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Section 4: First Amendment

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In 1994, Congress passed the Uruguay Round Agreements Act, restoring copyright protection to a number of foreign works previously in the public domain. Lawrence Golan, a music conductor, director, and professor, along with a number of educators, performers, publishers, film archivists, and motion picture distributors brought suit, arguing URAA §514 is unconstitutional because it violates their First Amendment rights by removing works from the public domain. The district court first granted summary judgment to the government, holding that private censorship via copyright does not implicate the First Amendment. On appeal, the 10th Circuit remanded, directing the lower court to apply an appropriate level of First Amendment scrutiny. The parties agreed to a characterization of the URAA as a content-neutral restriction on speech subject to intermediate scrutiny. The district court then granted summary judgment to the plaintiffs, holding that the URAA violated their First Amendment rights. In 2010, the 10th Circuit reversed the ruling, holding that URAA §514 satisfies intermediate scrutiny and that enacting §514 lay within Congress’s Article I powers.

Questions Presented: (1) Does the Progress Clause of the United States Constitution, Article I, § 8, cl. 8, prohibit Congress from taking works out of the public domain? (2) Does Section 514 of the Uruguay Round Agreements Act violate the First Amendment of the United States Constitution?
Plaintiffs brought this action challenging the constitutionality of Section 514 of the Uruguay Round Agreements Act ("URAA"), which granted copyright protection to various foreign works that were previously in the public domain in the United States. The district court granted plaintiffs’ motion for summary judgment, concluding that Section 514 violates plaintiffs’ freedom of expression under the First Amendment. In Case No. 09-1234, the government appeals the district court’s order granting plaintiffs’ motion for summary judgment and denying the government’s motion, arguing that Section 514 is a valid, content-neutral regulation of speech. In Case No. 09-1261, plaintiffs cross-appeal, contending that the statute is facially invalid and that they are entitled to injunctive relief. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reverse the judgment of the district court and conclude that Section 514 of the URAA is not violative of the First Amendment.

I. Statutory Background

In 1989, the United States joined the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). The Berne Convention requires each signatory to provide the same copyright protections to authors in other member countries that it provides to its own authors. Pursuant to Article 18, when a country joins the Convention, it must provide copyright protection to preexisting foreign works even when those works were previously in the public domain in that country. However, when the United States joined the Berne Convention, the implementing legislation did not extend copyrights to any foreign works that were already in the public domain in the United States.

In April 1994, the United States signed various trade agreements in the Uruguay Round General Agreement on Tariffs and Trade. Included in this round of agreements was the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). The TRIPs agreement required, in part, that its signatories comply with Article 18 of the Berne Convention, and thus, extend copyright protection to all works of foreign origin whose term of protection had not expired. Unlike the Berne Convention, the TRIPs agreement provided for dispute resolution before the World Trade Organization.

In order to comply with these international agreements, Congress enacted the URAA. In particular, Section 514 of the URAA implements Article 18 of the Berne Convention. Section 514 “restores” copyrights in foreign works that were formerly in the public domain in the United States for one of three specified reasons: failure to comply with formalities, lack of subject matter protection, or lack of national eligibility. See 17 U.S.C. § 104A(a), (h)(6)(C). Section 514 does not restore copyrights in foreign works that entered the public domain through the expiration of the term of protection.

In addition to restoring copyrights in preexisting foreign works, Section 514 provides some protections for reliance parties such as plaintiffs who had exploited these works prior to their restoration. In order to enforce a restored copyright against a reliance party, a foreign copyright owner must either file notice with the Copyright Office within twenty-four months of
restoration, or serve actual notice on the reliance party. A reliance party is liable for infringing acts that occur after the end of a twelve month grace period, starting from notice of restoration. Reliance parties may sell or otherwise dispose of restored works during this grace period, but they cannot make additional copies during this time.

Section 514 provides further protections for reliance parties who, prior to restoration, created a derivative work that was based on a restored work. Under Section 514, "a reliance party may continue to exploit that derivative work for the duration of the restored copyright if the reliance party pays to the owner of the restored copyright reasonable compensation. . . ." If the parties are unable to agree on reasonable compensation, a federal court will determine the amount of compensation.

II. Factual and Procedural Background

The factual background is not in dispute. Plaintiffs are orchestra conductors, educators, performers, publishers, film archivists, and motion picture distributors who have relied on artistic works in the public domain for their livelihoods. They perform, distribute, and sell public domain works. The late plaintiff Kapp created a derivative work—a sound recording based on several compositions by Dmitri Shostakovich. Section 514 of the URAA provided copyright protection to these foreign works, removing them from the public domain in the United States. As a result, plaintiffs are either prevented from using these works or are required to pay licensing fees to the copyright holders—fees that are often cost-prohibitive for plaintiffs.

Plaintiffs filed this action, challenging the constitutionality of the Copyright Term Extension Act, and Section 514 of the URAA, seeking declaratory and injunctive relief. Initially, the district court granted summary judgment to the government. On appeal, we concluded that plaintiffs' challenge to the Copyright Term Extension Act was foreclosed by the Supreme Court's decision in Eldred v. Ashcroft, 537 U.S. 186, 123 S.Ct. 769, 154 L.Ed.2d 683 (2003). We also held that "[Section] 514 of the URAA ha[d] not exceeded the limitations inherent in the Copyright Clause" of the United States Constitution. We recognized that "legislation promulgated pursuant to the Copyright Clause must still comport with other express limitations of the Constitution," and concluded that plaintiffs had "shown sufficient free expression interests in works removed from the public domain to require First Amendment scrutiny of [Section] 514." We then remanded the case to the district court to "assess whether [Section] 514 is content-based or content-neutral," and to apply the appropriate level of constitutional scrutiny.

On remand, the parties filed cross-motions for summary judgment. The government and plaintiffs agreed that Section 514 is a content-neutral regulation of speech, and thus should be subject to intermediate scrutiny. The district court concluded that "to the extent Section 514 suppresses the right of reliance parties to use works they exploited while the works were in the public domain," Section 514 was unconstitutional. Consequently, the district court granted plaintiffs' motion for summary judgment, and denied the government's motion.

The government timely appealed the district court's order, arguing that Section 514 of the URAA does not violate the First Amendment. Plaintiffs cross-appealed, arguing that the district court failed to provide all of the relief that they requested. Specifically, plaintiffs request that we adjudicate their facial challenge to Section 514, direct the district court to enjoin
Attorney General Holder from enforcing the statute, and order the Register of Copyrights Marybeth Peters to cancel the copyright registrations of restored works.

III. Government’s Appeal

“We review de novo challenges to the constitutionality of a statute.” Because this case implicates the First Amendment, “we have ‘an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.’”

The parties agree that Section 514 of the URAA is a content-neutral regulation of speech, and thus, is subject to intermediate scrutiny. Although their position is “not controlling given our special standard of de novo review,” we agree that Section 514 is a content-neutral regulation of speech.

In determining whether a regulation is content-neutral or content-based, “the government’s purpose in enacting the regulation is the controlling consideration.” The primary inquiry “is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” “If the regulation serves purposes unrelated to the content of expression it is considered neutral, even if it has an incidental effect on some speakers or messages but not others.” On its face, Section 514 is content-neutral. Moreover, there is no indication that the government adopted Section 514 “because of agreement or disagreement with the message [that the regulated speech] conveys.” Congress primarily enacted Section 514 to comply with the United States’ international obligations and to protect American authors’ rights abroad. Therefore, we agree that it is a content-neutral regulation.

In reviewing the constitutionality of a content-neutral regulation of speech, we apply “an intermediate level of scrutiny, because in most cases [such regulations] pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.” Applying intermediate scrutiny, a content-neutral statute “will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”

The government argues on appeal that Section 514 is narrowly tailored to advancing three important governmental interests: (1) attaining indisputable compliance with international treaties and multilateral agreements, (2) obtaining legal protections for American copyright holders’ interests abroad, and (3) remedying past inequities of foreign authors who lost or never obtained copyrights in the United States. We hold that the government has demonstrated a substantial interest in protecting American copyright holders’ interests abroad, and Section 514 is narrowly tailored to advance that interest. Consequently, the district court erred in concluding that Section 514 violates plaintiffs’ First Amendment rights.

A. Governmental Interest

1. Section 514 addresses a substantial or important governmental interest.

In order for a statute to survive intermediate scrutiny, the statute must be directed at an important or substantial governmental interest unrelated to the suppression of free expression. See Turner I, 512 U.S. at 662, 114 S.Ct. 2445. We have no difficulty in concluding that the government’s interest in securing protections abroad for American
Copyright holders satisfies this standard.

Copyright serves to advance both the economic and expressive interests of American authors. See Eldred, 537 U.S. at 211–13, 123 S.Ct. 769. In addition to creating economic incentives that further expression, copyright also serves authors' First Amendment interests. “[F]reedom of thought and expression ‘includes both the right to speak freely and the right to refrain from speaking at all.’” Courts and commentators have recognized that copyright . . . serve[s] this countervailing First Amendment value” of the freedom not to speak.

Plaintiffs contend that the government does not have an important interest in a “reallocation of speech interests” between American reliance parties and American copyright holders. However, the Supreme Court has recognized that not all First Amendment interests are equal. “The First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.” Although plaintiffs have First Amendment interests, so too do American authors.

Securing foreign copyrights for American works preserves the authors’ economic and expressive interests. These interests are at least as important or substantial as other interests that the Supreme Court has found to be sufficiently important or substantial to satisfy intermediate scrutiny. Accordingly, Section 514 advances an important or substantial governmental interest unrelated to the suppression of free expression.

2. Section 514 addresses a real harm.

The government’s asserted interest cannot be merely important in the abstract—the statute must be directed at a real, and not merely conjectural, harm. Thus, we must examine whether Section 514 was “designed to address a real harm, and whether [it] will alleviate [that harm] in a material way.” In undertaking this review, we “must accord substantial deference to the predictive judgments of Congress. Our sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.”

“[S]ubstantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency.” This deferential standard is warranted for two important reasons. First, Congress is “far better equipped” as an institution “to amass and evaluate the vast amounts of data bearing upon the legislative questions.” Second, we owe Congress “an additional measure of deference out of respect for its authority to exercise the legislative power.”

Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments . . . .

Additionally, the other branches’ judgments regarding foreign affairs warrant special deference from the courts. The Supreme Court has “consistently acknowledged that the nuances of the foreign policy of the United States are much more the province of the Executive Branch and Congress than of [the courts].” As such, we apply considerable deference to Congress and the
Executive in making decisions that require predictive judgments in the areas of foreign affairs.

To be clear, we do not suggest that Congress’s decisions regarding foreign affairs are entirely immune from the requirements of the First Amendment. Rather, we merely acknowledge that in undertaking our constitutional review of a content-neutral statute, Congress’s predictive judgments are entitled to “substantial deference,” and in this particular context, our review of Congress’s predictive judgments is further informed by the special deference that Congress and the Executive Branch deserve in matters of foreign affairs.

Turning to the issue at hand, prior to enacting Section 514 of the URAA, Congress heard testimony addressing the interests of American copyright holders. In particular, American works were unprotected in several foreign countries, to the detriment of the United States’ interests. By some estimates, billions of dollars were being lost each year because foreign countries were not providing copyright protections to American works that were in the public domain abroad.

Congress had substantial evidence from which it could reasonably conclude that the ongoing harms to American authors were real and not merely conjectural. Around the globe, American works were being exploited without the copyright owners’ consent and without providing compensation. Thus, there was a “substantial basis to support Congress’ conclusion that a real threat justified enactment of” Section 514 of the URAA.

3. Substantial evidence supported the conclusion that Section 514 would alleviate these harms.

Next, we must determine whether there was substantial evidence from which Congress could conclude that Section 514 would alleviate these harms to American copyright holders. At the Joint Hearings, Congress heard testimony that by refusing to restore copyrights in foreign works in the public domain, the United States was not in compliance with its obligations under the Berne Convention. In addition, the United States’ refusal to restore foreign copyrights was harming American authors’ interests abroad: foreign countries were following the United States’ example of refusing to restore copyrights in works in the public domain.

Further, the United States’ trading partners had represented that they would restore American copyrights only if the United States restored foreign copyrights. Foreign countries were willing to provide, at most, reciprocal copyright protections to American works. Moreover, the United States had an opportunity to set an example for copyright restoration for other countries. Thus, if the United States wanted certain protections for American authors, it had to provide those protections for foreign authors.

Plaintiffs aver that Congress was presented with evidence regarding the need to restore copyrights generally, but that there was no evidence that Congress needed to provide limited protections for reliance parties. According to plaintiffs, there is “no support for the conclusion that enacting more stringent measures against reliance parties . . . would have any impact whatsoever on the behavior of foreign countries.” To the
contrary, Congress heard testimony that the United States' chosen method and scope of copyright restoration would impact other nations that were similarly deciding how to restore copyrights.

