1896). So obscenity doctrine does not help Counterman.

2 The Court also cites *Elonis* v. *United States*, *ante*, at 8, 9, n. 4, 135 S.Ct. 2001, which Counterman argues puts a "gloss" on obscenity doctrine, Tr. of Oral Arg. 6–7. While *Elonis* briefly discusses the necessary *mens rea* for a conviction under a federal obscenity statute, it does so only in dicta. 575 U.S. 723, 739–740, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015). *Elonis* does not alter the doctrinal framework for assessing the constitutionality of obscenity laws: That case involves true threats, not obscenity, and it interprets a federal statute, not the Constitution.

The Court leans hardest on defamation law, but its argument depends on a single, cherry-picked strand of the doctrine. Yes, *New York Times Co.* v. *Sullivan* requires public figures and public officials to show "actual malice" on a defamation claim, and we have defined "actual malice" as "knowledge that [the statement] was false" or "reckless disregard of whether it was false or not." 376 U.S. 254, 279–280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). But that is not the full story. A private person need only satisfy an objective standard to recover actual damages for defamation. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–350, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). And if the defamatory speech does not involve a matter of public concern, she may recover punitive damages with the same showing. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760–761, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (plurality opinion). We have justified that distinction on the ground that public-figure defamation claims may deter "would-be critics of official conduct ... from voicing their criticism," which would "dampe[n] the vigor and limit the variety of public debate." *Sullivan*, 376 U.S. at 279, 84 S.Ct. 710. Not only that, but "the state interest in protecting" public figures is weaker, since they tend to "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements." *Gertz*, 418 U.S. at 344, 94 S.Ct. 2997. So, despite what the Court says, *Sullivan* does not stand for the broad proposition that the First Amendment "demand[s] a subjective mental-state requirement." *Ante*, at ——. Instead, it simply raises the bar for borderline unprotected speech with high social value (because of its proximity to public discourse) and low potential for injury (because public figures can engage in counterspeech).

***22** *Sullivan*'s rationale does not justify a heightened *mens rea* for true threats. Because true threats are not typically proximate to debate on matters of public concern, the Court's newly erected buffer zone does not serve the end of protecting heated political commentary. Nor can public figures use counterspeech in the public square to protect themselves from serious threats of physical violence. And perversely, private individuals now have less protection from true threats than from defamation—even though they presumably value their lives more than their reputations. See *Gertz*, 418 U.S. at 347–350, 94 S.Ct. 2997. The Court has therefore extended *Sullivan* in a way that makes no sense on *Sullivan*'s own terms.

I will give the Court this much: Speakers must specifically intend to incite violence before they lose First Amendment protection. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*) (defining incitement as "advocacy ... directed to inciting or producing imminent lawless action and likely to incite or produce such action"); see also *Hess v. Indiana*, 414 U.S. 105, 108–109, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (*per curiam*). Once more, however, our precedent itself explains the difference. Incitement, as a form of "advocacy," often arises in the political arena. See *Brandenburg*, 395 U.S. at 447, 89 S.Ct. 1827 (Ku Klux Klan rally held to plan a " 'marc[h] on Congress' "); *Hess*, 414 U.S. at 106, 94 S.Ct. 326 (antiwar demonstration); *Abrams v. United States*, 250 U.S. 616, 620, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (pamphlets about the President's " 'shameful, cowardly silence about the intervention in Russia' "). A specific intent requirement helps

draw the line between incitement and "political rhetoric lying at the core of the First Amendment." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926–927, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). The Court does not contend that targeted threats and political commentary share a similarly close relationship.

In sum, our First Amendment precedent does not set a "baseline ban on an objective standard." *Ante*, at ——. Precedent does more than allow an objective test for true threats; on balance, it affirmatively supports one.

B

The Court's analysis also gives short shrift to how an objective test works in practice. Two key features of true threats already guard against the risk of silencing protected speech. Thus, there is no need to go further and adopt the Court's heightened standard.

First, only a very narrow class of statements satisfies the definition of a true threat. To make a true threat, the speaker must express "an intent to commit *an act of unlawful violence*." *Black*, 538 U.S. at 359, 123 S.Ct. 1536 (emphasis added). Speech that is merely "offensive," " 'poorly chosen,' " or "unpopular" does not qualify. Brief for Petitioner 31, 36, 42. The statement must also threaten violence "to a particular individual or group of individuals"—not just in general. *Black*, 538 U.S. at 359, 123 S.Ct. 1536. These tight guardrails distinguish true threats from public-figure defamation, the model for the Court's rule. While defamatory statements can cover an infinite number of topics, true threats target one: unlawful violence.

Second, the statement must be deemed threatening by a reasonable listener who is familiar with the "entire factual context" in which the statement occurs. *State v. Taveras*, 342 Conn. 563, 572, 271 A.3d 123, 129 (2022). This inquiry captures (among other things) the speaker's tone, the audience, the medium for the communication, and the broader exchange in which the statement occurs. [3] Each consideration helps weed out protected speech from true threats.

3 Colorado's test provides a good example. Juries must apply the following nonexhaustive factors to determine whether a statement is a true threat: "(1) the statement's role in a broader exchange, if any, including surrounding events; (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features; (3) the manner in which the statement was conveyed (*e.g.*, anonymously or not, privately or publicly); (4) the relationship between the speaker and recipient(s); and (5) the subjective reaction of the statement's intended or foreseeable recipient(s)." *People in the Interest of R. D.*, 464 P.3d 717, 721–722 (Colo. 2020).

***23** Our decision in *Black* illustrates the point. There, the Court considered a Virginia law that prohibited cross burning " 'with the intent of intimidating any person or group of persons.' " 538 U.S. at 348, 123 S.Ct. 1536. Notably, the statute included a presumption: " 'Any such burning of a cross shall be prima facie evidence of an intent to intimidate.' " *Ibid.* After three men were convicted under the statute, they challenged it as facially unconstitutional. We upheld the general prohibition on cross burning, concluding that the First Amendment allows the government to ban "a particular type of threat." *Id.*, at 362–363, 123 S.Ct. 1536. A plurality then went on to address the statutory presumption. While cross burning "may mean that a person is engaging in constitutionally proscribable intimidation," the plurality reasoned, the act is not monolithic. *Id.*, at 365, 123 S.Ct. 1536. Cross burning could be directed "at an individual" or "at a group of like-minded believers"; it could be done "on a neighbor's lawn" or "at a public rally"; it could be done with the property owner's "permission" or without it. *Id.*, at 366, 123 S.Ct. 1536. The presumption "blur[red] the line" between these different situations and "ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning" was covered by the statute or not. [4] *Id.*, at 365, 367, 123 S.Ct. 1536. Thus, the presumption was unconstitutionally overbroad.

4 As Justice SOTOMAYOR emphasizes, *ante*, at ——, n. 4, the plurality said that context informs "whether a particular cross burning is *intended to intimidate*," 538 U.S. at 367, 123 S.Ct. 1536 (emphasis added). But this was a reference to the *statutory* requirements for a conviction, not the *constitutional* requirements—the Virginia statute covered only threats made " 'with the intent of intimidating any person or group of persons.' " *Id.*, at 348, 123 S.Ct. 1536. At no point did the Court hold that the First Amendment demands

> specific intent; on the contrary, it recognized that a statement made "with the intent of placing the victim in fear of bodily harm or death" is "*a* type of true threat." *Id.*, at 360, 123 S.Ct. 1536 (emphasis added).

The *Black* plurality's reasoning can be boiled down to the following insight: When context is ignored, true threats cannot be reliably distinguished from protected speech. The reverse also holds: When context is properly considered, constitutional concerns abate. See, *e.g.*, *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*) (concluding that a statement was "political hyperbole" instead of a true threat based on "context," "the expressly conditional nature of the statement," and the "reaction of the listeners").

One more point: Many States have long had statutes like Colorado's on the books. See Brief for Illinois et al. as *Amici Curiae* 16–17. Before we took this case, the vast majority of Courts of Appeals and state high courts had upheld these statutes as constitutional. So objective tests are effectively the status quo today, yet Counterman still struggles to identify past prosecutions that came close to infringing on protected speech. Tr. of Oral Arg. 28–30. The silence is telling.

C

So is the silence in the historical record. Since 1791, true threats have been excluded from the "speech" protected by the First Amendment. *R. A.V.*, 505 U.S. at 382–383, 388, 112 S.Ct. 2538. If Counterman could show that a subjective requirement has been inherent in the definition of "true threat" since the founding, he would have a compelling case. But Counterman cannot make that showing.

For starters, he produces no evidence directly addressing the meaning of the First Amendment—nothing from state ratifying conventions, political commentary, or even early debates about efforts to regulate threats in ways that might threaten speech. That is not surprising at the federal level, because the Federal Government did not prohibit threats until the early 20th century. *Elonis*, 575 U.S. at 760, 135 S.Ct. 2001 (THOMAS, J., dissenting). Some States, however, both regulated threats and guaranteed the right to free speech in their own constitutions. *Id.*, at 760–761, 135 S.Ct. 2001. Yet even at the state level, there was apparently no discussion about the implications of these statutes for the constitutional right.

That void notwithstanding, the state threat statutes are the evidence on which Counterman seizes. He argues that they imposed a subjective *mens rea*, demonstrating that the founding generation thought that threats could be punished on no less. But as Justice THOMAS has already discussed in detail, this is incorrect. See *id.*, at 760–765, 135 S.Ct. 2001. Rather than a subjective *mens rea*, these statutes used an objective standard resembling Colorado's.

***24** Even if they did require a heightened *mens rea*, though, these statutes would not carry the day for Counterman. The enactment of a statute against the backdrop of a free speech guarantee tends to show that the legislature thought the statute consistent with that guarantee. Thus, if the question were whether such statutes *violated* the First Amendment, their existence would be evidence to the contrary. But the question here is whether a subjective intent requirement is the constitutional floor. And because the legislature is always free to exceed the floor, the enactment of legislation does not necessarily reflect the legislature's view of the constitutional minimum.

At the end of the day, then, the best historical case for Counterman does not add up to much. He is plainly not asking the Court to enforce a historically sanctioned rule, but rather to fashion a new one.

D

Even if a subjective test had a historical pedigree, the Court's chosen standard of recklessness certainly does not. Where does recklessness come from? It was not raised by the parties. Only the Solicitor General noted this possibility—and briefly at that. Brief for United States as *Amicus Curiae* 28–31. Nor did the courts below address recklessness; indeed, very few courts (of the many that have taken up the question) have settled on recklessness as the constitutional floor for true threats. See, *e.g.*, *State v. Mrozinski*, 971 N.W.2d 233, 243–245 (Minn. 2022); *In re J. J. M.*, 265 A.3d 246, 269–270 (Pa. 2021). Still, the Court adopts recklessness as "the right path forward." *Ante*, at ——. Its rationale is, at best, unclear.

The Court begins by acknowledging the " 'competing value[s]' " of "free expression" on one hand, and "profound harms ... to both individuals and society" on the other. *Ante*, at —— – ——. But why do these considerations point to recklessness? A knowledge or purpose standard would allow

more free expression, so maybe we should go higher. See *ante*, at —— (SOTOMAYOR, J., concurring in part and concurring in judgment) ("chilling concerns only further buttress the conclusion that true threats should be limited to intentionally threatening speech"). An objective standard would cause less harm to victims, so perhaps lower is better. The optimal balance strikes me as a question best left to the legislature, which could calibrate the *mens rea* to the circumstance—for example, higher for the criminal context and lower for the civil. See Brief for Illinois et al. as *Amici Curiae* 28–30 (States "have a range of policy reasons for using subjective standards for penalizing threats of violence" and many "choose to require proof of a speaker's subjective mental state" in some situations but not others).

Nor does our First Amendment precedent buttress the Court's preferred standard. A recklessness requirement currently applies only to public-figure defamation claims. Incitement to violence calls for more. Fighting words, private-figure defamation, false commercial speech, and obscenity require less. I fail to see why, of all these categories of unprotected speech, public-figure defamation is the best analog for true threats. The reality is that recklessness is not grounded in law, but in a Goldilocks judgment: Recklessness is not too much, not too little, but instead "just right."

III

Some may find Colorado's statute harsh, and the Court's decision seems driven in no small part by the heavy hammer of criminal punishment. See *ante*, at ——; *ante*, at —— – ——, —— – —— (opinion of SOTOMAYOR, J.). While an objective test is "a familiar feature of civil liability in tort law," the " 'conventional requirement for criminal conduct' " is " '*awareness* of some wrongdoing.' " *Elonis*, 575 U.S. at 737–738, 135 S.Ct. 2001. In keeping with this convention, we generally presume that "federal criminal statutes that are silent on the required mental state" nonetheless impose the "*mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.*, at 736, 135 S.Ct. 2001 (internal quotation marks omitted). That is why we rejected an objective standard for the federal threat prohibition, 18 U.S.C. § 875(c). 575 U.S. at 737–739, 135 S.Ct. 2001. It is "the threatening nature of the communication" that "makes the conduct 'wrongful' "; thus, the statute is best interpreted to require that the defendant be aware of the impact of his speech. *Id.*, at 737, 135 S.Ct. 2001.