In particular, Congress heard testimony that the United States could set an example regarding copyright restoration, and other countries might mirror the United States' approach. For example, Ira Shapiro, General Counsel of the Office of the United States Trade Representative, testified that "the choices made in our implementation of the TRIPs agreement will set an example for other countries as governments decide on their own implementing legislation as well as influence future disputes over the obligations of the Agreement." Additionally, Eric Smith, speaking on behalf of a consortium of trade associations whose members represented both American copyright industries and reliance parties, testified as follows:

The fact is that what the United States does in this area will carry great weight in the international community. If we interpret Article 18 and the TRIPS provisions to deny protection or significantly limit its scope, our trading partners—just now considering their own implementing legislation—will feel free to simply mirror our views. If the largest exporter of copyrighted material in the world takes the position that we have no, or only limited, obligations, the United States will have little credibility in convincing particularly the new nations with whom we are just starting copyright relations to give us the expansive protection that we need.

Joint Hearings at 247 (emphasis added).

Thus, Congress heard testimony from a number of witnesses that the United States' position on the scope of copyright restoration—which necessarily includes the enforcement against reliance parties—was critical to the United States' ability to obtain similar protections for American copyright holders.

Further, Congress squarely faced the need to balance the interests of American copyright holders and American reliance parties. In his opening remarks, Senator DeConcini stated:

The conventional wisdom within the U.S. copyright community is that through the restoration of copyright protection to foreign authors we will get more than we give because U.S. authors will be able to retrieve far more works in foreign countries than foreign authors will retrieve here in the United States.

... [I]f we set out to restore copyright protection to foreign works, we must provide protection that is complete and meaningful. By the same token, we must ensure that copyright restoration provides reliance users a sufficient opportunity to recoup their investment.

Id. at 81–82 (Statement of Sen. DeConcini). Congress also heard from Eric Smith, who testified that the bills under consideration would provide a careful balance between the need, on the one hand, to establish a "model" provision which other countries could follow in order to secure effective restoration of our copyrights abroad and the need, on
the other hand, to balance the rights of foreign authors whose works are restored in the U.S. with the domestic users that may have relied on the public domain status of the work in making investments.

Id. at 252.

In spite of this testimony, plaintiffs contend that the government’s interest is too speculative to satisfy intermediate scrutiny. Although we require “substantial evidence” in order to satisfy intermediate scrutiny, the evidentiary requirement is not as onerous as plaintiffs would have us impose. The Supreme Court has cautioned that imposing too strict of an evidentiary requirement on Congress is “an improper burden for courts to impose on the Legislative Branch.” An overly demanding “amount of detail is as unreasonable in the legislative context as it is constitutionally unwarranted. Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.”

“Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.” Past conduct may be the best—and sometimes only—evidence available to Congress in making predictive judgments. We think that this is especially true in areas that involve predictions of foreign relations and diplomacy, where empirical data will rarely be available, and to which considerable deference is owed to Congress and the Executive.

Plaintiffs direct our attention to evidence in the Congressional record that contradicted the view that other countries would follow the United States’ approach to copyright restoration. More specifically, Irwin Karp stated:

When these countries grant retroactivity, the theory goes, they will deny their reliance interests real protection—if we do so now. But this is only a theory, and an unlikely one. Most foreign countries, including the Commonwealth countries, already grant us retroactivity. They will not change their laws to restrict protection of their reliance parties. Nor will the few important countries who presently do not retroactively protect U.S. works [...] When they do grant retroactivity they can decide what protection they will grant to their reliance interests. There is nothing to stop them from adopting the British et al buy-out provision.

Joint Hearings at 231.

However, as detailed above, this was not the only evidence in the record regarding the potential effect of the United States’ position on copyright restoration. Congress also heard testimony that if it wanted foreign countries to provide strong protections for American authors, Congress needed to provide like protections for foreign authors.

Although Congress was presented with evidence that its position on copyright restoration might not guarantee reciprocation, it does not follow that Section 514 is unconstitutional. “The Constitution gives to Congress the role of weighing conflicting evidence in the legislative process.” Thus, we must determine “whether, given conflicting views . . . , Congress had substantial evidence for making the judgment that it did.” In other words, “[t]he question is not whether
Congress, as an objective matter, was correct to determine" that limited protections for reliance parties were "necessary" to garner similar protections from foreign countries. “Rather, the question is whether the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress.”

In making that determination, we are not to reweigh the evidence de novo, or to replace Congress’ factual predictions with our own. Rather, we are simply to determine if the standard is satisfied. If it is, summary judgment for [the government] is appropriate regardless of whether the evidence is in conflict.

Id. (internal quotations and citations omitted).

Considering the deference that Congress is owed, particularly in areas of foreign relations, we conclude that Congress’s judgments were supported by substantial evidence. The testimony before Congress indicated that the United States’ historically lax position on copyright restoration had been an obstacle to the protection that the United States was seeking for its own copyright owners. Witnesses further testified that many countries would provide no greater protections to American authors than the United States gave to their foreign counterparts. There was also testimony that the chosen method of restoring foreign copyrights would have great weight in the international community and could induce other countries to follow the United States’ lead, although Congress heard some testimony that other countries would not necessarily follow the United States’ approach. Consequently, Congress was presented with substantial evidence that Section 514 would advance the government’s interest in protecting American copyright holders “in a direct and effective way.” The United States’ ability to protect American works abroad would be achieved less effectively absent Section 514, and therefore, the government’s interest is genuinely advanced by restoring foreign copyrights with limited protections for reliance parties such as plaintiffs.

B. Section 514 does not burden substantially more speech than necessary.

Under intermediate scrutiny, we must also determine whether Section 514 is narrowly tailored to further the government’s interests. “Content-neutral regulations do not pose the same inherent dangers to free expression that content-based regulations do,” and therefore, the government has a degree of latitude in choosing how to further its asserted interest. Accordingly, “the [g]overnment may employ the means of its choosing so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation and does not burden substantially more speech than is necessary to further that interest.” Further, the regulation need not be the least-restrictive alternative of advancing the government’s interest.

1. Section 514 is narrowly tailored.

The “[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” “[T]he essence of narrow tailoring” is when a regulation “focuses on the source of the evils the [government] seeks to eliminate . . . without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils.” That is, when “the burden
imposed by [a regulation] is congruent to the benefits it affords," that regulation is narrowly tailored.

In the case at bar, the burdens imposed on the reliance parties are congruent with the benefits Section 514 affords American copyright holders. As discussed above, the government has a substantial interest in securing protections for American works in foreign countries. Further, Congress heard testimony that the United States could expect foreign countries to provide only as much protection to American copyright holders as the United States would provide to foreign copyright holders, and other countries might follow the United States' example. In other words, the United States needed to impose the same burden on American reliance parties that it sought to impose on foreign reliance parties. Thus, the benefit that the government sought to provide to American authors is congruent with the burden that Section 514 imposes on reliance parties. The burdens on speech are therefore directly focused to the harms that the government sought to alleviate: "This is the essence of narrow tailoring."

2. Alternatives do not undermine the narrow tailoring of Section 514.

Plaintiffs contend that "the Government could have complied with the Berne Convention while providing significantly stronger protection for the First Amendment interests of reliance parties like the Plaintiffs here." According to plaintiffs, Article 18 of the Berne Convention provides considerable discretion that allows the government to provide greater protections for reliance parties. The government responds that the Berne Convention requires only transitional protections for reliance parties.

The parties' arguments about what the Berne Convention requires and permits are beside the point. As discussed above, the government's interest is not limited to compliance with the Berne Convention. Rather, its interest includes securing protections for American copyright owners in foreign countries, which includes providing copyright protection against foreign reliance parties. Thus, it is immaterial whether, as plaintiffs contend, the government could have complied with the minimal obligations of the Berne Convention and granted stronger protections for American reliance parties. If Congress had provided stronger protections to American reliance parties such as plaintiffs, many foreign countries may have provided similar protections for their own reliance parties, thereby providing less protection for American authors. Thus, even assuming for purposes of this appeal that the United States could have provided stronger protections for American reliance parties while complying with the minimum requirements of the Berne Convention, Section 514 does not burden substantially more speech than necessary to further the government's interest.

Moreover, in concluding that Section 514 is not narrowly tailored, the district court and plaintiffs relied on other countries' approaches to implementing the Berne Convention, specifically, the United Kingdom model. However, we are not persuaded that the constitutionality of Section 514 is undermined by the availability of the United Kingdom model.

First, the "less restrictive-alternative analysis has never been a part of the inquiry into the validity of content-neutral regulations on speech." A statute must be "narrowly tailored to serve the government's legitimate, content-neutral interests," but it "need not be the least restrictive or least intrusive means of doing so." As long as the government does not burden substantially
more speech than necessary to advance an important interest, we will not invalidate a statute simply because "the government's interest could be adequately served by some less-speech-restrictive alternative."

Second, to the extent that the United Kingdom model is relevant to our inquiry, it is not such an obvious and substantially less-speech-restrictive alternative that it undermines the validity of Section 514. Although not necessary to the intermediate scrutiny analysis, the existence of less-speech-restrictive alternatives may be relevant to determining whether Section 514 is narrowly tailored. "The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." This is particularly true when such alternatives are obvious and restrict substantially less speech." We do not suggest that the existence of a less restrictive alternative is dispositive. "We merely recognize the reality that the existence of an obvious and substantially less restrictive means for advancing the desired government objective [may] indicate[ ] a lack of narrow tailoring."

With this in mind, we turn to plaintiffs' suggestion that there were less restrictive means of restoring foreign copyrights. Although no country has provided full, permanent exemptions for reliance parties, other countries have provided limited protections for reliance parties. The chief alternative discussed by plaintiffs and the district court is the United Kingdom model. See Golan, 611 F.Supp.2d at 1174 However, the United Kingdom model is not an obvious and substantially less restrictive alternative.

The United Kingdom model is not substantially less restrictive of speech than Section 514 of the URAA. In the United Kingdom, a copyright owner cannot enforce the copyright against a reliance party unless the owner "buys out" the reliance party. Under Section 514, a copyright owner cannot enforce the copyright against a reliance party unless the owner files notice with the Copyright Office or serves notice on a reliance party. Moreover, under Section 514, reliance parties have twelve months to continue exploiting the works, although they cannot continue to make copies of the restored work. Under the United Kingdom model, however, the reliance party's interests are immediately terminated upon buy-out. Thus, under both systems, reliance parties receive qualified protection insofar as a reliance party can continue to exploit a work until the copyright owner does something: either buy out the reliance party (United Kingdom model) or file notice (Section 514). Ultimately, both approaches provide the copyright owner with the ability to terminate the reliance party's interests. The only significant difference is that under the United Kingdom model, the reliance party receives compensation from the owner, while under Section 514, the reliance party has a twelve month grace period to continue exploiting the work.

Further, the United Kingdom model is not far more protective of speech interests of reliance parties who have created derivative works, such as the late plaintiff Kapp. Section 514 allows these reliance parties to continue to use a derivative work as long as they pay "reasonable compensation" to the copyright owner. The United Kingdom model, on the other hand, apparently provides no such protection for creators of
derivative works. In a sense, the two models are mirror images of each other. Under Section 514, a reliance party can continue to exploit a derivative work as long as he pays compensation to the owner of the original copyright. In the United Kingdom, an author of a derivative work can continue to exploit the new work until the owner pays compensation to the reliance party.

We cannot say that one approach is clearly more protective of speech interests than the other. Although the United Kingdom model is arguably more protective of reliance parties’ economic interests, we cannot say that it is substantially more protective of reliance parties’ expressive interests. Moreover, even if the United Kingdom model is marginally more protective of speech interests,

when evaluating a content-neutral regulation which incidentally burdens speech, we will not invalidate the preferred remedial scheme because some alternative solution is marginally less intrusive on a speaker’s First Amendment interests. So long as the means chosen are not substantially broader than necessary to achieve the government’s interest, the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.

*Turner II*, 520 U.S. at 217–18, 117 S.Ct. 1174. (internal citations, quotations, and ellipses omitted).

At its core, plaintiffs’ challenge to Section 514 “reflect[s] little more than disagreement over the level of protection” that reliance parties should receive. Congress sought to balance the interests between American copyright holders and American reliance parties. In so doing, Congress crafted a nuanced statute that offered some protections for both of these competing interests. It is not our role to opine on the best method of striking this balance. A statute’s “validity does not turn on a [court’s] agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.” Plaintiffs may have preferred a different method of restoring copyrights in foreign works, but that is not what the Constitution requires; as long as the government has not burdened substantially more speech than necessary to further an important interest, the First Amendment does not permit us to second guess Congress’s legislative choice. “We cannot displace Congress’ judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination.”