***25** But this case is about the scope of the First Amendment, not the interpretation of a criminal statute. Accordingly, the Court's holding affects the *civil* consequences for true threats just as much as it restricts criminal liability. And the civil context underscores the danger of adopting a *Sullivan*-style buffer zone for true threats.

Consider, for example, threat victims who seek restraining orders to protect themselves from their harassers. See, *e.g.*, *United States v. Elonis*, 841 F.3d 589, 593 (C.A.3 2016) (defendant's wife sought a restraining order after he wrote on Facebook, "I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts"). Civil orders can also keep individuals away from particular geographic areas. Imagine someone who threatens to bomb an airport, *State v. Johnston*, 156 Wash.2d 355, 358–359, 127 P.3d 707, 708–709 (2006), or "shoot up [a] courthous[e]," *State v. Draskovich*, 2017 S.D. 76, ¶3, 904 N.W.2d 759, 761. The speaker might well end up barred from the location in question—for good reason. Yet after today, such orders cannot be obtained without proof—not necessarily easy to secure—that the person who issued the threat anticipated that it would elicit fear. See Tr. of Oral Arg. 92–93.

The government can also opt to counteract true threats by means of civil enforcement actions. For instance, 18 U.S.C. § 248 prohibits "threat[s] of force" against any person "obtaining or providing reproductive health services" or "seeking to exercise the First Amendment right of religious freedom at a place of religious worship." The statute imposes a range of civil penalties, and it allows enforcement suits by both private persons and government officials. See, *e.g.*, *United States v. Dillard*, 795 F.3d 1191, 1196–1197 (C.A.10 2015) (Government brought § 248 action after defendant warned a health provider, "[y]ou will be checking under your car everyday—because maybe today is the day someone places an explosive under it"); *McCullen v. Coakley*, 573 U.S. 464, 491, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014) (noting that several States have similar laws). After today, these civil enforcement actions face a higher constitutional hurdle.

In addition, employers and school administrators often discipline individuals who make true threats. Consider the student who was expelled after "draft[ing] two violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder" his ex-girlfriend. *Doe v. Pulaski Cty. Special School Dist.*, 306 F.3d 616, 619 (C.A.8 2002) (en banc). Or the one who was suspended after " 'talking about taking a gun to school' to 'shoot everyone he hates.' " *D. J.*

M. ex rel. D.M. v. Hannibal Public School Dist. No. 60, 647 F.3d 754, 758 (C.A.8 2011); *Lovell v. Poway Unified School District*, 90 F.3d 367, 369, 372–373 (C.A.9 1996) (similar); *Haughwout v. Tordenti*, 332 Conn. 559, 561–562, 211 A.3d 1, 3–4 (2019) (similar). True threats can also be expressed by a parent, a teacher, or an employee in another context altogether. See, *e.g.*, *Taveras*, 342 Conn. at 567–569, 578, 271 A.3d at 126–128, 133 (parent); *Smith v. New York City Dept. of Ed.*, 109 App.Div.3d 701, 702–703, 972 N.Y.S.2d 221, 222 (2013) (teacher); *Diggs v. St. Louis*, 613 S.W.3d 858, 862, 864 (Mo. App. 2020) (correctional officer).

Barring some reason why the speech receives lesser constitutional protection, *e.g.*, *Mahanoy Area School Dist. v. B. L.*, 594 U. S. ——, —— – ——, 141 S.Ct. 2038, 2044–2045, 210 L.Ed.2d 403 (2021), the Court's new rule applies to all of these situations. That can make all the difference in some cases. A delusional speaker may lack awareness of the threatening nature of her speech; a devious speaker may strategically disclaim such awareness; and a lucky speaker may leave behind no evidence of mental state for the government to use against her. The Court's decision thus sweeps much further than it lets on.

* * *

***26** The bottom line is this: Counterman communicated true threats, which, "everyone agrees, lie outside the bounds of the First Amendment's protection." *Ante*, at ——. He knew what the words meant. Those threats caused the victim to fear for her life, and they "upended her daily existence." *Ante*, at ——. Nonetheless, the Court concludes that Counterman can prevail on a First Amendment defense. Nothing in the Constitution compels that result. I respectfully dissent.

All Citations

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EXHIBIT C

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Chancery Division.

TEVA PHARMACEUTICALS USA, INC.; Plantex USA, Inc.; and George Svokos, Plaintiff(s)
v.
STOP HUNTINGDON ANIMAL CRUELTY USA a/k/a Shac USA, a/k/a Shac, a/k/a Stop Huntingdon Animal Cruelty a/k/a Hugs for Puppies; Animal Defense League of New Jersey; Animal Defense League of Long Island; Nick Cooney, an individual; and John and Jane Does 1 through 100, Defendant(s).

No. BER–C–63–05.
|
Argued April 1, 2005.
|
Decided April 1, 2005.

Attorneys and Law Firms

Brian P. Sullivan, appearing on behalf of the Plaintiffs, TEVA Pharmaceuticals USA, Inc., Plantex USA, Inc., and George Svokos (Stevens & Lee).

Bennet D. Zurofsky, appearing on behalf of the Defendant, Stop Huntingdon Animal Cruelty USA, Inc. (Reitman Parsonnet).

Nick Cooney, defendant, pro se.

OPINION

DOYNE, J.

Introduction

***1** Before the court is the return date of an order to show cause why this court should not enter an order against defendants, Stop Huntingdon Animal Cruelty USA, Inc. ("SHAC USA", "SHAC", or "defendant"), Stop Huntingdon Animal Cruelty ("SHAC"),[1] Animal Defense League of New Jersey ("ADLNJ"), Animal Defense League of Long Island ("ADLNY"), and Nick Cooney ("Cooney), preliminarily enjoining defendants, and their members, officers, employees, agents, servants, representatives, supporters, affiliates, and all persons acting in concert or combination with them from (1) coming up or on, or within one-hundred (100) feet of, the real or leased property of Plantex USA, Inc. ("Plantex"); (2) vandalizing or damaging the real, leased, or personal property of Plantex; (3) coming up or on, or within one-hundred (100) feet of, the real property of any employee, or family member of any employee, of Plantex; (4) vandalizing or damaging the real or personal property of any employee, or family member of any employee, of Plantex; and (5) harassing, intimidating, stalking, menacing, or committing or attempting to commit any act of violence, or making any overt or implicit threat of violence, against any employee, or family member of any employee, of Plantex.

1 The court notes that SHAC USA is a not-for-profit Delaware corporation, separate and distinct from SHAC, an unincorporated association. Specifically, SHAC is an international campaign to close Huntingdon Life Sciences ("HLS"). SHAC USA reports on efforts around the United States to close HLS. Inasmuch as both SHAC USA and SHAC share the same purpose and strategies, however, the court shall refer to them interchangeably, unless the distinction is significant, at which time they shall be referred to by their specific name.

On February 22, 2005, this court entered an order to show cause with temporary restraints, wherein defendants were temporarily restrained from engaging in the foregoing activities.

On March 4, 2005, counsel for SHAC USA filed a motion to dissolve the temporary restraints on two days notice. On March 7, 2005, the court denied counsel's request for the reasons then set forth on the record.

Relevant Statement of Facts and Procedural History

TEVA Pharmaceuticals USA, Inc. ("TEVA") is a Delaware corporation, with its principal place of business located in North Wales, Pennsylvania. Plantex is a New Jersey corporation, with its principal place of business located at Two University Plaza, Suite 305, Hackensack, New Jersey. Plaintiff, George Svokos ("Svokos") is the president of Plantex.

TEVA is engaged in the business of manufacturing and distributing pharmaceuticals. Plantex is an affiliate of TEVA, and is the sales and marketing office for TEVA's active pharmaceutical ingredient division. Huntingdon Life Sciences ("HLS") conducts research for pharmaceutical, biotechnical, agro-chemical, veterinary, food and chemical industries using research that involves the experimental use of live animals.

SHAC is a not-for-profit association, which, according to its own website, is organized as an international campaign to close HLS. SHAC asserts that HLS tests products on animals, purportedly in an inhumane fashion, and has been involved with the killing of hundreds, if not thousands, of animals. SHAC's website indicates that it was formed to target HLS's New Jersey facility, its U.S. affiliates, and "to pose a firm resistance to HLS's eyeing America as a safe haven." In an effort to fulfill this mission, SHAC has identified, and targets, entities that support HLS. These "secondary" targets, such as the plaintiffs, while having no "intrinsic connection to HLS", contract with HLS for the performance of various product testing. TEVA contracts with HLS for services and, therefore, TEVA, along with its divisions and affiliates, are "secondary" targets.

***2** Defendant Animal Liberation Front ("ALF") is an animal rights group, which allegedly frees animals who are being tortured, exposes animal abuse, and reduces the economic viability of animal abuse industries. Defendants ADLNJ and ADLNY are both unincorporated animal rights groups, which allegedly support the ALF. SHAC USA is a non-profit Delaware corporation, which is affiliated with SHAC and shares the same purpose and strategy as SHAC. Defendant Cooney is a member and/or supporter of SHAC.

Plaintiffs contend that defendants, and those persons associated with defendants, have committed and, unless restrained, will continue to commit unlawful acts resulting in serious injury and/or the threat of serious injury to plaintiffs, its employees, and those having business with plaintiffs. Plaintiffs contend that the Federal Bureau of Investigation ("FBI") has and is actively investigating acts of vandalism and "domestic terrorism" perpetrated by SHAC activists. Plaintiffs' counsel points out that a federal grand jury indicted the defendant and various of its members in a five-count indictment in 2004 for animal enterprise terrorism, conspiracy to engage in interstate stalking and interstate stalking. Counsel have advised the indictment remains pending.

Plaintiffs allege that the defendants have committed various unlawful acts including, but not limited to: (1) verbally and physically harassed the plaintiffs' employees, and the employees' family members; (2) threatened these individuals; (3) threatened violence; (4) uttered violent epitaphs at employees while in their respective homes; and (5) threatened various unlawful acts of violence. In addition to the same, plaintiffs have alleged that the various defendants, their members and/or their followers, have committed various criminal acts including, but not limited to, breaking and entering, stealing, and threatening violence, etc. The same has been substantiated by various certifications, as follows.

By way of certification, Svokos' contends that defendants have been harassing him and his family since 2004. Specifically, Svokos' alleges the following: on January 27, 2005, defendants broke into Svokos' home, at which time they stole an airplane ticket and Svokos' travel itinerary for a trip to London, which included his American Express credit card account number. Defendants thereafter attempted to purchase a "sex doll" using Svokos' account number. The company from which defendants attempted to purchase the sex doll called Svokos' home, and asked his seventeen-year-old daughter whether Svokos would authorize said purchase. Svokos' daughter told the caller no, thereby canceling the order.

On the date that Svokos' home was illegally entered, Svokos' Brooks Brothers Mastercard was stolen. Svokos was notified by his financial institution that over $5,000 in expenses were charged to this stolen credit card.

Commencing in December 2004, defendants repeatedly telephoned Svokos' home at all hours of the night, and threatened Svokos and his family. On December 22, 2004, representatives of defendants called his home, at which time they spoke with his twelve-year-old daughter, and advised her that her father causes animals to be tortured and killed, and described in detail the issues surrounding animal testing.

***3** Defendants have threatened the health and welfare of the Svokos' family on their website and through e-mail. Defendants have distributed fliers on automobile windshields to Plantex employees, Svokos' neighbors, and on Svokos' private property, containing accusations that Plantex abused and killed animals. Thus, it appears defendants trespassed onto Svokos' property without his permission. Moreover, defendants have threatened to return to Svokos' home unless

he advises defendants that Plantex will cease doing any further business with HLS.

Plaintiffs contend that defendants took responsibility for a number of the foregoing incidents via the SHAC website. Particularly, the SHAC website memorializes the incidents by way of excerpts submitted by the individuals or on behalf of individuals apparently responsible for the incidents. At oral argument, defendant's counsel indicated that, to the best of his knowledge, with regard to the postings on its website, an individual or individuals affiliated with SHAC revise the same, determine which submissions should be posted, and may make editorial deletions to the same. The website discloses the personal information of the individuals who were targeted, without their knowledge and/or consent, and encourages SHAC members [2] and website visitors to contact the "targets", their family members, and their neighbors. Postings encourage activity both within and beyond the parameters of the law.

2 The court notes that SHAC USA is a corporate entity and, as such, whether SHAC activists are deemed "members" is a term loosely utilized. There has been no suggestion by either counsel or their respective clients that the persons who post publications on the SHAC website are officers and/or directors of SHAC USA.

Plaintiffs indicate that there were various other incidents wherein defendants threatened and/or harassed Plantex employees. Specifically, on January 30, 2005, plaintiffs assert that three of defendants' representatives went to the home of Erez Israeli ("Israeli"), the vice president of marketing and sales for Plantex, at which time the individuals remained outside of the home for fifteen minutes, and spoke to people outside of the home. Additionally, defendants purportedly showed posters of bloody puppies and monkeys for fifteen seconds to a young girl, presumably Israeli's daughter. As a result of the same, Israeli is concerned about the health and welfare of himself and his family.

By way of certification, George Barrett ("Barrett"), the president and CEO of TEVA, certifies that defendants have been harassing him, his family, and other TEVA employees. Specifically, Barrett certifies to the following: on December 18, 2004, Barrett's neighborhood was leafleted by animal rights groups affiliated with SHAC and Cooney. More troubling, defendants went to the Germantown Friends School, where his children are students, and placed leaflets containing accusations that TEVA and Barrett are responsible for abusing and killing animals, on school property. The individuals also apparently conversed with Barrett's son. Thereafter, in late December 2004, Barrett received telephone calls from SHAC members at his home on several occasions, at all hours of the evening. Additionally, SHAC members began making disconnected collect calls. The calls escalated in quantity to the point where Barrett had no choice but to leave his telephone off the hook at a time when his mother was severely ill in the hospital. [3]

3 *See,* Transcript of Preliminary Injunction Hearing, Montgomery, Pennsylvania, February 28, 2005, p.42, 1.2–7.

***4** In December 2004, representatives from SHAC wrote a letter to the Middle States Tennis Foundation, of which Barrett is a member of the board of directors, informing them that Barrett is a proponent of "extremely brutal felony animal cruelty." SHAC representatives then wrote a second letter to the Middle States Tennis Foundation, in which the representatives profess to be Barrett, who, by copy of such letter, was purportedly resigning from his position on the board. Although the author of the letters is unknown, the incident was thereafter reported on SHAC's website.

Finally, SHAC representatives trespassed on Barrett's private property, and poured paint thinner on four cars parked on his property, thereby causing extensive damage.

By way of certification, Dennis Ferrell ("Ferrell"), the senior director of security operations and loss prevention at TEVA, certifies that defendants have been harassing employees of TEVA and Plantex, and their families, in a variety of ways, beginning in 2003. Ferrell alleges that defendants have engaged in leafleting, trespass, harassment, and, in particular, targeted Barrett and Svokos.

Based on the foregoing, plaintiffs filed the within order to show cause and verified complaint. The verified complaint, in eight counts, alleges as follows: (1) trespass upon the property of Plantex; (2) trespass upon the property of employees of Plantex, and/or their family members, (3) interference with Plantex's business operations; (4) conspiracy; (5) trespass; (6) intentional infliction of emotional distress; (7) invasion of privacy; and (8) private nuisance.

SHAC USA opposes plaintiffs' application for injunctive relief. By way of certification, Pamelyn Ferdin ("Ferdin"),

the president of SHAC, certifies to the following: SHAC is committed to lawful activity, and is not responsible for the purported actions of individuals which may have caused harm to the plaintiffs herein. Specifically, Ferdin directs the court to SHAC's website, which contains a link to the following disclaimer:

> The SHAC USA web site and newsletter, its hosts, designers, contributors, and sponsors, are not responsible for actions on the part of any individual which prove defamatory, injurious or prejudicial to the individuals or entities named herein, their families, or acquaintances. This publication is provided for informational purposes only, and is not intended to incite any criminal action on the part of its readers, visitors, or recipients.
>
> Links are placed for educational purposes only. SHAC USA, Inc. is not responsible for the content posted on outside sites.

SHAC USA provides the seminal case law regarding activists' First Amendment rights on its website for the benefit of its viewers. SHAC asserts it does not take active steps to organize, fund, solicit, participate in, or incite violence or other unlawful activity. However, "SHAC USA *ideologically* supports some illegal actions when non-violent, legal activity has failed, as long as no human or animal is physically harmed in the course of such actions." This position is endorsed on SHAC's website, which states that "SHAC will vocally support any action that contributes to animal liberation as long as no human or animal is harmed." The website further states, in its "Frequently Asked Questions" section, that:

> ***5** SHAC supports any action that contributes to animal liberation that does not harm any human or non-human. These actions range from protests, phone blockades, and office disruptions to live liberations and economic sabotage that is often painted as "violent" by our opponents. We support these tactics because we feel they are extremely effective and necessary to bring about change in the current social and economic climate.
>
> Prescribed methods of change, such as letter writing campaigns, relying on our elected officials, and even peaceful protest, have proven vastly ineffective in yielding the timely end to animal abuse on their own. Meanwhile billions of animals have suffered and died as time, energy, and resources are spent on tactics that, by themselves, do not bring about its end. If less "drastic," risky, and difficult tactics suddenly began to make the same changes that live liberations and economic sabotage currently do, ALF and other underground actions would be rendered unnecessary.
>
> In the words of Nelson Mandella, "Non-violence is not a moral principle but a strategy. And there is no moral goodness in using an ineffective weapon."
>
> Disclaimer: While SHAC ideologically supports illegal actions, we do not fund, organize, carry out, or have any knowledge of them before they are carried out. As an aboveground, legal campaign we do not involve ourselves in the illegal elements of social struggles, though we do lend our moral support to those carrying them out, will publicize them after the fact, and will lend tangible support to those tried and/or convicted of them.

The SHAC website advises viewers of their right to remain silent when dealing with investigators from the FBI, and further advises SHAC activists to notify SHAC immediately if they have been the subject of an attempted FBI investigation. The website instructs how to avoid being detected when using its website.

Ferdin further certifies that, although courts have in the past entered preliminary injunctions against SHAC USA, there has never been such an adjudication following a hearing in which witnesses were heard. Ferdin contends that, although activists have, in the past, had no prior knowledge of a restraining order, these activists have been arrested and held in jail for violating court orders. Accordingly, Ferdin urges that the foregoing discourages countless activists from attending events in support of the SHAC campaign.

Based on the foregoing, SHAC USA contends as follows: that an injunction cannot properly be entered against it, that there is no evidence that specifically connects SHAC to the events described, and urges that guilt need always be personal. Further, plaintiffs cannot identify the individuals who purportedly committed the acts set forth above, and, therefore, plaintiffs have no basis to allege that they were influenced by SHAC's website or publication.

SHAC USA argues that an injunction against SHAC, which is not an entity but rather a "worldwide campaign", is of no effect, as it is merely a "thought that is shared and endorsed" by SHAC activists. Additionally, although it is a definable legal entity, SHAC USA cannot be held responsible for the conduct of those who share its views and, even if it could, almost all of the conduct alleged in the verified complaint falls within the purview of protections afforded

by the United States and New Jersey Constitutions. To enter the requested restraints against SHAC USA based upon its speech and association would be violative of the free speech protections of the United States and New Jersey Constitutions and, further, the proposed injunction violates due process, as it promotes "guilt by association". Furthermore, SHAC USA's position is that all communication in this case is constitutionally protected, including the publication on SHAC's website of the names and addresses of the advocates' targets.

***6** SHAC argues its website is immunized by *Donato v. Muldow,* 374 *N.J.Super.* 475 (App.Div.2005), wherein Judge Lisa found that the defendant, an operator of an electronic community bulletin board website, was covered by the immunity provisions of the Communications Decency Act and therefore not responsible for derogatory statements found thereon.

By way of reply, plaintiffs point out that since the imposition of temporary restraints, defendants' "campaign of harassment and terror" has continued, unabated.

By way of supplemental certification, Svokos certifies as follows: regardless of the restraints, representatives of defendants have continued to contact his home with "hang-up" calls and, as a result, he has been forced to disconnect his answering machine based on the volume of the calls. Additionally, in February 2005,[4] the priest at St. Nicholas Greek Orthodox Church, which he attends with his wife and children, was contacted via email by representatives of defendants, who claimed they were parishioners and that they, and others, had observed Svokos inappropriately watching and touching children. Defendants' representatives requested that the priest intervene, or they would be forced to contact the police. The incident was thereafter posted on the SHAC website, with the heading "HLS CLIENT EXEC REPORTED AS PEDOPHILE." Based on the foregoing, Svokos' installed security cameras at his home, and employed a private security company to protect his family and home from defendants' unlawful activity. Additionally, Plantex has installed security cameras and other security systems in its Hackensack, New Jersey office as a result of the SHAC USA campaign.

4 It is unclear whether this incident occurred before the imposition of the temporary restraints.

On or about March 11, 2005, Svokos was contacted by a representative of American Express regarding unusual activity on Israeli's corporate account, totaling $1,600.00. Svokos confirmed said charges were not made or approved by Israeli or another Plantex employee, were fraudulent, and, as a result, he cancelled the card.

Richard S. Egosi ("Egosi"), the senior vice president and general counsel for TEVA, and a director of Plantex, certifies that on March 12, 2005, SHAC USA activists poured paint stripper on his vehicle that was parked in his driveway at his home, and spray painted his garage doors. The incident was thereafter posted on SHAC USA's website. Egosi further certifies that he has received numerous "hang-up" calls from defendants' representatives at all hours of the night. Egosi contends that the foregoing incidents were carried out in retaliation for the commencement of the within litigation. Based on the foregoing, Egosi maintains that he is concerned that his life, and his family, may be in danger.

By way of supplemental certification, Israeli indicates that he received numerous "hang-up" calls at his home during the week of March 7, 2005. Further, Israeli certifies that there was unusual activity on his company credit card, for on-line purchases that were not authorized by him or other Plantex employees.

***7** Plaintiffs contend that SHAC USA's argument that it is not responsible for the actions of the individuals who purportedly committed the acts alleged in plaintiffs' complaint is without merit. Specifically, plaintiffs assert that SHAC USA "devises, organizes, and directs the unlawful acts directed at the targets of its campaign" and, therefore, act in concert with the activists and/or incite their illegal activity. In support of the same, plaintiffs direct the court's attention to SHAC USA's previous newsletters. The Winter 2003 Newsletter, Volume 3, Issue 3.5 states in pertinent part as follows:

> In 2001 *we* took on the financiers and wiped the floor with the likes of Stephens Inc. and other major banks. In 2002 *we* taught the world's biggest insurance broker, Marsh Inc., a valuable lesson about the consequences of insuring animal cruelty....SHAC has not gone away and continually beats all expectations and delivers devastating blow after devastating blow....
>
> * * *
>
> All of us in the SHAC movement are creative, we are passionate, and we are unstoppable....

> * * *
>
> We are well on our way, and together we will close [HLS] and become the most effective voice for those animals this world has ever seen. (emphasis added).

The Fall 2003 Newsletter, Volume 3, Issue 3 included a SHAC action mailer ("mailer"), with an editorial on the first page which described the mailer as "... your resource tool to help dismantle the HLS lifeline." Additionally, the same newsletter included an article entitled "hit 'em HOME", which gives readers a step-by-step guide to home demonstrations, and encourages readers to tell their targets "Hi from SHAC!" Plaintiffs contend that the foregoing newsletters, along with additional newsletters, e-newsletters, and editorials, not only incite harassing and illegal activity, but also instruct its members on how to do so. Plaintiffs contend that SHAC USA participates in the unlawful activity of its members and activists by inciting, aiding and abetting such individuals in the commission of such acts. Further, SHAC USA identifies and targets HLS customers, which SHAC USA identifies as targets on its website.

Oral argument was entertained on April 1, 2005. This court afforded both counsel the opportunity to present witnesses at a plenary hearing specially scheduled for April 4, 2005. Neither counsel wished to call witnesses in support of their respective positions. Defendant's counsel requested the opportunity to subpoena plaintiffs' witnesses and to be able to "cross examine" those witnesses. This request was denied.

Analysis

Preliminary Restraints

As with all matters seeking preliminary relief, the application is guided by *Crowe v. DeGioia,* 90 *N.J.* 126 (1982). That is, for plaintiff to obtain the relief it seeks, he must show (1) irreparable harm; (2) that the application is premised upon settled law; (3) that there is a reasonable probability of success on the merits; and (4) a balancing of the hardships suggests that the relief should be afforded.

A. *Irreparable harm*

***8** The first principle under the *Crowe* standard is that an injunction should not issue except when necessary to prevent irreparable harm. *Id.* at 132. Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. *Id.* at 132–33. Pecuniary damages may be inadequate because of the nature of the injury or of the right affected. *Id.* at 133.

It is clear that the activity as alleged constitutes an immediate threat of irreparable harm. Reasonable fear of a threat to one's safety, or the safety of one's family is, by definition, irreparable harm. Plaintiffs contend that defendants will, if allowed to continue, threaten the safety and privacy of the plaintiffs, its officers and/or employees, cause families to live in fear, repeatedly violate criminal laws, and attempt to ruin the business of TEVA and Plantex. Plaintiffs understandably urge that Svokos has suffered disparagement of his reputation, embarrassment and humiliation in the presence of his family, friends, neighbors, and priest. The same can be said, in large measure, for Barrett and Israeli. Based on the foregoing, plaintiffs contend that the harm suffered is irreparable, and cannot be adequately addressed by way of monetary damages.

SHAC USA, although opposing the within application, does not dispute that that the alleged conduct occurred. Rather, SHAC's position is that, even if SHAC activists engaged in such conduct, SHAC is not responsible for the same, and their conduct is protected pursuant to the United States and New Jersey Constitutions.

The court is satisfied that, based on the record before it, the plaintiffs have made a sufficient showing of irreparable harm, as the alleged activity poses significant jeopardy to the health and safety of plaintiffs, their employees, and their families.

B. *Settled Law*

The second prong of *Crowe* is that the legal right underlying the plaintiff's claim is settled. *Crowe, supra,* 90 *N.J.* at 133.