We conclude that because Section 514 advances a substantial government interest, and it does not burden substantially more speech than necessary to advance that interest, it is consistent with the First Amendment. Accordingly, the district court erred in ruling that Section 514 violates plaintiffs’ freedom of expression.

**IV. Plaintiffs’ Cross-Appeal**

Plaintiffs have cross-appealed, arguing that Section 514 is unconstitutional on its face. More specifically, “[p]laintiffs contend that removing works from the public domain of copyright (as distinct from patents) is an illegitimate means regardless of the end or the importance of the interest.” Facial challenges to statutes are generally
disfavored as “[f]acial invalidation is, manifestly, strong medicine that has been employed by the [Supreme] Court sparingly and only as a last resort.” As such, plaintiffs bear a “heavy burden” in raising a facial constitutional challenge. They have not met this burden, as their arguments on appeal are largely foreclosed by our conclusion that Section 514 does not violate their freedom of expression, as well as by our previous decision in Golan I, which we are not free to revisit, as law of the case.

Plaintiffs assert that “there must be a ‘bright line’ drawn around the public domain . . . .” But in Golan I, we rejected plaintiffs’ argument “that, in the context of copyright, the public domain is a threshold that Congress may not traverse in both directions.” Golan I, 501 F.3d at 1187 (quotation omitted). We stated that

[The clear import of Eldred is that Congress has expansive powers when it legislates under the Copyright Clause, and this court may not interfere so long as Congress has rationally exercised its authority. Here, we do not believe that the decision to comply with the Berne Convention, which secures copyright protections for American works abroad, is so irrational or so unrelated to the aims of the Copyright Clause that it exceeds the reach of congressional power.]

Id. (internal citation omitted).

We held that Section 514 was within Congress’s Article I powers, and therefore, Congress had the authority to extend copyright to works that were in the public domain.

Of course, while Congress may have the authority under Article I to enact Section 514, it “must still comport with other express limitations of the Constitution.” Plaintiffs have cast their facial challenge to Section 514 in terms of “the First Amendment, the contours of which may be informed by the Progress [or Copyright] Clause.” However, plaintiffs have provided no legal support for their claim that the First Amendment—either by itself or informed by any other provision of the Constitution—draws such absolute, bright lines around the public domain, and we are aware of no such authority.

Plaintiffs’ only legal authority is Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), but their reliance on Bolling is without merit. In Bolling, the Supreme Court announced that “[s]egregation in public education [w]as not reasonably related to any proper governmental objective” and held “that racial segregation in the public schools of the District of Columbia [w]as a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.” The Due Process analysis in Bolling does not inform plaintiffs’ argument that the First Amendment makes the public domain of copyright absolutely inviolable. Instead, the First Amendment places the same restrictions on copyright restoration under Section 514 that it imposes on all other content-neutral regulations of speech.

In sum, Congress acted within its authority under the Copyright Clause in enacting Section 514. Further, Section 514 does not violate plaintiffs’ freedom of speech under the First Amendment because it advances an important governmental interest, and it is not substantially broader than necessary to advance that interest. Accordingly, we REVERSE the judgment of the district court and REMAND with instructions to grant summary judgment in favor of the government.
Does Congress have the power to "restore" copyright protection to public domain works? The U.S. Supreme Court will shortly consider the question in *Golan v. Holder*, the first case since *Eldred v. Ashcroft* to address the constitutional limits on Congress' power to expand copyright protection.

At issue is § 514 of the Uruguay Round Agreements Act, which granted copyright protection to certain works by foreign authors that, for a variety of reasons, had entered the public domain. As a result, public domain works potentially numbering in the millions—including Prokofiev's *Peter and the Wolf*, literature by Maxim Gorky, paintings by Picasso and music by Stravinsky, for example—were newly eligible for copyright protection. If the copyright owner decides to enforce its rights, those using or planning to use the works must either pay hefty license fees or cease use of the works. The law includes some protections for existing users, such as providing immunity for prerestoration uses and a one-year grace period.

The appellants are Lawrence Golan, a symphony conductor whose orchestra performs a wide variety of public domain works, and S.A. Publishing and Ron Hall, who publish and distribute public domain compositions and feature films. They argue that removing works from the public domain inserts potentially paralyzing uncertainty to the system and harms the public’s First Amendment rights to receive and share information. For its part, the government defends the law as a reasonable means of complying with U.S. treaty obligations.

The case has had a somewhat tortured history: In April 2005, the U.S. District Court for the District of Colorado rejected Golan's speech arguments as misplaced because "private censorship via copyright enforcement does not implicate First Amendment concerns." On appeal, the U.S. Court of Appeals for the 10th U.S. Circuit Court of Appeals held that, while Congress had not exceeded its authority under the copyright clause, § 514 did implicate First Amendment interests. Specifically, the court found that, after *Eldred*, copyright legislation is subject to First Amendment review if it alters the "traditional contours" of copyright protection and that the "bedrock principle of copyright law that works in the public domain remain there" means that removing works from the public domain calls for First Amendment scrutiny.

On remand, the District of Colorado invalidated the statute, holding that it was not sufficiently related to a significant government interest. This time, the government appealed, and won: Also applying intermediate scrutiny, the 10th Circuit found the law narrowly tailored to the government’s "substantial interest in protecting American copyright holders' interests abroad" because restoring protections for foreign works might induce other nations to provide reciprocal protections for American authors.
The Supreme Court has certified two questions for consideration: (1) Does the Constitution's progress clause prohibit Congress from taking works out of the public domain? And (2) does § 514 violate the First Amendment?

For the appellants, the answer is yes on both counts. In their petition for certiorari, the appellants argued that the progress clause, in particular the requirement that copyright protection be time-limited, embodies the central purpose of copyright: to encourage the public release, dissemination and use of creative works. During oral arguments in *Eldred v. Ashcroft*, the government's own lawyer suggested there was a "bright line" around works that had already entered the public domain. Section 514, the appellants contend, impermissibly transforms a "bright line" into a slippery slope:

"The Tenth Circuit's decision . . . invites Congress to restore copyright in Public Domain works any time there is an important interest in doing so. Yet reducing the federal deficit, demonstrating good will to a foreign nation or helping an aging museum would all appear to be sufficient reasons, by the Government's account, to give away pieces of the Public Domain."

Appellants' petition at 11.

Moreover, the appellants argue, Congress impermissibly sacrificed public speech rights—the vested interest in public domain works—to create private economic windfalls for foreign authors. The appellants can no longer freely express themselves, e.g., perform various works formerly in the public domain, or distribute certain films. More broadly, they argue, the public domain is a kind of cultural commons that provides the building blocks for all kinds of speech. Thus, any interference with its contents must impinge on free speech interests. That interference cannot be justified by mere speculation that it might lead to greater protections for American authors abroad.

Indeed, the appellants note that even if American authors do receive reciprocal rights, the usual public-benefit theory for copyright protection—that granting economic benefits to authors encourages the creation of new works—does not apply because the "windfall" in question would apply only to the authors of works created decades ago. Thus, § 514 cannot, by definition, benefit the public by encouraging the creation of new works.

The government, of course, has another view. With respect to the copyright clause's reference to "limited times," the government argues that § 514 is perfectly consistent: Protection ends when it would have anyway if the author had complied with appropriate formalities. Moreover, removal of works from the public domain is not unprecedented; in fact, it has occurred several times, beginning with the first U.S. Copyright Act in 1790. And, following *Eldred*, the Court should accept Congress' determination that § 514 would ultimately help American authors obtain rewards for their creative efforts, in keeping with the economic philosophy behind the copyright clause.

As for the alleged effects on speech, the government argues that the number of works affected is relatively small, and that nothing forbids secondary users from using the works subject to reasonable compensation or, when appropriate, making fair use of them. At the same time, § 514 was intended to accomplish not one, but three important government interests: to "ensure indisputable compliance" with the United States' obligations under the Berne
Convention; to encourage other countries to restore the rights of American authors abroad; and to remedy what it views as the inequitable treatment of foreign authors who lost U.S. copyright protection based on prior laws.

Again, the government stresses, the courts should not second-guess Congress' judgment as to the best way for the United States to comply with its international commitments.

In its opposition to the petition for certiorari, the government also contended that the law should never have been subjected to First Amendment scrutiny because it did not alter copyright law's traditional First Amendment safeguards: the idea/expression dichotomy and the doctrine of fair use.

The Court's ruling may have profound consequences, both legally and practically. First, the Court is likely to provide additional guidance as to when and how Congress may tinker with copyright law. Second, if the Court approves § 514, it may send a chilling message to the myriad individuals and institutions that reproduce and distribute public domain works, from orchestras and publishers to libraries and other archives.

For example, libraries seeking to provide online access to their collections need reliable conclusions as to whether those collections are in the public domain. Libraries follow a statutory exception that allows them to lend out material that may be covered by valid copyright. 17 U.S.C. 108. However, it is not always clear that this exception applies to digitally preserving and providing access to some materials, leaving libraries and archives at potential risk when they provide access to digital materials for which they do not have explicit rights or about which they are not certain as to the materials' public domain status.

Amicus filers in support of the appellants argue that a stable public domain helps librarians to do the crucial work of preserving and promoting access to the cultural commons. They point out that new technologies are spurring that progress by allowing libraries and other archivists to make more works more accessible to more people than ever before, and they warn that newly unstable public domain would inhibit such development.

For copyright lawyers, librarians or the many musicians, artists, writers, publishers and/or readers who use public domain works, this case will be one to watch.
Supreme Court arguments often concern not just the narrow issue in the case but also the implications of a ruling. You sometimes catch the justices squinting, trying to see over the legal horizon.

Nine years ago, for instance, the court heard arguments in a case about whether Congress was free to add 20 years of copyright protection for works that had not yet entered the public domain.

Several justices asked about a different and even tougher question: Was Congress also free to restore copyright protection to works that had entered the public domain and become public property?

"If Congress tomorrow wants to give a copyright to a publisher solely for the purpose of publishing and disseminating Ben Jonson, Shakespeare, it can do it?" Justice Stephen G. Breyer asked a lawyer for the government.

"It may," said the lawyer, Theodore B. Olson, who was United States solicitor general at the time. But he did not sound too sure.

A little later, Justice David H. Souter pressed Mr. Olson on the same point and elicited the concession that restoring a copyright presented a much harder case.

"There is a bright line there" for "something that has already gone into the public domain," Mr. Olson said.

Justice Souter seemed satisfied. "If you don't throw out a line there," he said, "then Ben Jonson certainly gets recopyrighted."

The court ended up ruling, by a 7-to-2 vote in 2003 in *Eldred v. Ashcroft*, that extensions for works still under copyright are allowed.

This month, the court agreed to hear a case on the question Justices Breyer and Souter anticipated, one that will test whether there is indeed a constitutional line Congress may not cross when it comes to the public domain.

The new case asks whether Congress acted constitutionally in 1994 by restoring copyrights in foreign works that had belonged to the public, including films by Alfred Hitchcock and Federico Fellini, books by C. S. Lewis and Virginia Woolf, symphonies by Prokofiev and Stravinsky and paintings by Picasso, including "Guernica."

"The works that qualify for copyright restoration probably number in the millions," Marybeth Peters, the United States register of copyrights, said in 1996.

The plaintiffs in the new case, Golan v. Holder, are orchestra conductors, teachers and film archivists who say they had relied for years on the free availability of works in the public domain that they had performed, adapted and distributed.
The 1994 law, they told the justices, "did something unprecedented in the history of American intellectual property law and constitutionally profound."

Lawrence Golan, the lead plaintiff, teaches conducting at the University of Denver and is the music director and conductor of the Yakima Symphony Orchestra in Washington State. He said the 1994 law made it very difficult for smaller orchestras to play some seminal 20th-century works that had once been a standard part of their repertoires.

"Once you own a Beethoven symphony, you own it till it falls apart," he said. "That used to be the case with Stravinsky, Shostakovich and Prokofiev. Now an orchestra that wants to play, say, Shostakovich's Fifth has to rent it for $800 for one performance."

He said he had no quarrel with providing financial incentives to people who create art. "Obviously, current composers need to be encouraged to create their works, and they should be getting royalties," Mr. Golan said.

But he said withdrawing works from the public domain did great harm to the cultural life of small communities for no good reason.

That analysis, Mr. Golan's lawyers say, is consistent with the constitutional balance between property and speech. The Constitution authorizes Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

In other words, said Anthony T. Falzone of the Stanford Law School Center for Internet and Society, which represents the plaintiffs, the Constitution meant to create incentives, not monopolies. "The whole point wasn't to protect stuff," he said. "It was to encourage people to make stuff, and everybody's lost sight of that."

The government counters that nothing in the 1994 law did damage to the constitutional structure or to free speech rights.