Limits on Freedom of Speech

It has long been recognized that one of the fundamental foundations of this country is the First Amendment and its establishment of freedom of speech. *See, De Jonge v. Oregon,* 299 *U.S.* 353, 364 (1937). Courts must pay due deference not only to the "letter" of the amendment, but also to its spirit, no matter how distasteful. *See, Texas v. Johnson,* 491 *U.S.* 397, 414 (1989); *see also, R.A.V. v. City of St. Paul,* 505 *U.S.* 377, 382 (1992); and *N.A.A.C.P. v. Claiborne Hardware Co.,* 458 *U.S.* 886, 910 (1982), 382

The content of speech, however, may be regulated in limited areas, where the "speech" is "of such slight social value as a step to truth that any benefit that may be derived from

them is clearly outweighed by the social interest in order and morality." *R.A.V. v. City of St. Paul,* 505 *U.S.* 377, 383 (1992) (*citing Chaplinsky v. State of New Hampshire,* 315 *U.S.* 568, 572 (1942)). *See, e.g., Roth v. United States,* 354 *U.S.* 476, *reh'g denied,* 355 *U.S.* 852 (1957) (obscenity); *Beauharnais v. Illinois,* 343 *U.S.* 250, *reh'g denied,* 343 *U.S.* 988 (1952) (defamation); *Chaplinsky, supra* ("fighting" words); *United States v. O'Brien,* 391 *U.S.* 367, *reh'g denied,* 393 *U.S.* 900 (1968) (burning draft card).

***9** The United States Supreme Court has long recognized the principal that "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio,* 395 *U.S.* 444, 447 (1969). Moreover, " 'the mere abstract teaching * * * of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." ' *Id.* (*citing Noto v. United States,* 367 *U.S.* 290, 297–298 (1961). *Brandenburg* stands for the proposition that inciteful speech alone is not enough to bring the speech outside of the protection of the First Amendment; rather, there must be a causal nexus between the inciteful speech and imminent unlawful activity. Stated differently, speech that is directed to inciting or producing *imminent* lawless action cannot hide under the veil of the First Amendment if likely to incite or produce such action. *Id. See also, Hess v. Indiana,* 414 *U.S.* 105 (1970), *N.A.A.C.P. v.. Claiborne, supra,* 458 *U.S.* at 886, and *Watts v. United States,* 394 *U.S.* 705 (1969).

In the instant matter, the court is satisfied that a prima facie showing has been made that the SHAC website is directed to, and likely to incite, imminent lawless activity. Specifically, the website clearly endorses any activity, legal or illegal, so long as it does not harm any human being or animal. Additionally, each time action is taken against a "target", the same is posted on the website, thereby encouraging further immediate illegal action against the "target". The actions complained of, breaking and entering a personal residence, stealing property of another and thereafter using the same, declaring Svokos' a pedophile, trespassing on private property, making anonymous telephone calls at all hours of the evening, strip painting vehicles and otherwise damaging private property, among others, clearly constitute illegal activity. The court would have to turn a blind eye to find that there is no causal nexus between the SHAC website and the violence thereafter produced. The court need also be concerned about what appears to be an escalation of the level and intensity of criminal behavior. That defendants fail to recognize the gravity of plaintiffs' allegations cannot change that which has occurred.

SHAC USA's Responsibility

The court acknowledges that, during the course of this opinion, it has referred to the defendants collectively, has not segregated the role of SHAC USA, and that a showing of responsibility must be made before an injunction can issue against SHAC USA. Defendant's contention that guilt must be individual, not collective, strikes a vibrant cord. In determining whether SHAC can be deemed responsible for the actions of its activists, the court is instructed by *Donato, supra,* 374 *N.J.Super.* at 475.

***10** In *Donato,* the Appellate Division considered the potential liability of the operator of an electronic community bulletin board website based on allegedly actionable messages posted anonymously by others. *Id.* at 477–78. The website, known as "Eye on Emerson," contained information about local government activities, including minutes of meetings of the borough council, planning board and board of education. *Id.* at 479. The site included a discussion forum, in which any user could post messages, either with attribution or anonymously. *Id.* After the inception of the website, negative messages about elected officials were posted, some concerning the discharge of their official duties, some personal, many vile and derogatory in their language and tone. *Id.* at 479–80. Several elected officials filed suit, alleging that the operator of the website was liable as a publisher of the defamatory statements made by others, and that the operator "actively participated in selective editing, deletion and re-writing of anonymously posted messages on the Eye on Emerson website and, as such, is entirely responsible for the content of the messages." *Id.* at 483–84. Judge Lisa found that the operator of the website was immunized by the provisions of the Communications Decency Act ("CDA"), and therefore not responsible for derogatory statements found thereon. The CDA provides 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." 47 *U.S.C.A.* § 230(c)(1).

The court is mindful of the court's holding in *Donato;* however, the court is not satisfied that *Donato* is controlling as it addressed distinctly different issues. Specifically, *Donato* is determinative of whether the anonymous posting of potentially politically scurrilous remarks can expose a website

operator to liability. In *Donato,* the defamatory postings pertained to political discourse. In this matter, however, the court is not concerned with political discourse and defamation but, rather, criminal activity and threats to an individual and/or an individual's family.

The court is also guided by *N.A.A.C.P. v. Claiborne, supra,* 458 *U.S.* at 886. In that case, the Court dealt with the issue whether an organization can be held legally responsible for the unlawful actions of its activists. *Id.* Particularly, in *N.A.A.C.P. v. Claiborne,* African American citizens of Claiborne County, Mississippi presented white elected officials with a list of particularized demands for racial equality and integration. *Id.* at 889. After failing to receive a satisfactory response, several hundred persons voted at a local National Association for the Advancement of Colored People ("NAACP") meeting to place a boycott on white merchants in the area. *Id.* In carrying out the boycott, "certain of the defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers. Intimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results." *Id.* at 894. As a result of the foregoing, several white business owners filed suit, seeking damages. *Id.* at 890.

***11** Faced with the question whether the NAACP can be held legally responsible for the actions of Charles Evers ("Evers"), the field secretary of the NAACP, the Court noted that "the NAACP—like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority....Moreover, the NAACP may be found liable for other conduct of which it had knowledge and specifically ratified." *Id.* at 930 (internal citations omitted). With the foregoing in mind, the Court held that, in the absence of evidence that the NAACP gave Evers any actual or apparent authority to commit the acts of violence or to threaten violent conduct in connection with the boycott, and in the absence of evidence that the NAACP had knowledge of or ratified any acts of violence, the NAACP could not constitutionally be held liable for any acts of violence in connection with the boycott. *Id.* at 930–31. In so holding, the court noted that the NAACP never authorized, and never considered taking, any official action with respect to the boycott; the NAACP supplied no financial aid to the boycott; and the trial court made no finding that the national organization was involved in any way in the boycott. *Id.*

That said, *N.A.A.C.P. v. Claiborne* allows for the proposition that SHAC USA may be held responsible for the unlawful conduct of its activists of which it had knowledge and specifically ratified, or if such conduct was taken within the scope of actual or apparent authority on behalf of SHAC. There are no facts before the court indicating that activists were acting under the auspice of authority on behalf of SHAC USA.

SHAC's website endorses any activity, legal or illegal, so long as it does not harm any human being or animal. Additionally, each time action is taken against a "target", the same is posted on the website, thereby encouraging further immediate illegal action against the "target". The website goes on to state that, although SHAC does not fund, organize, carry out, or have any knowledge of illegal actions before they are carried out, "we do lend our moral support to those carrying them out, will publicize them after the fact, and will lend tangible support to those tried and/or convicted of them." At oral argument, defendant's counsel indicated that, to the best of his knowledge, with regard to the postings on its website, an individual or individuals affiliated with SHAC revise the same, determine which submissions should be posted, and may make editorial deletions to the same. Accordingly, this court is satisfied, at least at this stage, that a prima facie showing has been made that SHAC ratifies the illegal activity every time it publicizes, and implicitly encourages, the activities on the website after the fact.

SHAC USA contends that the First Amendment provides them with freedom of speech which cannot be restricted by virtue of the proposed restraining order. What SHAC USA fails to note, however, is that the rights of one end where the rights of another begin. *See, West Virginia State Board of Education v. Barnette,* 319 *U.S.* 624, 630 (1943). Here, SHAC's website, whether intentionally or not, treads heavily on plaintiffs' rights to privacy in their home, to live peaceably, without fear. SHAC USA is seeking to avoid responsibility by taking shield behind its website. This court cannot countenance such conduct.

Content Neutral v. Content Based Speech

***12** *Horizon Health v. Felicissimo,* 135 *N.J.* 126 (1994) provides the court with guidance and establishes that the authority to issue injunctive relief falls well within the discretion of a court of equity. *Id.* at 137. "Moreover, courts have noted often that a State may impose content-neutral time, place, and manner restrictions on speech in public forums." *Id.*

In *Horizon,* a family planning clinic sought to enjoin the activities of antiabortion protestors who, directly in front of the clinic, began giving "sidewalk counseling" to potential abortion patients, described as "approaching a woman entering the clinic to gently inform her of alternatives to abortion and the potential bad effects of abortion in an effort to change her mind." *Id.* at 132. The protestors' activities also included handing patients pamphlets containing pictures of bloody, dismembered fetuses, warning patients that "there are murderers in there" who "tear the arms and legs off your babies," and urging staff members to "stop killing those babies." *Id.* The trial court issued an injunction, prohibiting "gathering, parading, patrolling and picketing," thereby regulating "expressive activity traditionally protected by the First Amendment." *Id.* at 139. The injunction enforced the following public-policy interests: "(1) the accessibility of medical services and the maintenance of medical standards; (2) protection of private property; and (3) public safety ." *Id.* at 138.

In a public forum,

> the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end....The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Murray v. Lawson, 138 *N.J.* 206, 234 (1994), *cert. denied,* 515 *U.S.* 1110 (1995) (*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 *U.S.* 37, 45 (1983). A threshold inquiry, then, is whether the proposed injunction is content neutral. *Id.*

"The principal inquiry in determining content neutrality in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Horizon, supra,* 135 *N.J.* at 140 (*citing Ward v. Rock Against Racism,* 491 *U.S.* 781, 791, *reh'g denied,* 492 *U.S.* 937 (1989). A restriction is content neutral if it can be justified without reference to the content of the regulated speech. *Id.* If a restriction is imposed because of a disagreement with the message the regulated speech conveys, however, it is impermissibly content-based. *Id.*

***13** Here, the plaintiffs do not seek the entry of the injunction because of what defendants said, but because of how and where they said it. Notably, the proposed injunction does not refer at all to the content of defendants' speech. In the instant matter, defendants have purportedly engaged in illegal conduct, have threatened the lives of Svokos, plaintiffs' employees, and their families, and have harassed the plaintiffs at all hours of the evening. The purpose of the injunction is not to restrain the specific viewpoints of defendants; rather, it is to allow defendants to express their views about animal testing in a manner that does not impermissibly interfere with or unnecessarily disrupt the plaintiffs, their employees, or their families. Accordingly, the proposed injunction is content-neutral.

Time, Place, and Manner Restrictions

Having determined that the injunction is content neutral, the court must next determine whether the proposed time, place, and manner restrictions are reasonable. Specifically, the court must decide whether those restrictions (1) serve a significant government interest; (2) are narrowly tailored to serve such an interest; and (3) leave open ample alternative channels of communication for defendants. *Horizon, supra,* 135 *N.J.* at 143.

1. *Defendant's actions at or near residential property*

"The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Madsen v. Women's Health Center, Inc.,* 512 *U.S.* 753, 775 (1994). Accordingly, the proposed restrictions clearly serve a significant government interest. *See, Frisby v.. Schultz,* 487 *U.S.* 474, 484 (1988) (concluding that protection of residential privacy is a significant government interest). Moreover, the proposed restrictions leave defendants with the opportunity to continue leafleting, to continue demonstrating, to continue zealously advocating for animal rights. What the restrictions do, however, is limit defendants' ability to do so within a certain distance of plaintiffs' homes, at all hours of the evening,

so as to ensure the health and well-being of plaintiffs, their employees, and their families.

In *Horizon,* the court recognized that the factual history of the protestors' conduct must be considered when crafting an injunctive order. *Id.* at 152. In *Murray,* however, a residential picketing injunction was sustained absent a showing of previous disorderly or unlawful conduct. *Murray, supra,* 138 *N.J.* at 215. In the instant matter, the court is satisfied that plaintiffs have made a prima facie showing that defendants have encouraged, supported, and facilitated illegal and reprehensible conduct by way of its website and newsletter. No matter how noble the defendants' cause, it cannot excuse utilization of terroristic tactics to fulfill its mission. Moreover, plaintiffs have made a prima facie showing that, if an injunction is not issued, defendants will continue to engage in such course of conduct.

***14** The court is satisfied that the proposed time, place, and manner restrictions in connection with plaintiffs' private residences are reasonable based on the circumstances.

2. *Defendant's actions at or near plaintiffs' business premises*

Whether or not the injunction as to plaintiffs' business premises can stand, however, is separate and distinct from the determination as to whether the injunction as to plaintiffs' homes is proper.