The government adds that the 1994 law applies to foreign works "previously ineligible for protection or whose authors were unfamiliar with the technicalities of United States law." Every work brought back into copyright protection, the government says, "expires on the same day as if the work had been protected since its creation."

The federal appeals court in Denver, in upholding the law, said there were important First Amendment interests at stake on both sides. It concluded that there was reason to think that American authors and artists would be better off abroad if foreign authors and artists received expanded copyright protection here.

That economic calculation rankled Mr. Falzone. "You're selling public property," he said. "Congress literally took the public's property and handed it over to foreign copyright owners."
When Lawrence Golan picks up his baton here at the University of Denver, the musicians in his student orchestra see a genial conductor who corrects their mistakes without raising his voice in frustration.

Yet Mr. Golan is frustrated, not with the musicians, but with a copyright law that does them harm. For 10 years, the music professor has been quietly waging a legal campaign to overturn the statute, which makes it impossibly expensive for smaller orchestras to play certain pieces of music.

Now the case is heading to the U.S. Supreme Court. The high-stakes copyright showdown affects far more than sheet music. The outcome will touch a broad swath of academe for years to come, dictating what materials scholars can use in books and courses without jumping through legal hoops. The law Mr. Golan is trying to overturn has also hobbled libraries’ efforts to digitize and share books, films, and music.

The conductor’s fight centers on the concept of the public domain, which scholars depend on for teaching and research. When a work enters the public domain, anyone can quote from it, copy it, share it, or republish it without seeking permission or paying royalties.

The dispute that led to Golan v. Holder dates to 1994, when Congress passed a law that moved vast amounts of material from the public domain back behind the firewall of copyright protection. For conductors like Mr. Golan, that step limited access to canonical 20th-century Russian pieces that had been freely played for years.

“It was a shocking change,” Mr. Golan says over dinner at a tacos-and-margaritas dive near the University of Denver’s mountain-framed campus. “You used to be able to buy Prokofiev, Shostakovitch, Stravinsky. All of a sudden, on one day, you couldn’t anymore.”

Other works once available but now restricted include books by H.G. Wells, Virginia Woolf, and C.S. Lewis; films by Alfred Hitchcock, Federico Fellini, and Jean Renoir; and artwork by M.C. Escher and Pablo Picasso. The U.S. Copyright Office estimated that the works qualifying for copyright restoration “probably number in the millions.”

Congress approved the recopyrighting, limited to foreign works, to align U.S. policy with an international copyright treaty. But the Golan plaintiffs—a group that includes educators, performers, and film archivists—argue that bigger principles are at stake. Does Congress have the constitutional right to remove works from the public domain? And if it does, what’s stopping it from plucking out even more freely available works?

“If you can’t rely on the status of something in the public domain today—that is, if you never know whether Congress is going to act again and yank it out—you’re going to be a lot more cautious about doing anything with these materials,” says Mr. Golan’s lawyer, Anthony Falzone, executive director.
of the Fair Use Project and a lecturer in law at Stanford Law School. "You really destroy the value and the usefulness of the public domain in a profound way if the rug can be pulled out from under you at any time."

The Radicalization of Golan

Before the rug was yanked out from under him, Mr. Golan had no experience as an activist. He still doesn't seem like one. Outside the orchestra pit, the conductor could pass for an off-duty businessman: trim build, clean-cut dark hair, slacks, waist-length tan jacket. The tenured professor has taught conducting and led the 80-student Lamont Symphony Orchestra at this private university since 2001. Yet he has done little to publicize his cause on campus, at least judging from the reactions of others in the music school one recent evening as the halls buzzed with costumed nuns rehearsing Puccini's Suor Angelica.

"No!" said one professor after hearing that Mr. Golan's case was going to Washington. "Are you making it up?" asked another.

Mr. Golan keeps a low profile as a plaintiff because his life is about music, not litigation. "I would love to have my name go down in history like Arturo Toscanini, for being the greatest conductor of all time," he says.

But because his quest for that glory coincides with a broad shift in the reach of copyright law, he has a better shot at going down in history as the capitalized name atop a Supreme Court opinion studied by future generations of law students.

The son of a violinist in the Chicago Symphony Orchestra, Mr. Golan was just starting his own professional career when Congress passed the copyright restoration.

The change was surprising from a philosophical point of view: Under copyright law, the Constitution grants authors a limited monopoly over their works as an incentive to promote creativity. Over the years, Congress has often delayed the passage of works into the public domain by lengthening the duration of copyright terms. But removing pieces already there was different, Mr. Golan's lawyers argue, a radical change in what one scholar describes as the basic "physics" of the public domain. That may sound abstract, but the impact on Mr. Golan was direct. When a work is in the public domain—that Puccini opera, say—an orchestra can buy the sheet music. Symphonies typically cost about $150. And the orchestra can keep those pages forever, preserving the instructions that librarians laboriously pencil into scores. But works under copyright are typically available only for rent. And the cost is significantly higher: about $600 for one performance. With the flip of a switch, the new law restored copyright to thousands of pieces.

For big-city orchestras like the New York Philharmonic, that change is like a "mosquito bite," Mr. Golan says. But Mr. Golan's university ensemble gets only about $4,000 to rent and buy music each year. That means it can perform some copyrighted works but must rely on the public domain for about 80 percent of its repertoire. And $4,000 is relatively generous. Other colleges might have only $500 to spend on music. When the Conductors Guild surveyed its 1,600 members, 70 percent of respondents said they were now priced out of performing pieces previously in the public domain.

Teaching suffers, too. Every year, for example, University of Denver students
compete for the honor of playing a concerto, a piece in which the orchestra accompanies a solo instrument. But when a pianist wanted to audition with a piano concerto by Prokofiev, a Russian composer who died in 1953, Mr. Golan was forced to tell her no.

“It’s one that any aspiring pianist needs to learn, and to have the experience of actually playing it with orchestra is phenomenal,” Mr. Golan says. But “we just didn’t have the money in the orchestra budget to pay the rental price.”

The problem soon got worse. In 1998, after lobbying by entertainment groups like the Walt Disney Company, Congress passed another law, extending copyrights by 20 years. This Copyright Term Extension Act—mocked by critics as the Mickey Mouse Protection Act—meant that a work would not enter the public domain until up to 70 years after its creator’s death.

That legal one-two punch made it hard for Mr. Golan to play both foreign and American works, like Gershwin’s Rhapsody in Blue.

In response to those changes, reform-minded academics at top law schools fought back with multiple lawsuits challenging the constitutionality of the statutes. The conductor’s tale made him an ideal poster child for their war to protect the public domain.

Reformers suffered a defeat in 2003, when the Supreme Court rejected an online book publisher’s challenge of the 20-year extension. In that case, Eldred v. Ashcroft, the court found the change acceptable in part because it had not “altered the traditional contours of copyright protection.”

Think of the Golan case as “Eldred, the Sequel.” Only this time the question isn’t whether Congress can delay works from entering the public domain. It’s whether removing works already there is a “bright line” Congress can’t cross.

‘Fairly Horrible’

If that bright line dims, scholars and librarians will have problems. To understand why, consider the copyright confusion faced by Elizabeth Townsend-Gard.

Ms. Townsend-Gard is an associate professor at Tulane University Law School. As a graduate student in the 1990s, she studied history at the University of California at Los Angeles. Her dissertation was a biography of Vera Brittain, a British author known for her World War I autobiography, Testament of Youth. Ms. Townsend-Gard mined letters, diaries, photos, and other texts for her research. But she worried about getting permission to publish materials she needed, because Ms. Brittain’s literary executor, too, was writing a biography of the author.

In 1996 the ground shifted under Ms. Townsend-Gard’s feet. At the outset of her research, almost all the works she needed had been in the public domain. When she finished, because of the restoration now under attack by Mr. Golan, almost all those works were under copyright.

She ultimately diversified her project so that it became a comparative biography of many subjects rather than just one. But she also grew fascinated with the copyright complexities surrounding the daily work of historians. Ms. Townsend-Gard ended up going to law school after finishing her
Ph.D., and invented a software tool, called the Durationator, designed to tell users the copyright status of any work.

The market of scholars who might need that tool is large. The law at stake in Golan alone potentially affects anyone studying works created or published by non-U.S. authors or publishers from 1923 to 1989. Most of those materials were in the public domain before. Now they are covered by a complicated copyright statute, says Ms. Townsend-Gard.

“For people who work on the 20th century, it’s fairly horrible,” she says.

Now pull back from the view of an individual scholar, and imagine you are working on one of the numerous projects to make millions of digital books available online. Libraries, archives, Google: Copyright restoration has big consequences for their digitization efforts. Most of those ventures will not publish the full texts of works online unless they are clearly in the public domain in the United States.

But when it comes to a foreign book, figuring out its copyright status can require a mammoth investigation. That’s because a work must have been under copyright in its home country to qualify for restoration in the United States, says Kenneth D. Crews, director of the copyright advisory office at Columbia University Libraries. So, for example, when Columbia considers digitizing a rare trove of Chinese books, including many from the 1920s and 1930s of great interest to scholars, its staff must grasp the legal nuances of a country that has gone through a revolution—and a transformation of copyright law—since the books were published. Or must try to, anyway.

And if the law is unclear, the university must decide whether digitization is worth risking a potentially expensive lawsuit should a rights-holder turn up later.

“It’s deterring digitization on anything foreign,” Ms. Townsend-Gard says, “because people can’t figure it out.”

The U.S. Court of Appeals for the 10th Circuit took a different view. In a 2010 ruling backing the government, it stressed the argument that recopyrighting foreign works that had fallen into our public domain was crucial to protecting American authors’ interests abroad. Our restoration of those copyrights could drive other countries to grant retroactive copyrights to contemporary American works that had fallen into their public domains.

And big money is at stake. The court quoted Congressional testimony from the mid-1990s in which a group representing publishers, record companies, and other copyright-based industries estimated that billions were being lost each year because foreign countries were failing to provide copyright protections to U.S.-originated works. The recording industry told lawmakers that there were “vastly more U.S. works currently unprotected in foreign markets than foreign ones here.”

The government, in its Supreme Court brief, pointed out that the copyright restorations were limited in scope. They applied to foreign works whose creators weren’t familiar with U.S. copyright procedures, for example. Other works restored were previously ineligible for protection.

The Supreme Court is expected to decide the case during the term that begins in October. Mr. Golan hopes to be in Washington to watch. Unless, that is, he has a concert to conduct.
A major victory for copyright owners was rendered today by the Tenth Circuit U.S. Court of Appeals in *Golan v. Holder*, in which Reed Elsevier participated in a friend-of-court brief supporting the US Government.

The case involved the constitutionality of Section 514 of the Uruguay Round Agreements Act ("URAA") (codified as amended at 17 U.S.C. §§ 104A, 109) a federal statute restoring copyright to works of other treaty partners that were still in copyright in their countries of origin but had fallen into the public domain in the United States. The plaintiffs challenged the constitutionality of the law as a restriction on free speech, asserting that the law should be subjected to a "strict standard" or review, that compliance with the Berne Convention was an insufficiently important public purpose to justify the restraints on their use of the foreign works at issue, and, most importantly, that the public domain was a form of Constitutional sanctuary from which works could not be removed once they had entered it.

Originally the District Court rejected the Constitutional challenge, but on appeal the Tenth Circuit reversed and remanded to the District Court to consider the free speech (First Amendment) issue. The District Court then dutifully ruled the statute unconstitutional as violative of the First Amendment. This time, the Tenth Circuit reversed the second ruling and upheld the statute. For US copyright owners, the most significant points of the decision are:

Compliance with the Berne Convention is a "substantial" government interest.

In balancing the free speech equities, "Copyright also serves authors' First Amendment interests." The free speech argument is not a one-way street.

The "inviolable" public domain argument was squarely rejected: "[P]laintiffs have provided no legal support for their claim that the First Amendment—either by itself or informed by any other provision of the Constitution—draws such absolute, bright lines around the public domain, and we are aware of no such authority."

The Tenth Circuit did not confront the Supreme Court's language in *Eldred v. Ashcroft* that copyright law does not conflict with the First Amendment so long as the "traditional contours of copyright," are preserved, language with the some academics have interpreted as prohibiting an material change from the structure of copyright in the 1790's including, for example, the elimination of formalities under the Berne Convention, but finessed the issue as follows: "We note that copyright includes several "built-in" First Amendment protections. *Eldred*, 537 U.S. at 219-20. The idea/expression dichotomy ensures that only particular expressions, and not ideas themselves, are subject to copyright protection. *Id.* Additionally, the fair use
defense allows individuals to use expressions contained in a copyrighted work under certain circumstances, including "criticism, comment, news reporting, teaching... scholarship, or research... and even for parody." Id. (quotations and citation omitted). Section 514 does not disturb these, traditional, built-in protections [emphasis supplied], and thus, such protected speech remains unburdened."
Plaintiff Cheryl Perich was a ‘called’ teacher at defendant Hosanna-Tabor, a religiously affiliated school, until academic year 2004-2005 when she went on disability and was diagnosed with narcolepsy. Her duties as a teacher included teaching secular subjects using secular materials and approximately forty-five minutes of religious activities each day. Halfway through academic year 2004-2005, Perich was medically cleared to return to work. Perich attempted to do so but was informed her position had been filled by a substitute the school had contracted with through the end of the year. Perich refused to leave the building until she was given a letter indicating she had appeared for work. The school offered her a deal whereby she would resign her call and they would pay a portion of her insurance premiums through December of 2005. Perich refused this deal and was eventually terminated. The school cited disruptive behavior and characterized Perich’s conduct as regrettable. Perich filed a complaint with the EEOC under the ADA and the EEOC filed suit against Hosanna-Tabor on her behalf, alleging discrimination and retaliation. The District Court awarded summary judgment to Hosanna-Tabor, holding that Perich’s duties placed her under the ministerial exception of the ADA. On appeal, the 6th Circuit vacated and remanded, applying a primary duties test and finding that Perich’s duties were primarily secular and thus the ministerial exception did not apply.

Question Presented: Whether the ministerial exception, which prohibits most employment-related lawsuits against religious organizations by employees performing religious functions, applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.
with Disabilities Act of 1990, 42 U.S.C. § 12117(a) (the “ADA”). For the reasons set forth below, we VACATE the district court’s order and REMAND the case for further proceedings consistent with this opinion.

BACKGROUND

This case arises out of Perich’s employment relationship with Hosanna-Tabor, which terminated Perich from her teaching position on April 11, 2005. Hosanna-Tabor, an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod (the “LCMS”), operates a church and school in Redford, Michigan. The school teaches kindergarten through eighth grades. The faculty consists of two types of teachers: (1) “lay” or “contract” teachers, and (2) “called” teachers. Contract teachers are hired by the Board of Education for one-year renewable terms of employment. Called teachers are hired by the voting members of the Hosanna-Tabor church congregation upon the recommendation of the Board of Education, Board of Elders, and Board of Directors. Called teachers are hired on an open-ended basis and cannot be summarily dismissed without cause. They can also apply for a housing allowance on their income taxes provided that they are conducting activities “in the exercise of the ministry.”

To be eligible for a “call,” a teacher must complete the colloquy classes required by the LCMS, which focus on various aspects of the Christian faith. After completing the colloquy, a teacher receives a certificate of admission into the teaching ministry, and the Michigan District of the LCMS places the teacher’s name on a list that can be accessed by schools that need teachers. Once selected by a congregation, a called teacher receives the title of “commissioned minister.”

In July 1999, Hosanna-Tabor hired Perich as a contract teacher to teach kindergarten on a one year contract from August 15, 1999 to June 15, 2000. After Perich completed the required colloquy classes at Concordia College in February 2000, Hosanna-Tabor hired Perich as a called teacher on March 29, 2000. Perich continued teaching kindergarten until the end of the 2002-2003 year. She taught fourth grade during the 2003-2004 school year, and she was assigned to teach third and fourth grades for the 2004-2005 school year. From the time she was hired as a called teacher until her termination, Perich was listed as a commissioned minister in the LCMS. At least once during her tenure, Perich claimed the housing allowance on her income taxes.

After Perich was hired as a called teacher, her employment duties remained identical to the duties she performed as a contract teacher. Perich taught math, language arts, social studies, science, gym, art, and music. Language arts instruction included reading, English, spelling, and handwriting. Music instruction included secular music theory and playing the recorder, using the same music book as the local public school. During the 2003-2004 school year, Perich taught computer training as well.

Perich also taught a religion class four days per week for thirty minutes, and she attended a chapel service with her class once a week for thirty minutes. Approximately twice a year, Perich led the chapel service in rotation with other teachers. Perich also led each class in prayer three times a day for a total of approximately five or six minutes. During her final year at Hosanna-Tabor, Perich’s fourth grade class engaged in a devotional for five to ten minutes each morning. In all, activities devoted to religion consumed approximately forty-five minutes of the seven hour school day.
Hosanna-Tabor's website indicates that the school provides a “Christ-centered education” that helps parents by “reinforcing bible principals [sic] and standards.” Hosanna-Tabor describes its staff members as “fine Christian role models who integrate faith into all subjects.” Perich valued the freedom a sectarian school afforded to “bring God into every subject taught in the classroom.” However, Perich taught secular subjects using secular textbooks commonly used in public schools, and she can only recall two instances in her career when she introduced religion into secular subjects.

Furthermore, Hosanna-Tabor does not require teachers to be called or even Lutheran. Non-Lutheran teachers have identical responsibilities as Lutheran teachers, including teaching religion classes and leading chapel service. Members of the custodial staff and at least one teacher who worked at Hosanna-Tabor were not Lutheran.

At a church golf outing in June 2004, Perich suddenly became ill and was taken to the hospital. She underwent a series of medical tests to determine the cause. Perich’s doctors had not reached a definitive diagnosis by August, and Hosanna-Tabor administrators suggested that Perich apply for a disability leave of absence for the 2004-2005 school year. The principal of Hosanna-Tabor, Stacy Hoeft, informed Perich that she would “still have a job with [Hosanna-Tabor]” when she regained her health. Perich agreed to take a disability leave and did not return to work at the beginning of the 2004-2005 school year. Throughout her leave, Perich regularly provided Hoeft with updates about her condition and progress.

On December 16, 2004, Perich informed Hoeft by email that her doctor had confirmed a diagnosis of narcolepsy and that she would be able to return to work in two to three months once she was stabilized on medication. On January 19, 2005, Hoeft asked Perich to begin considering and discussing with her doctor what she might be able to do upon return. Perich responded the same day that she had discussed her work day and teaching responsibilities with her doctor, and he had assured her that she would be fully functional with the assistance of medication. Perich reiterated this sentiment with additional explanation on January 21, 2005.

Also on January 21, 2005, Hoeft informed Perich that the school board intended to amend the employee handbook to request that employees on disability for more than six months resign their calls to allow Hosanna-Tabor to responsibly fill their positions. Such resignations would not necessarily prevent reinstatement of these employees’ calls upon their return to health. Perich had been on disability for more than five months when she received this email.

On January 27, 2005, Perich wrote to Hoeft that she would be able to return to work between February 14 and February 28, 2005. Hoeft responded with surprise, because Perich had indicated a few days before that she had been unable to complete her disability forms because of her condition. Hoeft expressed concern that Perich’s condition would jeopardize the safety of the students in her care. Hoeft also indicated that Perich would not be teaching the third and fourth grades upon return, because the substitute teacher had a contract that ran through the end of the school year. Furthermore, she indicated that the third and fourth grade students had already had two teachers that year and having a third would not provide a good learning environment for them.

Three days later, at the annual congregational "shareholder" meeting, Hoeft
and the school board expressed their opinion that it was unlikely that Perich would be physically capable of returning to work that school year or the next. Consequently, the congregation adopted the Board's proposal to request that Perich accept a peaceful release agreement wherein Perich would resign her call in exchange for the congregation paying for a portion of her health insurance premiums through December 2005. On February 7, 2005, the Board selected Chairman Scott Salo to discuss this proposal with Perich.

On February 8, 2005, Perich's doctor gave her a written release to return to work without restrictions on February 22, 2005. The next day Salo contacted Perich to discuss her employment. Perich instead requested to meet with the entire school board. At the meeting on February 13, 2005, the Board presented the peaceful release proposal, and Perich responded by presenting her work release note. The Board continued to express concerns about Perich's ability to supervise students for the entire day. Perich explained that, as of her doctor's release on February 22, 2005, she would no longer be eligible for disability coverage and would be required to return to work. The Board, however, continued to request that Perich resign and asked her to respond to the peaceful release proposal by February 21, 2005.

Shortly after 9:00 p.m. on February 21, 2005, Perich emailed Hoeft to confirm that she had decided not to resign from her position and that she planned to return to work in the morning. When Perich reported to work on February 22, 2005, the school did not have a job for her. Because the school handbook states that failure to return to work on the first day following the expiration of an approved medical leave may be considered a voluntary termination, Perich refused to leave school grounds until she received a letter acknowledging that she appeared for work. Perich received a letter signed by Hoeft and Salo, which said that Perich had provided improper notification of her return to work and asked that she continue her leave to allow the congregation a chance to develop a possible plan for her return. Perich took the letter and left the premises.

Later that day, Perich spoke with Hoeft over the phone. Hoeft told Perich that she would likely be fired, and Perich told Hoeft that she would assert her legal rights against discrimination if they were unable to reach a compromise. Perich asked Hoeft to transmit that information to the Board. Perich also sent Hoeft an email stating that her doctor had reaffirmed that she was healthy and ready to return to work. Following the Board's meeting on February 22, 2005, Salo sent Perich a letter describing Perich's conduct as "regrettable" and indicating that the Board would review the process of rescinding her call based on her disruptive behavior.

On March 19, 2005, Salo sent Perich a follow-up letter stating that, based on Perich's insubordination and disruptive behavior on February 22, 2005, the Board would request rescinding Perich's call at the next voter's meeting on April 10, 2005. The letter also stated that Perich had "damaged, beyond repair" her working relationship with Hosanna-Tabor by "threatening to take legal action," and it laid out the voting procedure by which the congregation could depose a called minister. Finally, the letter again proposed the peaceful release offer and gave Perich until April 8, 2005 to accept the offer.

On March 21, 2005, Perich's lawyer sent a letter to Hosanna-Tabor's lawyer stating that Hosanna-Tabor's actions amounted to unlawful discrimination. The letter asked
Hosanna-Tabor to respond seeking an amicable resolution to the matter, or else Perich would be forced to bring a lawsuit or file a complaint with the EEOC. On April 10, 2005, the congregation voted to rescind Perich’s call. The next day, Salo informed Perich of her termination.

On May 17, 2005, Perich filed a charge of discrimination and retaliation with the EEOC alleging that Hosanna-Tabor had discriminated and retaliated against her in violation of her rights under the ADA. On September 28, 2007, the EEOC filed a complaint against Hosanna-Tabor in the United States District Court for the Eastern District of Michigan alleging one count of retaliation in violation of the ADA. Perich and Hosanna-Tabor each filed motions for summary judgment on July 15, 2008. On October 23, 2008, the district court granted summary judgment in favor of Hosanna-Tabor, dismissing the claim on the grounds that the court could not inquire into her claims of retaliation because they fell within the “ministerial exception” to the ADA.

DISCUSSION

I. Standard of Review

This Court reviews de novo a district court’s order of dismissal for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Although the district court issued its decision in the context of a summary judgment motion, the court dismissed Perich’s claim based on a lack of subject matter jurisdiction and did not reach the merits of the claim. In addition, this Circuit has treated the “ministerial exception” as jurisdictional in nature and an appropriate ground for a motion to dismiss pursuant to Rule 12(b)(1). Accordingly, this Court should review the claim using the same analysis as it does for an order entered pursuant to Rule 12(b)(1).

In response to a Rule 12(b)(1) motion, the plaintiff bears the burden of proving jurisdiction. Furthermore, “unlike Rule 12(b)(6) analysis, under which the existence of genuine issues of material fact warrants denial of the motion to dismiss, ‘the court is empowered to resolve factual disputes when subject matter jurisdiction is challenged.’” If the district court makes its jurisdictional ruling based on the resolution of both legal and factual disputes, this Court reviews the legal findings under a de novo standard and the factual findings under a clearly erroneous standard.

Perich argues that no facts relevant to the determination of subject matter jurisdiction were in dispute and, thus, this Court should review de novo all of the district court’s findings. Hosanna-Tabor argues the district court made a number of factual findings in determining that the court had no subject matter jurisdiction, including Hosanna-Tabor’s status as a “religious institution” and Perich’s status as a “minister” and “ministerial employee.” Thus, according to Hosanna-Tabor, this Court should review these factual findings under the clearly erroneous standard.

The district court made both factual and legal findings in determining whether the court had subject matter jurisdiction. The district court’s determinations concerning Perich’s primary duties throughout her work day were factual. Accordingly, this Court must accept these factual findings unless they are clearly erroneous. However, its decision as to whether Perich classified as a ministerial employee remains a legal conclusion subject to de novo review.