A cursory review of plaintiffs' pleadings indicates that, with regard to plaintiffs' business premises, plaintiffs allege that defendants have left fliers accusing Plantex and TEVA of abusing and killing animals on the windshields of cars parked in both the Plantex and the TEVA parking lots. Additionally, plaintiffs allege that in November 2004, SHAC activists attempted to gain unlawful entry to TEVA's Boston facility. [5]

5 Plaintiffs do not allege, however, that SHAC activists attempted to gain unlawful entry to TEVA's New Jersey facility and, as such, the court shall not address that which purportedly occurred in Boston.

Peaceful leafleting, without more, is clearly constitutionally protected speech. *See, Martin v. City of Struthers,* 319 *U.S.* 141, 143 (1943). "The right to distribute, circulate or otherwise disseminate ideas and written materials has long been recognized to constitute an integral part of the right of free speech and press. Both rights are clearly fundamental ones protected by the First Amendment." *Toms River Pub. Co. v. Borough of Manasquan,* 127 *N.J.Super.* 176, 182 (Ch. Div.1974). *See also, Martin, supra,* 319 *U.S.* at 143.

This court does not wish to be heard for the proposition that leafleting, demonstrations, and ringing doorbells of plaintiffs' neighbors are in any way comparable to illegal activity such as breaking and entering, stealing, and the destruction of property. The court notes that plaintiffs have set forth no evidence establishing that SHAC activists harassed plaintiffs' employees at their place of business, nor did the plaintiffs, its employees, or their families report any acts of violence or threats made at plaintiffs' place of business. There is simply insufficient evidence before the court to support a showing that defendants have taken action which creates the threat of imminent danger to plaintiffs' businesses.

The court is satisfied that plaintiffs have failed to make a prima facie showing that the proposed restrictions in connection with plaintiffs' business premises are reasonable based on the circumstances. Accordingly, plaintiffs' requests to preliminary enjoin defendants from coming up or on, or within one-hundred (100) feet of, the real or leased property of Plantex USA, Inc. ("Plantex") is denied.

Plaintiffs also seek to preliminarily restrain defendants from vandalizing or damaging the real, leased, or personal property of Plantex. The court in like manner cannot enjoin future conduct when there has been no showing of an imminent threat that the same will occur. Accordingly, such request is also denied.

C. *Reasonable Probability of Success*

The third prong of *Crowe* is that a preliminary injunction should not issue where material facts are controverted. *Crowe, supra,* 90 *N.J.* at 133. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits. *Id.* That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. *Id.* Indeed, the point of temporary relief is to maintain the parties in substantially the same condition when the final decree is entered as they were when the litigation began. *Id.* at 134.

***15** As stated above, SHAC USA does not dispute that the aforementioned conduct occurred. Rather, SHAC's position is that, even if SHAC activists engaged in such conduct, SHAC cannot be held responsible for the same, and their conduct

is protected pursuant to the United States and New Jersey Constitutions. Accordingly, the material facts are not disputed but, rather, the parties dispute the extent to which SHAC USA can be held responsible for individual activities, and the applicability of the First Amendment and its progeny.

Accordingly, the court is satisfied, at least at this stage, that plaintiffs have demonstrated a reasonable likelihood of success on the merits.

D. *Balance of Hardship*

The final test from *Crowe* is the relative hardship to the parties in granting or denying relief. *Crowe, supra,* 90 *N.J.* at 134. Therefore, in granting injunctive relief, the court must balance the defendants' constitutional right of free expression against the public-policy considerations. A balance of these competing interests requires the court to devise a remedy that "should be 'no broader than necessary to achieve [the] desired goal[ ]." *Murray, supra,* 138 *N.J.* at 218 (*citing Madsen v. Women's Health Center, Inc.,* 512 *U.S.* 753 (1994)).

In fashioning injunctive relief, the court is guided by the Supreme Court's holding in *Murray.* In that case, the Supreme Court found that an injunction against picketing would serve the residential privacy interest while upholding free speech, by prohibiting picketing within 100 feet from the property line of the target's residence, requiring that there be no more than ten picketers outside the "picket free zone", and requiring that notice be given to the local police department at least 24 hours in advance, indicating the number of picketers, the intended commencement time, and the duration of the picketing. *Id.* at 234. Further, picketing was permitted no more than once during any given two-week period. *Id.*

The court is satisfied that, based on the holding in *Murray,* the following injunction will properly serve the plaintiffs' interests while upholding the defendants' rights to free speech: defendants shall be restrained from picketing within 100 feet from the property line of the plaintiffs' residences, there shall be no more than twenty picketers outside the "picket free zone", and defendants shall give twenty-four hours notice to the local police department, indicating the anticipated number of picketers if so known, when picketing shall commence, and the proposed duration of the picketing. Further, picketing shall be permitted no more than twice during any given week period.

This court is sensitive to the difficulties which ensue when the specter of contempt is present and the issue of notice is raised. Therefore, to assuage defendants' concerns as to the power of this court to enforce the within order, particularly in the context of contempt proceedings, the defendant shall post the following language on the websites owned, operated, or controlled by it:

***16** "NOTICE: THE SUPERIOR COURT OF NEW JERSEY HAS ISSUED AN ORDER PROHIBITING CERTAIN ACTIVITY RELATING TO TEVA PHARMACEUTICALS, PLANTEX USA, INC., THEIR EMPLOYEES, AND THEIR FAMILIES."

Such notice shall be posted as a continuously visible underlined hyperlink which, when clicked, displays a legible, complete, and unmodified copy of all pages of the order, excluding the names of plaintiffs' attorney. Such notice shall be posted on the home page of any website owned and/or operated by this defendant, in a typeface and color that is consistent with the most prominent reference to plaintiff(s) on each such page, and in a manner whereby the hyperlink is proximately located to the most prominent reference to plaintiff(s) on the page, such that the hyperlink would ordinarily be displayed to a user viewing the page. Such notice shall be posted by this defendant within seventy-two (72) hours of receipt of this court's order memorializing this decision.

The court notes that plaintiff's counsel has not requested, and the court has not directed, that SHAC USA is precluded from posting any publications of its activists on its website.

That which the court grants herein is only that which was requested by plaintiffs' counsel by way of this court's order dated February 22, 2005, (1)(a) through (e), and nothing more.

Plaintiffs' counsel shall prepare and submit the appropriate order pursuant to the five-day rule in conformity with the above.

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CITY OF HOBOKEN, Plaintiff, v. EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, and AMERICAN PETROLEUM INSTITUTE, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY Docket No. HUD-L-3179-20 Civil Action CBLP Action

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS CHEVRON CORPORATION AND CHEVRON U.S.A. INC.'S ANTI-SLAPP SPECIAL MOTION TO DISMISS

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I. INTRODUCTION[1]

Plaintiff, the City of Hoboken, seeks to use state tort law to force a selected group of energy companies to pay for all the alleged harms of global climate change based on a novel, *post hoc* regulation of global fossil fuel emissions. To evade federal jurisdiction and obtain remand to this Court, Plaintiff argued its claims were based exclusively on *speech*, rather than petroleum production or emissions. But Plaintiff knows it cannot allege that run-of-the-mill commercial advertisements *caused* climate change. Thus, to connect its theory of climate change harm with its theory of speech-based liability, Plaintiff has alleged that Defendants' *political speech* caused climate change—i.e., that, as the Complaint puts it, by engaging in speech to "turn public opinion against actions to restrict their marketing and sale of fossil fuels," Amended Complaint ("Compl.") ¶ 327(c), Defendants somehow "caused" global warming that would not have occurred otherwise. Indeed, the gravamen of the Complaint, as Plaintiff itself has stated, is that Defendants "waged campaigns to turn public opinion against the scientific consensus that Defendants' marketing and sale of fossil fuels was causing devastating climate impacts," *id.* ¶ 126, and thereby turned "governmental actors" against "taking action to address" climate change, *id*. ¶ 115.

Plaintiff's theory raises obvious First Amendment problems. And it triggers special protections for speech under California's anti-SLAPP law, which applies here under New Jersey choice-of-law principles.

Under California's anti-SLAPP law, defendants have a qualified immunity from suit for any "cause of action" that "aris[es] from any act" the defendant has taken "in furtherance of the [defendant]'s right of petition or free speech … in connection with a public issue." Cal. Civ. Proc. Code § 425.16(b)(1); *see DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015 (9th Cir. 2013)

[1] This Memorandum of Law is submitted subject to, and without waiver of, any defense, affirmative defense, or objection, including lack of personal jurisdiction.

("California's anti-SLAPP statute functions as an immunity from suit, and not merely as a defense against liability."). An "act in furtherance of the [defendant]'s right of petition or free speech" is broadly defined to include practically all statements regarding "an issue of public interest," Cal. Civ. Proc. Code § 425.16(e)(4), which unquestionably includes climate change. The immunity can be overcome only if the plaintiff "establish[es] that there is a probability that the plaintiff will prevail on the claim." *Id.* § 425.16(b)(1). But even if the plaintiff could show that *some* of its claims survive—either because they are not based on speech on a matter of public concern, or because they target speech not protected by the First Amendment—*any* speech-based claims that the plaintiff cannot support should be stricken under the anti-SLAPP law. *Baral v. Schnitt*, 1 Cal. 5th 376, 393 (2016).

Plaintiff cannot evade California's anti-SLAPP law simply by filing suit outside of California.[2] As numerous courts have held, the anti-SLAPP choice-of-law analysis turns on which state has a stronger interest in applying its anti-SLAPP law to protect the speech of its citizens, which generally is the home state of the speaker. *E.g.*, *Diamond Ranch Acad., Inc. v. Filer*, 117 F. Supp. 3d 1313, 1323 (D. Utah 2015) ("California has a strong interest in having its own anti-SLAPP law applied to the speech of its own citizens." (quotations omitted)); *Sarver v. Chartier*, 813 F.3d 891, 897–900 (9th Cir. 2016) ("[T]he interests of interstate comity and the competing interests of the states tilt in favor of applying California law. Whereas California would appear to object strongly to the absence of a robust anti-SLAPP regime, New Jersey's interests would be less harmed by the use of [California law]."). Thus, if Plaintiff is right to characterize its Complaint as

[2] The Complaint improperly conflates the activities of Defendants with the activities of their separately organized predecessors, subsidiaries, and affiliates. Although the Chevron Defendants reject this erroneous attempted attribution to Chevron Corporation, for purposes of this motion only they accept the Complaint's unavailing conflation of Chevron Corporation with its predecessors, subsidiaries, and affiliates.

focused on *speech*—as it did to defeat federal jurisdiction—its claims against Chevron are subject to California's anti-SLAPP law.

Plaintiff cannot carry its burden of showing a probability that it will prevail on its claims, as it must to defeat an anti-SLAPP motion. On the contrary, all of Plaintiff's claims fail as a matter of law for the reasons outlined in Defendants' Joint Motion To Dismiss For Failure To State A Claim ("Motion to Dismiss").

In addition, the speech "campaign" Plaintiff complains about consists of communications allegedly intended to influence the government and the voting public on issues of energy and environmental policy. Compl. ¶¶ 75, 120, 126, 309(c). But Plaintiff does not identify a *single statement* in the "campaign" that was allegedly made by Chevron, *see id*. ¶¶ 123–78, which alone requires dismissal of Plaintiff's claims against Chevron. The only statements Plaintiff alleges Chevron made involve its support for renewable energy, which Plaintiff calls "greenwashing." But none of these statements is alleged to be untrue, and thus they are also unactionable. *E.g.*, *id.* ¶¶ 203–04.

Even if the speech campaign identified by Plaintiff could be attributed to Chevron, Plaintiff still cannot demonstrate a probability that it will prevail on its claims because those claims are barred by the First Amendment. The *Noerr-Pennington* doctrine holds that "[a] publicity campaign directed at the general public and seeking government action" is immune from liability under the First Amendment's Petition Clause. *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1091–92 (9th Cir. 2000); *accord Main St. at Woolwich, LLC v. Ammons Supermarket, Inc.*, 451 N.J. Super. 135, 144 (App. Div. 2017) (explaining that *Noerr-Pennington* applies to conduct when "lobbying" for government action). This legal bar applies even if Plaintiff's allegations are accepted as true. *See Oasis Therapeutic Life Ctrs., Inc. v. Wade*, 457 N.J. Super. 218, 232 (App. Div. 2018)

(stating the lobbying conduct "must be examined objectively and without consideration of the actor's underlying motivation"). And factual development on this issue is unnecessary because Plaintiff does not identify *any* speech that it claims caused its harm (i.e., climate change) *except* for the purported publicity campaign aimed at influencing the public's—and, in turn, lawmakers'—views on climate change. *E.g.*, Compl. ¶¶ 309(c), 327(c), 344(c). Simply put, Plaintiff cannot overcome the high burden imposed by *Noerr-Pennington* and the First Amendment, which protects not only the heartland of political speech, but even "the *prospect* of chilling fully protected expression." *Counterman v. Colorado*, __ S. Ct. __, 2023 WL 4187751, at *4 (U.S. June 27, 2023) (emphasis added.) As the United States Supreme Court recently emphasized, this includes so-called commercial speech, because "the First Amendment extends to all persons engaged in expressive conduct, including those who seek profit." *303 Creative LLC v. Elenis*, __ S. Ct. __, 2023 WL 4277208, at *15 (U.S. June 30, 2023).

In short, Plaintiff's attempt to hold Chevron liable for climate change based on alleged speech opposing stricter energy and environmental regulation fails on multiple levels. California's anti-SLAPP law protects California-based defendants, like Chevron, from meritless claims that burden constitutionally protected speech on issues of public interest. And Plaintiff cannot satisfy its burden under California's anti-SLAPP law to show its claims have merit: it has not pleaded facts showing Chevron's involvement in the complained-of speech, its claims are barred by *Noerr-Pennington* and the First Amendment, *and* its claims fail for all the reasons explained in the concurrently filed Motion to Dismiss. Accordingly, the Court should strike and dismiss the Complaint as to Chevron and award Chevron its attorney's fees and costs under California's anti-SLAPP law. Cal. Civ. Proc. Code § 425.16(c)(1).[3] At the very least, the causes of action barred by the First

[3] Defendants will file an affidavit of attorney's fees and costs in the event this Motion is granted.

Amendment should be struck.

II. PLAINTIFF'S ALLEGATIONS AND PROCEDURAL BACKGROUND

A. Plaintiff Seeks Remedies for Global Emissions

Plaintiff seeks to hold Chevron liable for harms allegedly caused (or to-be-caused) by global climate change, including the emissions of anyone who might have burned any fossil fuels, including coal.[4] The first half of the Complaint is a lengthy discussion of the extent to which "[t]he leading driver of global warming" is "the atmospheric concentration of greenhouse gasses." Compl. ¶ 30. Plaintiff alleges that the burning of fossil fuels—conducted by inhabitants worldwide—has caused "major climate disruptions and portends more devastating climate disruptions in the near future," including "sea level rise, extreme heat, and extreme rainfall events." *Id.* ¶¶ 44–45. Although Plaintiff includes a bare assertion that Defendants' supposed "half-century of deception" caused "climate disruption and resulting damage to Hoboken," *id.* ¶¶ 8, 45, it does not identify any Chevron statement as false or misleading or allege how such statement(s) impacted greenhouse gas emissions.

B. Plaintiff Attacks Defendants' Political Speech and Petitioning on a Public Issue

In an attempt to make this case about something other than emissions, Plaintiff attacks Defendants' (and others') purported participation in the public debate on climate change and the regulation of greenhouse gas emissions, arguing that Defendants are liable for the greenhouse gas

[4] *See* Compl. ¶ 2 ("[T]he fossil fuels they market and sell on a massive scale are causing accelerating climate change that poses grave threats to society—sea level rise, extreme heat, and increasingly destructive storms, among many others."); *id.* ¶ 8 ("[C]limate harms masked by Defendants' half-century of deception have now slammed into the shores of Hoboken, New Jersey."); *id.* ¶ 9 ("The increasing concentration of atmospheric greenhouse gasses from fossil fuels has caused sea levels to rise by nearly a foot in and around Hoboken."); *id.* ¶ 15 ("Defendants' lies about the risks of fossil fuels, are the cause of both the escalating climate harms experienced by Hoboken."). Plaintiff seeks to compel Chevron to pay damages for these allegedly climate change-related harms. *E.g.*, *id.* ¶ 240 (identifying numerous "harms" from climate change); *id.* ¶ 242 (alleging "existential threat" to Hoboken from climate change).

emissions of all of humanity because Defendants allegedly launched a "disinformation campaign[]" to "turn public opinion against the scientific consensus that Defendants' marketing and sale of fossil fuels was causing devastating climate impacts," Compl. ¶ 126, at a time when "governmental actors began to consider taking action to address" climate change, *id.* ¶ 115. According to Plaintiff, Defendants led a decades-long "campaign" designed to undermine "the public's faith in the certainty of climate science." *Id.* ¶ 6. Plaintiff vaguely claims all "Defendants" engaged in this "campaign," but does not identify *any* statement allegedly made by Chevron in the "campaign." *Id.* ¶¶ 123–78.

Plaintiff attacks core First Amendment speech by Defendants, including political speech on matters of public concern. Plaintiff alleges that Defendants engaged in speech that was intended to "manipulate public opinion against the need to take action to curb their production and distribution of fossil fuels across the globe" and "turn public opinion against actions to restrict their marketing and sale of fossil fuels" by emphasizing the heavy social costs imposed by over-regulation of energy. *Id.* ¶¶ 113, 309(c); 376(d). For example, Plaintiff denounces a 1994 (non-Chevron) report advocating against "policies to curb greenhouse gas emissions beyond 'no regrets' measures." *Id.* ¶ 164. Similarly, Plaintiff criticizes a 1996 (non-Chevron) book stating that "[s]evere reduction in greenhouse gas emissions by the United States or even all developed countries would impose large costs on countries but yield little in the way of benefits—even under drastic climate change scenarios." *Id.* ¶ 153. The Complaint also includes images of (non-Chevron) print advertisements discussing "global warming." *Id.* ¶ 147. But though Plaintiff alleges these public statements were intended to "turn public opinion" against regulation, *id.* ¶¶ 115, 126, it says nothing about whether or how these public statements affected the robust and uninhibited public discourse about energy policy that the First Amendment protects—an important deficiency because competing views obtained extensive media coverage, including on the front pages of major national newspapers.

Plaintiff alleges that Defendants supported trade organizations that organized campaigns to oppose energy regulation, but these campaigns likewise focused on indisputable issues of public concern. For example, Plaintiff alleges that the Global Climate Coalition (GCC), on behalf of Defendants, "employed a host of methods to deceive the public about the impacts of fossil fuels on the climate and oppose efforts to curb fossil fuel use, including by funding front groups and creating denial and misinformation campaigns." *Id.* ¶ 128. And Plaintiff alleges that Defendants were connected to the American Petroleum Institute (API), which developed a "Global Climate Science Communications Team" to "ensure that a majority of the American public, including industry leadership, recognizes that significant uncertainties exist in climate science, and therefore raises questions among those (e.g. Congress) who chart the future U.S. course on global climate change." *Id.* ¶ 154 (cleaned up).

C. Plaintiff Attacks Truthful Statements Supporting Renewable Energy

After numerous (non-Chevron) allegations about the alleged campaign to oppose fossil fuel regulation, the Complaint shifts to describing what it calls a "greenwashing" campaign in which Chevron publicized its support for renewable energy. *See* Compl. ¶¶ 189–211. But Plaintiff does not explain how the few purported "greenwashing" statements it identifies somehow *caused* climate change, or otherwise constitute a recognized tort or violate the Consumer Fraud Act. The "greenwashing" allegations are therefore irrelevant to Plaintiff's claims of injury.

Regardless, Plaintiff does not identify any allegedly false statement by Chevron. Instead, Plaintiff attacks *truthful* statements, such as Chevron's accurate representation that it has spent "millions" on renewables, on the ground that it is somehow misleading because Chevron spent *more* on fossil fuels. *Id.* ¶¶ 7, 203–04. The few other "greenwashing" allegations Plaintiff makes about Chevron likewise attack indisputably true statements. *See infra* at 20–21.

D. Plaintiff Concedes Its Complaint Targets Political Speech

Defendants removed this case to federal court, arguing that the Complaint "arises under federal laws and treaties and presents substantial federal questions" because it seeks to hold Defendants liable for the nationwide and international emission of greenhouse gases. Dkt. 1 at ii.[5] In response, Plaintiff argued that its claims were not based on emissions but rather on Defendants' *speech* opposing regulation. In its motion to remand the case to this Court, Plaintiff described its Complaint as based on "Defendants' half-century disinformation campaign" that was purportedly intended to "fuel [Defendants'] massive fossil fuel production and sale." Dkt. 94 at 39. And Plaintiff argued that this "purposeful disinformation campaign," and Defendants' alleged "misrepresentations and omissions about the effects" of fossil fuels, was the *sole basis* for Plaintiff's claims because it led to a "long history of unfettered production, marketing, and sale of fossil fuels." *Id.* at 5, 39.[6]

The federal district court credited Plaintiff's framing of its Complaint and remanded the case. *See City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d 191, 196 (D.N.J. 2021), *aff'd sub nom. City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022). In its remand order, the district court adopted Plaintiff's argument that its claims are based *solely* on speech—i.e., the Court stated Plaintiff "alleges that Defendants … engaged in a decades-long campaign to downplay the effect of fossil fuel usage on climate change," and "that it and its residents have been damaged by this conduct through the dire effects of global warming." *Id.*

III. LEGAL STANDARDS

New Jersey has adopted the choice-of-law approach outlined in the Restatement (Second)

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[5] Unless otherwise indicated, citations to "Dkt." are to filings on the federal district court docket in *City of Hoboken v. Exxon Mobil Corp.,* No. 20-CV-14243-JMV-MF (D.N.J.).

[6] Although Plaintiff vaguely invokes language used in the context of product advertising, its Complaint does not identify *any* product advertisement by Chevron. *Cf.* Compl. ¶¶ 123–178.

of Conflict of Laws. *P.V. ex rel. T.V. v. Camp Jaycee*, 197 N.J. 132 (2008). Under this approach, a court conducts a two-part inquiry. First, the court determines if "an actual conflict exists" by evaluating whether "the application of one or another state's law may alter the outcome of the case." *In re Accutane Litig.*, 235 N.J. 229, 254 (2018) (citing *McCarrell v. Hoffmann-La Roche, Inc.*, 227 N.J. 569, 584 (2017)). Second, the Court applies the "significant relationship" test, a fact-specific inquiry considering which state has the greatest "interest" in having its law applied to the dispute. *Id.* at 257–63; *see also Camp Jaycee*, 197 N.J. at 135–36. This analysis "requires consideration of 'certain contacts' to determine which state 'has the most significant relationship to the occurrence and the parties under the principles stated in § 6.'" *Calabotta v. Phibro Animal Health Corp.*, 460 N.J. Super. 38, 57 (App. Div. 2019) (quoting Restatement (Second) of Conflict of Laws § 145); *see also Sarver*, 813 F.3d at 899 ("[T]his analysis focuses primarily on the interests of the two states." (quotation marks omitted)).[7] The Restatement also identifies "four contacts" that may bear on a choice-of-law inquiry: "[1] the place where the injury occurred; [2] the place where the conduct causing the injury occurred; [3] the domicile, residence, nationality, place of incorporation and place of business of the parties; and [4] the place where the relationship, if any, between the parties is centered." *Id*. at 898. However, the relevance or importance of any particular factor varies depending on the choice-of-law inquiry at hand: "[T]he contacts 'are to be evaluated according to their relative importance with respect to the particular issue.'" *Fairfax Fin. Holdings Ltd. v. S.A.C. Cap. Mgmt., L.L.C.*, 450 N.J. Super. 1, 51 (App. Div. 2017). New Jersey's choice-of-law principles

[7] The principles stated in Restatement (Second) of Conflict of Laws § 6 are:
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

dictate that the court must decide choice-of-law questions on an "issue-by-issue" basis. *Id.*

IV. ARGUMENT

As a California-domiciled corporation, Chevron is protected by California's anti-SLAPP law. Because Plaintiff cannot show that its claims are subject to any of the narrow exemptions from California's law, it bears the burden to show a probability that it will prevail on those claims. Plaintiff cannot carry that burden because (1) Plaintiff has failed to allege facts sufficient to hold Chevron liable for the speech it complains of, and (2) the First Amendment bars tort liability based on speech attempting to influence public support for climate policies.

A. Chevron Is Protected by California's Anti-SLAPP Law

The first part of New Jersey's choice-of-law inquiry asks whether "the application of one or another state's law may alter the outcome of the case." *In re Accutane Litig.*, 235 N.J. at 254. Here, the answer is clearly "yes." Because "[the New Jersey] Legislature has not enacted anti-SLAPP legislation," *LoBiondo v. Schwartz*, 199 N.J. 62, 88 (2009), Chevron's motion would necessarily fail if New Jersey law applied. On the other hand, California provides broad immunity to *any* suit based on speech on matters of public concern, *see* Cal. Civ. Proc. Code § 425.16(b)(1), (e)(1), which includes the instant action.

Because the outcome of the case is affected by the choice of law, the Court must proceed to the second part of New Jersey's choice-of-law inquiry. The second part asks which state has the most significant interest in applying its law. Importantly, the test is *issue specific*, meaning that different jurisdictions' laws can apply to different issues in the case, including anti-SLAPP immunity and the merits. *See Fairfax*, 450 N.J. Super. at 51 ("[C]hoice-of-law decisions are made not only issue-by-issue, but also, at times, party-by-party." (citations omitted)). Thus, the Court must consider which state has the most significant interest in this specific issue—an anti-SLAPP motion—because the "most significant relationship" test is applied "on an issue-by-issue basis." *Camp*

Jaycee, 197 N.J. at 143; *accord Ginsberg ex rel. Ginsberg v. Quest Diagnostics, Inc.*, 441 N.J. Super. 198, 230 (App. Div. 2015). And the contours of the choice-of-law analysis vary by issue—for example, while the "place of injury" has overwhelming importance in evaluating some choice-of-law questions (such as for personal injury claims), in other instances the "place of injury" is effectively "fortuitous" and "bears little relation" to the issues at hand. *Ginsberg*, 441 N.J. Super. at 227.