II. The ADA’s Application to Religious Organizations

The ADA generally prohibits an employer with fifteen or more employees from
discriminating against a qualified individual with a disability on the basis of that disability in regard to all conditions of employment. See 42 U.S.C. § 12111(5), § 12112(a). The retaliation provision of the ADA prohibits employers from "discriminat[ing] against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge . . . under [the ADA]." Title I of the ADA includes an exception-known as the "ministerial exception"-which allows religious entities to give "preference in employment to individuals of a particular religion" and to "require that all applicants and employees conform to the religious tenants of such organization." 42 U.S.C. § 12113(d).

However, the legislative history makes clear that Congress intended the ADA to broadly protect employees of religious entities from retaliation on the job, subject only to a narrowly drawn religious exemption. The House Report provides the following illustrative hypothetical example:

"[A]ssume that a Mormon organization wishes to hire only Mormons to perform certain jobs. If a person with a disability applies for the job, but is not a Mormon, the organization can refuse to hire him or her. However, if two Mormons apply for a job, one with a disability and one without a disability, the organization cannot discriminate against the applicant with the disability because of that person's disability."


III. The Ministerial Exception

The ministerial exception is rooted in the First Amendment's guarantees of religious freedom.

A. Interference in Church Governance

As applied by this Circuit, the doctrine "precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution's constitutional right to be free from judicial interference in the selection of those employees."

As the Fifth Circuit noted in *McClure v. Salvation Army*, one of the first cases to analyze the ministerial exception, "[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose." 460 F.2d at 558-59.

While the ministerial exception was first applied in the context of suits brought against religious employers under Title VII, the exception has been extended to suits brought against religious employers under the ADA.

For the ministerial exception to bar an employment discrimination claim, two factors must be present: (1) the employer must be a religious institution, and (2) the employee must be a ministerial employee.

To qualify as a religious institution under the first prong, the employer need not be a traditional religious organization, such as a church, diocese, or synagogue, nor must it be an entity operated by a traditional religious organization. Rather, a religiously
affiliated entity is considered a religious institution if its “mission is marked by clear or obvious religious characteristics.” This Circuit has applied the ministerial exception to a religiously affiliated hospital, and it has explicitly approved of applying the doctrine to religiously affiliated schools and corporations.

To determine whether an employee is ministerial under the second prong, this Circuit has instructed courts to look at the function, or “primary duties” of the employee. As a general rule, an employee is considered a minister if “the employee’s primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship.” In extending the ministerial exception beyond ordained ministers, this Circuit has instructed courts to look at the function of the plaintiff’s employment position rather than the fact of ordination. Other circuits have further instructed that courts must “determine whether a position is important to the spiritual and pastoral mission of the church.” The parties in the instant case do not dispute that “religious institutions” include religiously affiliated schools and that Hosanna-Tabor meets this requirement. Thus, the first requirement under the ministerial exception is present, and the primary issue is whether Perich served as a ministerial employee.

The question of whether a teacher at a sectarian school classifies as a ministerial employee is one of first impression for this Court. However, the overwhelming majority of courts that have considered the issue have held that parochial school teachers such as Perich, who teach primarily secular subjects, do not classify as ministerial employees for purposes of the exception.

By contrast, when courts have found that teachers classify as ministerial employees for purposes of the exception, those teachers have generally taught primarily religious subjects or had a central role in the spiritual or pastoral mission of the church.

The district court’s factual determinations concerning Perich’s primary duties throughout her work day were not clearly erroneous. The record supports the finding that Perich’s employment duties were identical when she was a contract teacher and a called teacher and that she taught math, language arts, social studies, science, gym, art, and music using secular textbooks. Furthermore, the record indicates that Perich taught a religion class four days per week for thirty minutes and that she attended a chapel service with her class once a week for thirty minutes. Perich also led each class in prayer three times a day for a total of approximately five or six minutes. The record also indicates that Perich seldom introduced religion during secular discussions. Approximately twice a year, Perich led the chapel service in rotation with other teachers. However, teachers leading chapel or teaching religion were not required to be called or even Lutheran, and, in fact, at least one teacher was not. In all, the record supports the district court’s finding that activities devoted to religion consumed approximately forty-five minutes of the seven hour school day.

However, given these factual findings relating to Perich’s primary duties, the district court erred in its legal conclusion classifying Perich as a ministerial employee. Perich spent approximately six hours and fifteen minutes of her seven hour day teaching secular subjects, using secular textbooks, without incorporating religion into the secular material. Thus, it is clear
that Perich's primary function was teaching secular subjects, not "spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship."

The fact that Perich participated in and led some religious activities throughout the day does not make her primary function religious. This is underscored by the fact that teachers were not required to be called or even Lutheran to conduct these religious activities, and at least one teacher at Hosanna-Tabor was not Lutheran.

In addition, that Hosanna-Tabor has a generally religious character-as do all religious schools by definition-and characterizes its staff members as "fine Christian role models" does not transform Perich's primary responsibilities in the classroom into religious activities. This is underscored by the fact that Perich can only recall twice in her career when she introduced the topic of religion during secular discussions. Similarly, Perich's extra religious training as a result of completing her colloquy did not affect the duties she performed in the classroom on a daily basis.

In finding that Perich was a ministerial employee, the district court relied largely on the fact that Hosanna-Tabor gave Perich the title of commissioned minister and held her out to the world as a minister by bestowing this title upon her. However, the title of commissioned minister does not transform the primary duties of these called teachers from secular in nature to religious in nature. The governing primary duties analysis requires a court to objectively examine an employee's actual job function, not her title, in determining whether she is properly classified as a minister. In this case, it is clear from the record that Perich's primary duties were secular, not only because she spent the overwhelming majority of her day teaching secular subjects using secular textbooks, but also because nothing in the record indicates that the Lutheran church relied on Perich as the primary means to indoctrinate its faithful into its theology. By contrast, in Clapper, the defendant schools envisioned their teachers as having a primarily religious role. The teachers were required to be "tithe paying members of the Seventh-day Adventist Church and are expected to participate in church activities, programs, and finances." See Clapper, 1998 WL 904528, at *2. The Fourth Circuit observed that "[t]he purpose of this requirement is obvious-the Chesapeake Conference desires to insure that the minds of its youth are shaped by model members of the Seventh-day Adventist faith."

Furthermore, the district court in the instant case found that the primary duties of called teachers are identical to those of contract teachers, who do not have the title of minister, and at least one contract teacher who taught at the school was not Lutheran. Given the undisputed evidence that all teachers at Hosanna-Tabor were assigned the same duties, a finding that Perich is a "ministerial" employee would compel the conclusion that all teachers at the school-called, contract, Lutheran, and non-Lutheran-are similarly excluded from coverage under the ADA and other federal fair employment laws. However, the intent of the ministerial exception is to allow religious organizations to prefer members of their own religion and adhere to their own religious interpretations. Thus, applying the exception to non-members of the religion and those whose primary function is not religious in nature would be both illogical and contrary to the intention behind the exception.
B. Interpretation of Church Doctrine

In addition to being motivated by the concern of government interference in church governance, the ministerial exception is also motivated by the concern "that secular authorities would be involved in evaluating or interpreting religious doctrine."

In the instant case, Hosanna-Tabor has attempted to reframe the underlying dispute from the question of whether Hosanna-Tabor fired Perich in violation of the ADA to the question of whether Perich violated church doctrine by not engaging in internal dispute resolution. However, contrary to Hosanna-Tabor's assertions, Perich's claim would not require the court to analyze any church doctrine; rather a trial would focus on issues such as whether Perich was disabled within the meaning of the ADA, whether Perich opposed a practice that was unlawful under the ADA, and whether Hosanna-Tabor violated the ADA in its treatment of Perich. As Plaintiff notes, the LCMS personnel manual, which includes EEOC policy, and the Governing Manual for Lutheran Schools clearly contemplate that teachers are protected by employment discrimination and contract laws. In addition, none of the letters that Hosanna-Tabor sent to Perich throughout her termination process reference church doctrine or the LCMS dispute resolution procedures.

Furthermore, this Court would not be precluded from inquiring into whether a doctrinal basis actually motivated Hosanna-Tabor's actions.

CONCLUSION

Because the ministerial exception does not bar Perich's claims against Hosanna-Tabor, we VACATE the district court's order entering summary judgment on behalf of Defendant and REMAND with instructions that the district court make a finding on the merits of Perich's retaliation claim under the ADA.

HELENE N. WHITE, Circuit Judge, concurring.

I agree that the ministerial exception does not bar this ADA action. I write separately because I read the relevant cases as more evenly split than does the majority.

As the majority notes, whether a teacher at a sectarian school is properly characterized as a ministerial employee is an issue of first impression for this Court. A number of courts have concluded that parochial school teachers are not ministerial employees for purposes of the exception. In contrast, courts have found teachers to be ministerial employees where the teachers have taught religious subjects and/or had a key role in the religious mission of the church.

Of these cases, four present situations similar to that here—plaintiff teachers who taught primarily secular subjects at a religious school and court decisions turning on a primary-duties analysis. Two plaintiffs were not found to be ministerial employees. Two plaintiffs were found to be ministerial employees.

Perich's daily duties resemble to some extent those of the plaintiffs in each of these cases, including those in which the courts found the plaintiffs' "primary duties" to be ministerial in nature. Tipping the scale against the ministerial exception in this case is that, as the majority points out, there is evidence here that the school itself did not envision its teachers as religious leaders, or as occupying "ministerial" roles. Hosanna-Tabor's teachers are not required to be called or even Lutheran to teach or to lead
daily religious activities. The fact that the duties of the contract teachers are the same as the duties of the called teachers is telling. This presence (or lack) of a predominantly religious yardstick for qualification as a teacher is a key factor in decisions finding the ministerial exception applicable and those finding it inapplicable alike.

By this measure, even courts that have found ministerial plaintiffs who have daily schedules that have roughly the same ratio of religious to non-religious activities as Perich would find that the ministerial exception should not apply here.

For the reasons above, I concur.
The U.S. Supreme Court on Monday agreed to decide whether a private school teacher involved in secular and religious instruction falls under a widely recognized exception to employment-discrimination laws for ministers and other church leaders.

The appeal by a Lutheran church and elementary school in Redford, Mich., was joined by a number of religious organizations and scholars, who argued that there are widely disparate rulings in the lower courts about whether religious-school teachers are subject to the “ministerial exception” to job-bias laws.

The exception, recognized by virtually every federal circuit court of appeals, bars lawsuits that interfere in the relationship between a religious organization and employees who perform religious functions. It is separate from the specific religious exemption in Title VII of the Civil Rights Act of 1964, which applies to any employee of a religious organization, but only with respect to claims of religious discrimination.

The federal appeals courts are split on the legal standard to be applied and the scope of the employees covered by the ministerial exception.

The case accepted by the Supreme Court, Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission (No. 10-553), involves Cheryl Perich, a 4th grade teacher at the school who got into a dispute over her return from a medical leave for narcolepsy in the 2004-05 school year.

Perich was a “called teacher” under the Lutheran Church-Missouri Synod, which meant she was trained in the church’s theology and selected for her job by voting members of the church. She taught a secular 4th grade curriculum, but also taught religion classes on some days and led devotional exercises, among other religious duties, according to court papers.

Amid the dispute over her medical leave, the church rescinded her “call,” effectively terminating her. She filed a charge of discrimination and retaliation with the federal Equal Employment Opportunity Commission, which took her side and filed a retaliation suit against the church and school under the Americans with Disabilities Act.

A federal district court ruled for the church, but in March 2010, a panel of the U.S. Court of Appeals for the 6th Circuit, in Cincinnati, ruled 2-1 for the teacher. The court applied a “primary duties” test, and held that Perich was not subject to the ministerial exception because she “spent the overwhelming majority of her day teaching secular subjects using secular textbooks.” The court also said that “called” and “lay” teachers at the school had primarily the same duties.

The church and school appealed to the Supreme Court with the support of the Becket Fund for Religious Liberty.

“The decision below conflicts with this court’s cases forbidding secular courts from
interfering in religious disputes,” says the brief on the church’s behalf, co-written by Douglas Laycock, a prominent law and religion scholar and a professor at the University of Virginia. “The courts here have no business reinstating a commissioned minister and called teacher who teaches religion and leads children in worship.”

Among the groups filing friend-of-the-court briefs on the church’s side were the Association of Christian Schools International, the Council of Hindu Temples of North America, and the Union of Orthodox Jewish Congregations of North America.

The EEOC filed a brief urging the court not to review the case, noting that the 6th Circuit had conducted a “fact-intensive” review of Perich’s duties at the school.

“The fact that Perich led chapel twice a year in rotation with other teachers did not make her a minister for purposes of the ministerial exception, the [6th Circuit] court noted,” the EEOC brief said.

In a brief filed on behalf of Perich, her lawyer also urged the high court not to take the case, saying that religious organizations are seeking “wide leeway to avoid the federal statutory prohibitions on discrimination.”

The court will hear arguments in the case during its term that begins next October.
A parochial school teacher is not a ministerial employee and can sue her parish employer for violating the Americans with Disabilities Act, said the 6th U.S. Circuit Court of Appeals.

The facts are similar to the recent Michigan Court of Appeals’ decision in Weishuhn v. Catholic Diocese of Lansing (see “You’re fired!,” Michigan Lawyers Weekly, Feb. 8, 2010). In that case, the court said the teacher couldn’t sue for wrongful termination because she was a ministerial employee.

But the facts of that case are distinguishable because of comments Weishuhn made about her personal teaching philosophy in a newspaper interview, said Thomas A. Cooley Law School professor John Taylor.

Determining whether a teacher is a ministerial employee is not as simple as counting the religious classes.

“It [is] a factor, but not the only factor,” he said.

Weishuhn’s attorney, Julie A. Gafkay, said Weishuhn’s personal beliefs are beyond the proper analysis.

Perich not a minister

In general, the ministerial exception prevents courts from interfering in the employment relationship between a religious institution and its ministerial employees. A ministerial employee is determined by a primary duties test—the totality of the employee’s duties and responsibilities, position and function.

In the 6th Circuit case, Equal Employment Opportunity Commission et al. v. Hosanna-Tabor Evangelical Lutheran Church & School, parochial teacher Cheryl Perich began suffering from narcolepsy during the summer of 2004. School administrators told her that she should take a disability leave of absence for the school year, and the principal told her she’d still have a job when she was ready to return.

In January 2005, the school changed its policy to “request that employees on disability for more than six months [to] resign” so the school could fill their positions. When Perich tried to return before the end of her six months, she was not allowed to do so.

The court noted that “the overwhelming majority of courts” have held that parochial school teachers that teach primarily secular subjects aren’t ministerial employees.

But, “when courts have found that teachers classify as ministerial employees for purposes of the exception, those teachers have generally taught primarily religious subjects or had a central role in the spiritual or pastoral mission of the church,” wrote Judge Eric L. Clay.

Using the primary duties test analysis, the court determined Perich was not a ministerial employee because she spent six hours and 15 minutes of her seven-hour day...
teaching secular subjects.

"The fact that Perich participated in and led some religious activities throughout the day does not make her primary function religious," Clay wrote.

In a concurring opinion, Judge Helene N. White wrote that, while she agreed with the majority, her analysis of whether Perich was a ministerial employee was much closer, tipped by the fact that the school did not envision its teachers as religious leaders.

Should personal beliefs matter?

Taylor said the two rulings are consistent because the court didn’t base its decision in Weishuhn solely on teaching time.

"I don’t think that the Michigan Court of Appeals applied a different rule," he said. "I just think that there was a different set of facts."

Taylor said that by his count, Perich spent about 10 percent of her week teaching religious classes, while Weishuhn spent about a third of her time teaching religion.

But the fact that Taylor thought swung Weishuhn in favor of the church was an interview she gave to The Catholic Times, in which she talked about weaving religion into any class that she taught.

"That was the single most crucial difference between the two cases and the single most crucial factor working against her," Taylor said.

Gafkay disagreed, saying the primary duties of both teachers were similar.

"[Perich] led the class in prayer three times a day," she said. "She led chapel two times a year. She attended chapel with her class. She taught religion four days per week. And, she’s considered a commissioned minister."

Gafkay said it wouldn’t be fair to hold statements made in the newspaper interview regarding her personal religious beliefs against her because it had nothing to do with her job duties.

"Nowhere does [the primary duties] test call for looking at the individual beliefs of that employee," she said.

Weishuhn recently appealed the case to the Michigan Supreme Court.

Another important distinction was Hosanna-Tabor didn’t require its teachers to be Lutheran, and all teachers, whether "called" or contract teachers, did the same job, said Wayne State University School of Law professor Kingsley R. Browne.

He said the rulings were consistent because the courts applied the same basic law to each set of facts. But Browne agreed that consideration of Weishuhn’s choice to infuse religion to secular classes could tip the analysis between similarly situated teachers with different philosophies.

"If you had a case in which you had two employees that are suing for the same thing, joint plaintiffs, and they testify differently in depositions about whether they had incorporated religion into their secular classes, that would be a tough call," he said.

"What’s controlling? The way the employee does their job, or the way the employer contemplated that the job would be performed?"

Attorneys for both Perich and Hosanna-Tabor did not respond to Michigan Lawyers
Weekly's requests for comment.

Decision in a Nutshell


The Facts: A parochial teacher was fired after becoming ill, even though her doctors said she could fully return to work. She sued under the Americans With Disabilities Act.

The Decision: She was not a ministerial employee, and her ADA lawsuit is allowed to proceed.

From the Decision: “A religious entity may give a preference in employment to individuals of the particular religion, and may require that ... employees conform to the religious tenets of the organization. However, a religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled. . . .”

“The governing primary duties analysis requires a court to objectively examine an employee’s actual job function, not her title, in determining whether she is properly classified as a minister.”

From the Concurrence: “Perich's daily duties resemble to some extent those of the plaintiffs in each of these cases, including those in which the courts found the plaintiffs ‘primary duties’ to be ministerial in nature. Tipping the scales against the ministerial exception in this case is that, as the majority points out, there is evidence here that the school itself did not envision its teachers as religious leaders.”
The Supreme Court's religious-freedom decisions are usually about symbols, speech and spending: war memorial crosses in the desert and Ten Commandments monuments near public buildings, scholarships that allow poor kids to attend parochial schools and funding for "faith-based" social services, Pledge of Allegiance, and so on.

In late March, the justices agreed to review a Michigan job-discrimination case with none of these familiar eye-catching and attention-grabbing features. It does involve, however, fundamental questions about church-state relations and the limits of government authority—questions at the core of the First Amendment's concerns—and it could prove to be among the court's most important religious-liberty cases in many years.

Critics sometimes complain that the court's religion-related decisions bog down in trivia—How close are the reindeer and snowmen to the Baby Jesus in the holiday display?—but this case, **Hosanna-Tabor Church v. EEOC**, is about a big idea, the "separation of church and state," that really matters.

**The case**

In a nutshell, **Hosanna-Tabor** is a lawsuit brought by Cheryl Perich, a former teacher at a church-run Lutheran grade school who argues that the church violated a federal law against disability-based discrimination when it rescinded her "call" as a "commissioned minister"—and fired her as a third- and fourth-grade teacher, after a disability-related leave of absence.

A federal trial court in Michigan dismissed the teacher's claim, insisting that the "ministerial" nature of her position and the religious dimensions of the church's decision made it inappropriate to apply the anti-discrimination law. But the court of appeals disagreed and concluded that her "primary duties"—as a "commissioned minister" at a school that aims to provide a "Christ-centered education" from teachers who "integrate faith into all subjects"—were secular, and not religious.

The court gave little weight to the facts that the teacher led her students in prayer several times a day and taught religion classes four days a week, and instead simply compared the minutes she spent on religious formation with those she spent teaching "secular subjects."

The Supreme Court should reverse this decision, and it is important to understand why.

For starters, it is well established that a "ministerial exception" to job-discrimination laws prevents secular courts from jumping into religious disputes that they lack the authority to address or the competence to solve. The question in the **Hosanna-Tabor** case is not so much whether the exception exists—it does, and it should—as how it should be understood and applied.

As the court of appeals recognized, this exception is "rooted in the First Amendment's concern that courts not become instruments of religious disputes among religious institutions," and it is important to understand how it should be applied.
Amendment’s guarantees of religious freedom.” Indeed, a religious-liberty promise that allowed governments to second-guess religious communities’ decisions about what should be their teachings or who should be their teachers would be a hollow one.

To be clear, the ministerial exception is constitutionally required and valuable, but it does not rest on assumption that religious institutions and employers never behave badly. Certainly, they do. Its premise is not that churches are somehow “above the law.” They are not, and should not be. Its point is not “discrimination is fine, if churches do it.” It is, instead, that there are some questions secular courts should not claim the power to answer, some wrongs that a constitutional commitment to church-state separation puts beyond the law’s corrective reach, and some relationships—such as the one between a religious congregation and the ministers to whom it entrusts not only the “secular” education but also the religious formation of its members—that government should not presume to supervise too closely.

Out of government’s league

To be sure, not every employee of a religious institution is a “ministerial employee,” and religious institutions—like all employers—have many legal obligations to their employees. Although there are difficult questions to be asked, and many fine lines to be drawn, when it comes to interpreting and applying the First Amendment’s religious-freedom guarantees, it cannot be the role of secular government to second-guess the decisions of religious communities and institutions about who should be their ministers, leaders and teachers, any more than they should review their decisions about the content of religious doctrines.

Last October, many enjoyed a laugh at the expense of Christine O’Donnell, then a candidate for one of Delaware’s U.S. Senate seats, when she questioned the constitutional pedigree of the “separation of church and state.” Her critics were a bit too quick to poke fun. In fact, “separation of church and state” does not appear in the Constitution. Still, and even though it is often distorted and misused, the idea is a crucial dimension of religious freedom. We wisely distinguish, or “separate,” the institutions and authorities of religion from those of government. We do this, though, not so much by building a “wall,” but by respecting the genuine autonomy of these different spheres. We do this not to confine religious belief and practice but to curb the ambitions and reach of governments.

The Gospel reports that Jesus told the Pharisees to “render therefore to Caesar the things that are Caesar’s, and to God the things that are God’s.” In a similar vein, our Constitution tells Caesar that he is only Caesar, and insists that he not demand what is God’s.
"Should Religions Be Allowed to Discriminate?"

Washington Post
April 5, 2011
Marci A. Hamilton

Congress and the state legislatures owe it to potential employees of religious institutions to warn them of their lack of protection from invidious discrimination.

The Supreme Court this week granted review on the issue of whether religious organizations have a constitutional right to discriminate against their employees. That is right—there is a legal argument that religious organizations should have a constitutional right to treat their employees in ways no secular organization could.

Although the lower courts have been entertaining arguments in this sphere for decades, this is the first time the Supreme Court has waded into what is called the "ministerial exception." Don’t be misled by the name of the doctrine, though. These cases do not involve simply ministers, priests, or rabbis. Religious organizations obviously should have a right to choose their clergy according to their own lights.

The doctrine, though, was extended to include others who are not clergy per se, e.g., teachers whose role is more secular than religious, as in this particular case.

The case is Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, and involves teacher Cheryl Perich. She developed narcolepsy and, therefore, took a medical leave. The head of the school promised to hold her job for her. When her health improved, she returned to the school, but was told she could not come back yet. She had to wait until the beginning of the next school year.

She argued that the school violated the Americans with Disabilities Act ("ADA") by excluding her on the basis of her illness. The church school has responded that it had the power to remove her for disobedience to its leaders’ order to wait until the next year, regardless of the ADA.

Then, in the courts, the school raised the flag of the First Amendment, arguing that she was a religious employee and the courts should not interfere. She taught secular subjects but also some religion classes and led the students in prayer.

In most employment contexts, an employer who behaved like the church school in this case would be accountable to state and federal anti-discrimination laws protecting the sick and disabled. The United States Court of Appeals for the Sixth Circuit found that the First Amendment was not a bar to her claims, and, therefore, concluded that the church could be liable under the Americans with Disabilities Act.

This case reminds me of Lynette Petruska’s struggles. She was chosen by a Catholic university to be its chaplain. There was no requirement that the position be held by a priest and, therefore, it was open to a woman. The school, however, eventually shoved Petruska out of her position to replace her with a man. It was gender discrimination. The United States Court of Appeals for the Third Circuit held that she had no rights, because the university was religious and she was a chaplain, so gender discrimination was their right.
At this early stage in the case, in this column, I will not delve into the niceties of the legal doctrine that will be debated at the Court. Rather, I want to paint the big picture for my readers so that they can understand what is happening in this and other related cases.

There are two sides of this debate. First, there are the religious groups, which have been trying to construct a moat or a wall around religious institutions that would shield them from accountability for discrimination against their employees. They are fond of arguing for their “autonomy” from the law. They trade on the American inclination to trust and revere religious institutions.

On the other side are the employees who find themselves shocked by a religious institution they intuitively trusted that fires them in violation of our shared cultural norm against many kinds of discrimination. Cases have involved racial, gender, and disability discrimination. They also have involved sexual harassment. For example, seminaries have argued that seminarians may not bring a sexual harassment claim after the seminarian was sexually propositioned by superiors.

This is a clash of old-time First Amendment thinking—which treats religious institutions as benign institutions that should be left to their own devices—and civil rights. Americans have an instinct for fairness and justice, and assume that if anyone, including their religious employer, treats them discriminatorily, they should have legal recourse. But religious institutions and their lawyers sink tremendous resources into blocking such legal recourse. (Never forget—all those who hold power are likely to abuse it in some way, and religious institutions are run by humans, not gods.) The church in this case is seeking the right to exclude the courts from “interfering” with their employment decisions.