As numerous courts have held when conducting a similar issue-specific choice-of-law analysis, the defendant's home state generally has the strongest interest in seeing its anti-SLAPP law applied to claims based on its citizens' speech. *E.g.*, *Diamond Ranch*, 117 F. Supp. 3d at 1323–24; *Underground Sols., Inc. v. Palermo*, 41 F. Supp. 3d 720, 726 (N.D. Ill. 2014); *O'Gara v. Binkley*, 384 F. Supp. 3d 674, 682 (N.D. Tex. 2019). Accordingly, the defendant's domicile is given heavy—and often dispositive—weight in anti-SLAPP choice-of-law analyses. In fact, the U.S. Court of Appeals for the Ninth Circuit applied New Jersey choice-of-law principles to hold that California's anti-SLAPP law governed tort claims originally filed in New Jersey against a California defendant: "Whereas California would appear to object strongly to the absence of a robust anti-SLAPP regime, New Jersey's interests would be less harmed by the use of California law." *Sarver*, 813 F.3d at 899–900. This Court should adhere to the Ninth Circuit's well-reasoned decision in that case and apply California's anti-SLAPP law to Chevron.

1. California's Anti-SLAPP Law Provides Broad Immunity for Speech on Issues of Public Concern

Based on its finding of "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition," the California legislature passed California's anti-SLAPP law to protect and encourage speech and "participation in matters

of public significance." Cal. Civ. Proc. Code § 425.16(a). "California's anti-SLAPP statute functions as an immunity from suit, and not merely as a defense against liability." *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015 (9th Cir. 2013). And this immunity is "substantive," meaning that it can be applied in other courts. *Batzel v. Smith*, 333 F.3d 1018, 1025–26 (9th Cir. 2003), *superseded in part by statute on other grounds as stated in Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 766–67 (9th Cir. 2017) ("Because California law recognizes the protection of the anti-SLAPP statute as a substantive immunity from suit, this Court, sitting in diversity, will do so as well."). In order to effectuate this immunity, the statute "authorizes defendants to file a special motion to strike in order to expedite the early dismissal of unmeritorious claims" based on speech. *City of Montebello v. Vasquez*, 1 Cal. 5th 409, 416 (2016).

California's anti-SLAPP "special motion to strike" may target any cause of action that "aris[es] from any act" that is taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue." Cal. Civ. Proc. Code § 425.16(b)(1). An "act in furtherance of a person's right of petition or free speech under the United States or California Constitution" is defined broadly to include all speech regarding "a public issue or an issue of public interest," and speech regarding topics that are "under consideration" by "a legislative, executive, or judicial body." *Id.* § 425.16(e). A cause of action "aris[es] from" such speech, and thus is subject to strike, *whenever* the speech is alleged to "support a claim for recovery," and the only speech allegations that are *not* subject to the anti-SLAPP statute are those that are "merely background" and thus irrelevant to the plaintiff's claims. *Sheley v. Harrop*, 9 Cal. App. 5th 1147, 1170 (2017).

"If the defendant makes the required showing" that a cause of action arises from speech or

petitioning activity, "the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." *Baral*, 1 Cal. 5th at 384. The plaintiff must establish that its allegations are properly pleaded and not subject to a legal bar. *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018).

2. California Has the Most Significant Interest in Applying Its Anti-SLAPP Law to Speech-Based Claims Against Its Domiciliaries

As New Jersey courts have explained (*see supra* at 10–11), the choice-of-law analysis changes depending on the issue being considered—meaning facts that may be relevant to the choice-of-law analysis for one issue may not be relevant when analyzing another issue. This is particularly true here, where a plaintiff brings substantive tort claims based on the defendant's speech, and the defendant invokes the protection of an anti-SLAPP law. Although the location of the plaintiff and place of injury might be relevant to determining the law that governs the *plaintiff's affirmative tort claims*, those facts are not particularly relevant to determining the law that governs the *defendant's anti-SLAPP immunity. See Diamond Ranch*, 117 F. Supp. 3d at 1323 ("[T]he place where the injury occurred … [has] little, if any, relevance in this area of law."); *Palermo*, 41 F. Supp. 3d at 726 ("'[P]lace of injury ... is less important' in 'the anti-SLAPP context.'" (quoting *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011)).

A defendant's home state has an overriding interest in applying its anti-SLAPP law to claims based on the defendant's speech. In *Diamond Ranch*, for example, a Utah court applied California's anti-SLAPP law to a suit brought by a Utah plaintiff against a California defendant alleged to have posted defamatory statements on the internet, reasoning that "[t]he purpose behind an anti-SLAPP law is to encourage the exercise of free speech, and California has a strong interest in having its own anti-SLAPP law applied to the speech of its own citizens." 117 F. Supp. 3d at 1323 (quotations omitted). This is consistent with the Restatement (Second) of Conflict of Laws, under which "the

needs of the interstate … system[],” “the protection of justified expectations” of speakers, and the interest in “certainty, predictability and uniformity of result” all point to application of the anti-SLAPP law of the speaker’s domicile, rather than the anti-SLAPP law of whatever state a plaintiff happens to sue in. Restatement (Second) of Conflicts of Laws § 6(2)(a), (d), (f). The U.S. Court of Appeals for the Ninth Circuit applied New Jersey’s choice-of-law analysis in nearly identical circumstances to those presented here, concluding that California’s anti-SLAPP law governed claims originally brought in New Jersey court against a California defendant. *Sarver*, 813 F.3d at 900.

Other courts have similarly held that the defendant’s domicile is overriding in the anti-SLAPP choice-of-law analysis. *E.g.*, *Palermo*, 41 F. Supp. 3d at 726 (applying Tennessee anti-SLAPP law to suit filed in Illinois against Tennessee defendant, due to “the importance of a speaker’s domicile in a court’s decision on which state’s anti-SLAPP law to apply”). This is so even when it is unclear where the speech at issue was created. *See O’Gara*, 384 F. Supp. 3d at 682 (“Although it is unclear whether … [defendant] made these allegedly defamatory statements in Texas, it is undisputed that [defendant] is domiciled in Texas, which weighs heavily in favor of applying Texas’s anti-SLAPP statute.”); *Diamond Ranch*, 117 F. Supp. 3d at 1323–24 (holding that, without contrary evidence, speech “likely originated” from plaintiff’s home state); *Palermo*, 41 F. Supp. 3d at 725 (reasoning that, although defendant made statements in “multiple other states,” anti-SLAPP law of his home state controlled).

Here, the Complaint alleges that Chevron Corporation has “its global headquarters and principal place of business in San Ramon, California,” Compl. ¶ 21(a), and “controls and has controlled companywide decisions related to climate change and greenhouse gas emissions from its fossil fuel products, including those of its subsidiaries,” *id.* ¶ 21(d). Likewise, Chevron U.S.A. Inc. is alleged

to have "its principal place of business in San Ramon, California." *Id.* ¶ 21(f). Thus, to the extent the Chevron Defendants are purported to have been involved in any of the alleged speech, the Complaint necessarily alleges that speech would have emanated from its California headquarters.

New Jersey has no obvious interest in applying its own lack of anti-SLAPP law to California speakers. *Cf.* Restatement (Second) of Conflicts of Laws § 6(2)(b) (choice-of-law analysis considers "the relevant policies of the forum"). Quite the opposite: the New Jersey Legislature recently enacted its own anti-SLAPP statute (which as of this filing is still awaiting the Governor's signature), rebutting any contention that applying California's law would contravene New Jersey public policy. *See* Dana DiFilippo, *Legislators Pass Bill That Would Restrict Lawsuits Meant to Silence Critics*, N.J. Monitor (July 5, 2023), https://tinyurl.com/mucyxyck. And because California's anti-SLAPP caselaw is the most robust and well-developed in the country, with thousands of opinions providing guidance on the scope and application of the law, applying California's anti-SLAPP law will not negatively impact the Court's interest in the "ease in the determination and application of the law to be applied." *Id.* § 6(2)(g); *see also Abbas v. Foreign Pol'y Grp., LLC*, 975 F. Supp. 2d 1, 9 (D.D.C. 2013) (interpreting D.C.'s anti-SLAPP law by looking to "California, which has a well-developed body of case law" interpreting California's anti-SLAPP law).

Thus, this Court should follow courts applying the Restatement by holding that "the interests of interstate comity and the competing interests of the states tilt in favor of applying California law" to the anti-SLAPP question. *Sarver*, 813 F.3d at 899.

B. Chevron Is Immune From Plaintiff's Claims Under California's Anti-SLAPP Law

1. Plaintiff's Claims Arise From Speech on Issues of Public Interest

California's anti-SLAPP immunity applies to claims "arising from" speech on issues of "public interest" or issues that have been subject to "consideration or review" by a governmental body. Cal. Civ. Proc. Code § 425.16(e)(2), (3), (4). It also applies to "mixed" claims predicated

both on speech and activity if the speech is not "merely incidental" to the claim. *Baral*, 1 Cal. 5th at 394. Here, there is no dispute that fossil fuel emissions, energy regulation, and climate change are all "issue[s] of public interest." Indeed, "[g]lobal warming is one of the greatest challenges facing humanity today." *City of New York v. Chevron Corp.*, 993 F.3d 81, 86 (2d Cir. 2021); *see also Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 347, 348 (2019 (Alito, J., dissenting from denial of certiorari) (noting that climate change "has staked a place at the very center of this Nation's discourse" as "one of the most hotly debated issues of the day").

Plaintiff states that each of the Complaint's causes of action are based on "fifty years [of] deceiving the public about [Defendants'] central role in causing climate change." Dkt. 94 at 38. For example, the Complaint points to Defendants' alleged "coordinated campaigns to deceive the public about the known and foreseeable threats their fossil fuels posed to the climate." Compl. ¶¶ 309(c), 327(c). And it emphasizes that the speech it targets sought to influence "public opinion against the need to take action" to curb greenhouse gas emissions. *Id.* ¶ 113. Among other things, the Complaint points to (1) API's Global Climate Science Communications Team's alleged goal to "create advertisements fraudulently emphasizing 'uncertainties' in climate science," *id.* ¶ 404, (2) Defendants' alleged actions "[t]hroughout the 1990s … [to] foment[] uncertainty about climate science," including by making "economic arguments to turn public opinion against taking action to address climate change," *id.* ¶ 162, (3) alleged "campaigns to deceive the public," *id.* ¶ 178, and (4) a purported "multifaceted campaign of climate disinformation," *id.* ¶ 179. Plaintiff further alleges that Defendants sought to "influence possible legislation on environmental controls" because "there is a good probability that legislation affecting [their] business will be passed." *Id.* ¶ 94. The allegations in the Complaint are demonstrably about matters of public import.

Because Plaintiff has already successfully argued that its Complaint is based on speech on

matters of public concern in its remand briefing, *see supra* at 7–8, Plaintiff is judicially estopped from arguing otherwise now. *See Kress v. La Villa*, 335 N.J. Super. 400, 412 (App. Div. 2000) ("When a party successfully asserts a position in a prior legal proceeding, that party cannot assert a contrary position in subsequent litigation arising out of the same events."); *Kimball Int'l, Inc. v. Northfield Metal Prods.*, 334 N.J. Super. 596, 607 (App. Div. 2000).

2. Plaintiff's Claims Do Not Fall Within Any Anti-SLAPP Exemption

Because Plaintiff's claims arise from Defendants' speech, those claims are subject to strike and dismissal *unless* Plaintiff can demonstrate that they fall within one of three narrow exemptions to California's anti-SLAPP law. *See Simpson Strong-Tie Co. v. Gore*, 49 Cal. 4th 12, 26 (2010). But Plaintiff cannot carry this burden here. *See Montebello*, 1 Cal. 5th at 419–20.

One exemption, the "public enforcement" exemption, is extremely narrow, applying only to actions that are "brought in the name of the people of the State of California." Cal. Civ. Proc. Code § 425.16(d). Plaintiff's suit does not qualify because it is brought in the name of the City of Hoboken. *See Montebello*, 1 Cal. 5th at 420 (holding that the enforcement exemption applies only to actions brought by California itself, and does not even apply to enforcement actions brought by California municipalities).

Plaintiff's suit also does not qualify for the "public interest" exemption for "private enforcement" lawsuits, another recognized exemption. Cal. Civ. Proc. Code § 425.17(b). By its terms, this exemption applies only to "[p]rivate" class actions and private-attorney-general suits. *Id.* § 425.17(b)(3); *see Tourgeman v. Nelson & Kennard*, 222 Cal. App. 4th 1447, 1459 (2014). So even if this suit had been brought by New Jersey's Attorney General, it *still* would not qualify for the public interest exemption. And the exemption is doubly inapplicable here because it does not apply to actions seeking compensatory damages for the plaintiff. *Ingels v. Westwood One Broad. Servs., Inc.*, 129 Cal. App. 4th 1050, 1067 (2005) ("Because appellant alleges and seeks recovery

of damages personal to himself, his claim fails to meet the first requirement [of the statute].”).

Finally, the third exemption, the “commercial speech” exemption, also does not apply. *See* Cal. Civ. Proc. Code § 425.17(c). As the California Supreme Court has explained, this exemption applies to one narrow “subset of commercial speech”: “comparative advertising” between competitors. *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 147 (2019). Thus, the exemption, “by its terms, is limited to statements by one business competitor about the products or services of another.” *Indus. Waste & Debris Box Serv., Inc. v. Murphy*, 4 Cal. App. 5th 1135, 1152 (2016). Plaintiff’s claims are not based on this kind of comparative advertising. Rather, Plaintiff’s allegations focus on the speech of trade associations allegedly on behalf of the whole industry. *E.g.*, Compl. ¶ 143 (“[A] group of coal companies … formed the Information Council for the Environment (‘ICE’) to lead a campaign to promote an alternative set of facts suggesting that increased atmospheric CO_2 would be beneficial, not harmful, for the environment and humanity.”); *id.* ¶ 149 (allegations about the speech of “API”); *id.* ¶ 133 (same for “GCC”). Chevron cannot be held liable for the speech of these third parties, but even if it could, “the [commercial speech] exception does not apply” to statements by “trade association[s].” *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.*, 183 Cal. App. 4th 1186, 1212 (2010).

Although Plaintiff includes a perfunctory assertion that Defendants are “greenwashing” by “highlighting the company’s commitment to sustainable energy investments and environmental stewardship,” Compl. ¶ 203, Plaintiff does not identify any comparative product advertisement. Nor does Plaintiff contend that its alleged “injuries”—“global warming” and its “environmental changes”—have been *caused* by “greenwashing.” *Id.* ¶ 7. Rather, Plaintiff alleges that the campaign *against regulation* is the but-for cause of climate change. *See, e.g.*, *id*. ¶¶ 309(c), 327(c), 344(c) (“coordinated campaigns to deceive the public about the known and foreseeable threats their

fossil fuels posed to the climate in order to mislead consumers and turn public opinion against actions to restrict their marketing and sale of fossil fuels"). The greenwashing allegations are thus irrelevant to Plaintiff's claims.

C. Plaintiff Cannot Carry Its Burden of Demonstrating a Probability That It Will Prevail on Its Claims

1. Plaintiff Cannot Carry Its Burden

Because Plaintiff is estopped from denying that its claims against Chevron arise from speech, the burden shifts to Plaintiff to establish a probability that it will prevail on those claims. But Plaintiff cannot carry this burden. In order to effectuate California's substantive immunity, Plaintiff's claims must be stricken and dismissed under California's anti-SLAPP law if they would fail on the merits for *any* reason, *see supra* at 3–4, and here Plaintiff's claims against Chevron suffer from several fatal deficiencies—including, but not limited to, those identified in the Motion to Dismiss. Although Plaintiff pins its case on a purported decades-long speech "campaign"—which Plaintiff alleges somehow caused its climate change injuries (*see, e.g.*, Compl. ¶¶ 309(c), 314(a), 327, 332(a), 348(a), 361, 363, 376, 382)—Plaintiff has not identified *any* speech by Chevron that was actually part of this "campaign." *See id.* ¶¶ 123–178 (not attributing *any* statement in the campaign to Chevron). For that reason alone, Plaintiff's speech-based claims against Chevron—which, according to Plaintiff, are *all* of its claims, *see supra* at 7–8—must be dismissed.

Furthermore, all of Plaintiff's claims against Chevron are barred by the First Amendment because Plaintiff has not alleged that Chevron made knowingly false misstatements. Suits "on matters of public concern" are subject "to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986); *see also Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057–58 (9th Cir. 1990) (such suits "are subject to the same first amendment requirements" as "defamation" claims). This

requirement of "a culpable mental state" is designed to ensure that citizens do not engage in "'self-censorship' of speech that could not be proscribed." *Counterman*, 2023 WL 4187751, at *4. Even if Plaintiff could show that *some* conduct it attacks is not protected by the First Amendment, it must plead and prove that it is basing its claims *only* on that unprotected conduct or speech. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 934 (1982) (the plaintiff bears "[t]he burden of demonstrating that [unprotected conduct] rather than protected conduct" caused injury). It must also show that this unprotected speech was made by *Chevron itself*, not by some organization that happened to include Chevron as one member among many. *See Santopietro v. Howell*, 857 F.3d 980, 990 (9th Cir. 2017) (under *Claiborne*, plaintiffs cannot allege the defendant is responsible for a group's conduct); *TEVA Pharm. USA, Inc. v. Stop Huntingdon Animal Cruelty USA*, 2005 WL 1010454, at *11 (N.J. Super. Ct. Ch. Div. Apr. 1, 2005) (same).

Here, Plaintiff does not identify *any false statement* by Chevron. Although it includes over 60 paragraphs of allegations about the purported speech "campaign," *see* Compl. ¶¶ 123–78, *none* involves any statement by Chevron—and only six paragraphs even *mention* Chevron at all, *see id.* ¶¶ 127, 130, 131, 143, 155, 177. In those paragraphs, Plaintiff merely alleges affiliations between Chevron and organizations including GCC (*id.* ¶¶ 127, 130, 131), ICE (*id.* ¶ 143), and API (*id.* ¶ 155), and alleges that Chevron and other Defendants "shift[ed] away from acknowledging the reality of anthropogenic climate change, to actively working to undermine scientific consensus and public trust," *id.* ¶ 177. But even if that were true, Chevron cannot be held liable for being associated with a "group" that engaged in speech on an issue of public concern. *Santopietro*, 857 F.3d at 990.

Aside from this "campaign," Plaintiff also alleges that Chevron engaged in "greenwashing"—but again, Plaintiff does not identify any false statement by Chevron. Instead, it attacks

anodyne and admittedly truthful statements about Chevron's support for renewable energy. Plaintiff complains that Chevron states "We agree," "It's time oil companies get behind the development of renewable energy," and "Protecting the Planet is Everyone's Job." Compl. ¶ 203. Plaintiff does not contend that this statement of opinion is factually false, but rather claims that "just 0.2% of [Chevron's] total capital [spending from 2010 to 2018 was in] low-carbon energy sources." *Id.* ¶ 204. Plaintiff admits that Chevron has invested in renewable energy sources. Plaintiff's chief complaint seems to be that Chevron has not invested *enough* according to Plaintiff's standards. This does not demonstrate untruthfulness, but rather a difference of opinion. Simply put, the *only* statements in the Complaint that are actually attributed to Chevron are indisputably true—barring Plaintiff's claims. *See Philadelphia Newspapers*, 475 U.S. at 776.

2. Any Speech-Based Claims Are Barred by the *Noerr-Pennington* Doctrine

Even if Plaintiff could allege that Chevron engaged in the purported publicity "campaign" *and* made knowingly false statements that caused Plaintiff's injuries, Plaintiff's claims would *still* be subject to dismissal. Plaintiff argues that the Complaint targets "decades of deceptions" to "foment[] uncertainty about climate science and center[] economic arguments to turn public opinion against taking action to address climate change," in an effort to avoid government regulation. Compl. ¶¶ 14, 162. But under the *Noerr-Pennington* doctrine, "[a] publicity campaign directed at the general public and seeking government action" is protected by the First Amendment—*even if* the speech is allegedly misleading. *Manistee*, 227 F.3d at 1092. Plaintiff's speech-based claims are legally barred and should be dismissed.

a. The Noerr-Pennington *Doctrine Applies to Claims About Public Policy Campaigns*

The *Noerr-Pennington* doctrine protects activities intended to influence the government—including publicity campaigns designed to influence the voting public—pursuant to the Petition Clause of the First Amendment. The doctrine was first articulated in *E. R. R. Presidents Conf. v.*

Noerr Motor Freight, Inc., 365 U.S. 127 (1961), a case brought by a group of trucking plaintiffs against railroads and affiliated defendants. The trucking plaintiffs alleged that the railroads violated the Sherman Act by "conduct[ing] a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business," and "creat[ing] an atmosphere of distaste for the truckers among the general public." *Id.* at 129. The plaintiffs alleged that this "publicity campaign" was "fraudulent" because "the publicity matter circulated in the campaign was made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared and produced by [the railroads' PR firm] and paid for by the railroads." *Id.* at 129–30. After a bench trial, the district court awarded "substantial damages" and a "broad injunction" to the plaintiffs. *Id.* at 133–34.

The Supreme Court reversed, explaining that "publicity campaign[s]" aimed at influencing governmental action cannot be the grounds for civil liability, as "representative democracy … depends upon the ability of the people"—including businesspeople—"to make their wishes known to their representatives." *Id.* at 137. The fact that the defendants "deliberately deceived the public and public officials" was irrelevant. *Id.* at 145. Four years later, the Court reiterated that defendants cannot be liable for "a concerted effort to influence public officials." *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669–70 (1965).

Although *Noerr* and *Pennington* dealt with antitrust claims under the Sherman Act, later decisions have clarified that the doctrine they announced is a constitutional rule that applies to *all* claims—including the state-law claims that Plaintiff brings in this case. *See Main St. at Woolwich, LLC v. Ammons Supermarket, Inc.*, 451 N.J. Super. 135, 144 (App. Div. 2017) (stating that the *Noerr-Pennington* doctrine has been "extended to include common-law torts such as malicious prosecution and abuse of process"); *accord Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546

F.3d 991, 1007 (9th Cir. 2008) ("There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim." (quotation omitted)).

b. Noerr-Pennington *Protects the Publicity Campaign Alleged in the Complaint*

Just as the *Noerr* plaintiffs could not use the Sherman Act to punish the defendants for engaging in an allegedly "fraudulent" "publicity campaign" aimed at legislative and regulatory action, Plaintiff here cannot punish Defendants for allegedly doing the same. The Petition Clause protects "the right of the people ... to petition the Government," U.S. Const. amend. I—and in a republic, the most effective means of petitioning "the Government" is to speak to the *voting public*. "The dual principles underlying the *Noerr–Pennington* doctrine are the constitutional right to petition under the First Amendment *and the importance of open communication in representative democracies*." *Mariana v. Fisher*, 338 F.3d 189, 197 (3d Cir. 2003) (emphasis added). For that reason, *Noerr* "extended immunity not only to the railroads' direct communications with legislators but *also* to its public relations campaign, finding that the latter's aim was to influence the passage of favorable legislation." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 934 (9th Cir. 2006) (emphasis added) (citing *Noerr*, 365 U.S. at 140–43).

Here, Plaintiff repeatedly describes the speech it attacks as a publicity campaign aimed at influencing public opinion and regulators:

- "a massive marketing campaign … [to] manipulate public opinion against the need to take action to curb their production and distribution of fossil fuels," Compl. ¶ 113;
- a "multifaceted and multimillion-dollar campaign to deceive the public about climate science," *id*. ¶ 120;
- "disinformation campaigns calling climate science into question," in order to "turn public opinion against the scientific consensus that Defendants' marketing and sale of fossil fuels was causing devastating climate impacts," *id.* ¶ 126; and
- "Defendants fomented uncertainty about climate science and centered economic arguments to turn public opinion against taking action to address climate change," *id.* ¶ 162.

In short, Plaintiff alleges that Defendants engaged in "[a] publicity campaign directed at the general public and seeking government action"—precisely what the *Noerr-Pennington* doctrine protects. *Manistee*, 227 F.3d at 1092; *see also Noerr*, 365 U.S. at 129–30.

Plaintiff's allegations that the campaign was "false" or "misleading," Compl. ¶ 364, or purportedly conducted through "front groups," *id.* ¶ 126, are irrelevant under *Noerr-Pennington*. As the Supreme Court explained, "[t]he political campaign operated by the railroads in *Noerr* to obtain legislation crippling truckers employed deception and misrepresentation and unethical tactics," but it was still protected by the Constitution. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972). "As pointed out by the Court in *Noerr*, attempts to influence public officials may occasionally result in 'deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information.'" *Boone v. Redev. Agency of City of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988). Even if such "misrepresentations" occur, the political process is intended to "accommodate false statements and reveal their falsity." *Id.* Merely alleging a speech campaign is "false" does not remove *Noerr-Pennington* immunity. *Id.*

The speech Plaintiff alleges described the costs of regulation and advocated that voters, legislators, and regulators weigh those costs against the risk of climate change. Plaintiff may disagree with this advocacy, but it cannot hold Defendants liable for advocating their views. The First Amendment does not permit plaintiff to seek judicial remedies for allegedly false political speech.

V. CONCLUSION

For the foregoing reasons, the Court should grant Chevron's special motion to strike, dismiss the case with prejudice, and award Chevron its attorney's fees.

Dated: July 7, 2023
Florham Park, New Jersey

By: */s/ Herbert J. Stern*
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CITY OF HOBOKEN Plaintiff, v. EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, AMERICAN PETROLEUM INSTITUTE, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY Docket No. HUD-L-3179-20 Civil Action CBLP Action **CERTIFICATION OF SERVICE**

HERBERT J. STERN, ESQ., of full age, does hereby certify as follows:

On July 7, 2023, I caused copies of a (1) Notice of Defendants Chevron Corporation and Chevron U.S.A. Inc.'s Anti-SLAPP Special Motion to Dismiss, (2) Brief, (3) Certification of Herbert J. Stern, Esq., (4) proposed form of Order, and (5) this Certification of Service to be served upon Plaintiff's counsel of record via eCourts.

I certify that the foregoing statements made by me are true. I am aware that if any of these foregoing statements made by me are willfully false, I am subject to punishment.

s/ Herbert J. Stern

Dated: July 7, 2023

Herbert J. Stern, Esq.