If the church school wins this case, which it should not, I think that Congress and the state legislatures owe it to potential employees of religious institutions to warn them of their lack of protection from invidious discrimination. Most come into such institutions expecting that they will receive better treatment than your average corporation. Without such a warning, employees unwittingly place themselves in a position of weakness and risk at work. All religious institutions should be required to include language in their employment contracts that states the following:

This is a religious institution, which treats all of its employees as though they are religious. You must understand that that means that we will take the position if we discriminate against you that the federal and state anti-discrimination laws cannot apply. Therefore, if this institution engages in invidious racial, gender, or disability discrimination against you, you may have no legal recourse.

This is what is at stake in this case.
Federal Communications Commission v. Fox Television Stations, Inc.


In both 2002 and 2003, the F.C.C. found expletives uttered by award recipients during the Fox's live broadcast of the Billboard Music Awards violated the F.C.C.'s indecency policy. Additionally in 2003, several affiliates on the ABC-TV network were fined for airing an episode of "NYPD Blue" found to be indecent by the F.C.C. The cases involve separate proceedings that were combined in a sole petition to the Court. The F.C.C. indecency policy was originally held to be arbitrary and capricious in the first appeal before the Second Circuit. As such, the network's constitutional claims were not reached. The Court granted cert and reversed, holding the F.C.C.'s indecency policy was not arbitrary and capricious, and remanded the case for consideration of the constitutional claims. In this latest appeal, the Second Circuit found the F.C.C. indecency policy to be unconstitutionally vague, resulting in a chilling effect on speech in violation of the First Amendment.

Question Presented: Whether the Federal Communications Commission's current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.


United States Court of Appeals for the Second Circuit

Filed July 13, 2010

[Excerpt; some footnotes and citations omitted.]

POOLER, Circuit Judge:

This petition for review comes before us on remand from the Supreme Court. Previously, we held, with Judge Leval dissenting, that the indecency policy of the Federal Communications Commission ("FCC" or "Commission") was arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir.2007). The Supreme Court reversed, upholding the policy under the APA and remanding for consideration of petitioners' constitutional arguments. See *FCC v. Fox Television Stations, Inc.*, — U.S. —, 129 S.Ct. 1800, 1819, 173 L.Ed.2d 738 (2009) (Scalia, J.). We now hold that the FCC's policy violates the First Amendment because it is unconstitutionally
vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here. Thus, we grant the petition for review and vacate the FCC’s order and the indecency policy underlying it.

BACKGROUND

Section 1464 of Title 18 of United States Code provides that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.” In 1960, Congress authorized the FCC to impose civil forfeitures for violations of Section 1464. It was not until 1975, however, that the FCC first exercised its authority to regulate speech it deemed indecent but not obscene. The speech at issue was comedian George Carlin’s “Filthy Words” monologue, a 12-minute string of expletives broadcast on the radio at 2:00 in the afternoon.

The FCC brought forfeiture proceedings against the Pacifica Foundation, the broadcaster that had aired the Carlin monologue. In finding that Pacifica had violated Section 1464, the Commission defined “indecent” speech as “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.” Pacifica petitioned for review to the D.C. Circuit, which declared the FCC’s indecency regime invalid. In finding the FCC’s order both vague and overbroad, the court pointed out that the Commission’s definition of indecent speech would prohibit “the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the Bible.” Such a result, the court concluded, amounted to unconstitutional censorship.

In a plurality opinion authored by Justice Stevens, the Supreme Court reversed. See FCC v. Pacifica Found., 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). The Court limited its review to the question of whether the FCC could impose a civil forfeiture for the Carlin monologue and declined to address Pacifica’s argument that the regulation was overbroad and would chill protected speech. In limiting its review, the Court stressed the “specific factual context” of the Carlin monologue, focusing in particular on Carlin’s deliberate and repetitive use of expletives to describe sexual and excretory activities.

The Court then went on to hold that the FCC could, at least in the situation before it, restrict indecent speech in the broadcast context that did not meet the legal definition of obscenity. Resting on a nuisance rationale, the Court first noted that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection” because of its “uniquely pervasive presence in the lives of all Americans.” Moreover, the nature of broadcast television—as opposed to printed materials—made it “uniquely accessible to children, even those too young to read.” The Court, however, “emphasize[d] the narrowness of [its] holding.” “[N]uisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.”

Justices Powell and Blackmun, who concurred in a separate opinion, also made clear that the FCC’s regulatory authority
was limited, stating that the Court’s holding did not give the FCC “an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes.” Nor, they explained, did the holding “speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here.” Finally, they took the FCC at its word that it would “proceed cautiously,” which they reasoned would minimize any chilling effect that might otherwise result.

In the years after Pacifica, the FCC did indeed pursue a restrained enforcement policy, taking the position that its enforcement powers were limited to the seven specific words in the Carlin monologue. No enforcement actions were brought between 1978 and 1987. Then, in 1987, the FCC abandoned its focus on specific words, concluding that “although enforcement was clearly easier under the standard, it could lead to anomalous results that could not be justified.” The FCC reasoned that under the prior standard, patently offensive material was permissible as long as it avoided certain words. This, the Commission concluded, “made neither legal nor policy sense.” The Commission instead decided to utilize the definition it had used in Pacifica, adopting a contextual approach to indecent speech.

Despite its move to a more flexible standard, the FCC continued to exercise restraint. In particular, it consistently held that a single, non-literal use of an expletive was not actionably indecent.

In 2001, in an attempt to “provide guidance to the broadcast industry regarding . . . [its] enforcement policies with respect to broadcast indecency,” the FCC issued a policy statement in which it set forth its indecency standard in more detail. *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464, 16 F.C.C.R. 7999*, at ¶ 1 (2001) (“Industry Guidance “). In *Industry Guidance*, the FCC explained that an indecency finding involved the following two determinations: (1) whether the material “describe[s] or depict[s] sexual or excretory organs or activities”; and (2) whether the broadcast is “patently offensive as measured by contemporary community standards for the broadcast medium.” The FCC further explained that it considered the following three factors in determining whether a broadcast is patently offensive: (1) “the explicitness or graphic nature of the description or depiction”; (2) “whether the material dwells on or repeats at length” the description or depiction; and (3) “whether the material appears to pander or is used to titillate, or whether the materials appears to have been presented for its shock value.” The *Industry Guidance* reiterated that under the second prong of the patently offensive test, “fleeting and isolated” expletives were not actionably indecent.

In 2004, however, the FCC’s policy on indecency changed. During the 2003 Golden Globe Awards, U2 band member Bono exclaimed, upon receiving an award, “this is really, really, fucking brilliant. Really, really, great.” *In re Complaints Against Various Broadcast Licenses Regarding the Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975*, at ¶ 3 n. 4 (2004) (“Golden Globes Order “). In response to complaints filed after the incident, the FCC declared, for the first time, that a single, nonliteral use of an expletive (a so-called “fleeting expletive”) could be actionably indecent. Finding that “the ‘F–Word’ is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language,” and therefore
"inherently has a sexual connotation," the FCC concluded that the fleeting and isolated use of the word was irrelevant and overruled all prior decisions in which fleeting use of an expletive was held per se not indecent. The FCC also found that the broadcast was "profane" within the meaning of Section 1464, abandoning its previous interpretation of the term to mean blasphemy.

At the same time that the FCC expanded its enforcement efforts to include even fleeting expletives, the FCC also began issuing record fines for indecency violations. While the Commission had previously interpreted the maximum fines in the statute as applying on a per-program basis, it began treating each licensee's broadcast of the same program as a separate violation, thereby multiplying the maximum fine the FCC could order for each instance of indecent speech. In addition, Congress amended Section 503(b)(2)(c)(ii) to increase the maximum fine permitted by a factor of 10—from $32,500 to $325,000—meaning that the fine for a single expletive uttered during a broadcast could easily run into the tens of millions of dollars.

NBC Universal, Inc. ("NBC"), along with numerous other parties, filed petitions for reconsideration of the Golden Globes Order before the FCC, raising statutory and constitutional challenges to the new policy. While the petitions for reconsideration were pending, the FCC applied the Golden Globes Order policy in IN RE COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005, 21 F.C.C. Red. 2664 (2006) ("Omnibus Order ") , which the Commission stated was intended to "provide substantial guidance to broadcasters and the public" about what was considered indecent under the new policy. In the Omnibus Order (which dealt with many more programs than are at issue in the present case), the Commission found four programs—the 2002 Billboard Music Awards, the 2003 Billboard Music Awards, various episodes of ABC's NYPD Blue, and CBS's The Early Show—indecent and profane under the Golden Globes standard.

All four programs involved what could be characterized as fleeting expletives. For instance, during the 2002 Billboard Music Awards, Cher, in an unscripted moment from her acceptance speech, stated: "People have been telling me I'm on the way out every year, right? So fuck 'em." Similarly, during the 2003 Billboard Music Awards, Nicole Ritchie—on stage to present an award with Paris Hilton—made the following unscripted remark: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." Episodes of NYPD Blue were found indecent based on several instances of the word "bullshit," while the CBS's The Early Show was found indecent on the basis of a guest's use of the word "bullshitter" to describe a fellow contestant on the reality TV show, Survivor: Vanuatu.

In finding these programs indecent and profane, the FCC reaffirmed its decision in the Golden Globes Order that any use of the word "fuck" was presumptively indecent and profane, further concluding that any use of the word "shit" was also presumptively indecent and profane. It also held that the four broadcasts in question were "patently offensive" because the material was explicit, shocking, and gratuitous, notwithstanding the fact that the expletives were fleeting and isolated.

Fox Television Stations, Inc. ("Fox"), CBS Broadcasting Inc. ("CBS"), and ABC Inc. ("ABC"), as well as several network affiliates, filed petitions for review of the Omnibus Order. The FCC moved for a voluntary remand, which we granted, so that
it could have the opportunity to address petitioners' arguments and could ensure that all licensees had a full opportunity to be heard before the FCC issued a final decision. After soliciting public comments, the FCC issued a second order on November 6, 2006. See IN RE COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005, 21 F.C.C.R. 13299 (2006) ("Remand Order"). In the Remand Order, the FCC reaffirmed its finding that the 2002 and 2003 Billboard Music Awards were indecent and profane. However, the FCC reversed its finding with respect to The Early Show and dismissed the complaint against NYPD Blue on procedural grounds.

In the Remand Order, the FCC rejected the petitioners' argument that non-literal uses of expletives were not indecent, reasoning that "any strict dichotomy between expletives and descriptions or depictions of sexual or excretory functions is artificial and does not make sense in light of the fact that an expletive's power to offend derives from its sexual or excretory meaning." However, the Commission did not take the position that any occurrence of an expletive is indecent or profane under its rules, allowing that expletives that were "integral" to an artistic work or occurring during a "bona fide news interview" might not run afoul of the indecency standard. As such, it reversed its previous decision concerning the CBS's The Early Show because the utterance of the word "bullshitter" took place during a bona fide news interview. The Commission made clear, however, that "there is no outright news exemption from our indecency rules."

Petitioners and intervenors, which collectively represented all the major broadcast networks as well as local affiliates affected by the FCC's indecency policy (hereinafter, the "Networks"), returned to this Court for review of the Remand Order, making a variety of administrative, statutory, and constitutional arguments. In a 2–1 decision (with Judge Leval in dissent), we held that the FCC's indecency policy was arbitrary and capricious under the APA. Fox, 489 F.3d at 447. We reached this decision because we believed that the FCC had failed to adequately explain why it had changed its nearly–30–year policy on fleeting expletives. Moreover, we noted that the FCC's justification for the policy—that children could be harmed by hearing even one fleeting expletive (the so-called "first blow" theory)—bore "no rational connection to the Commission's actual policy," because the FCC had not instituted a blanket ban on expletives.

Because we struck down the indecency policy on APA grounds, we declined to reach the constitutional issues in the case. We noted, however, that we were "skeptical that the Commission [could] provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster." We expressed sympathy for "the Networks' contention that the FCC's indecency test [wa]s undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague." We were also troubled that the FCC's policy appeared to permit it to "sanction speech based on its subjective view of the merit of that speech." However, because it was unnecessary for us to reach them, we left those issues for another day. The FCC subsequently filed a writ of certiorari, which the Supreme Court granted.

In a 5–4 decision, the Supreme Court reversed our APA ruling, holding that the FCC's "fleeting expletive" policy was not arbitrary and capricious because "[t]he Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent
regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children.” 129 S.Ct. at 1819. However, the Court declined to address the Networks’ constitutional arguments, “seeing] no reason to abandon our usual procedures in a rush to judgment without a lower court opinion,” and remanded for us to consider them in the first instance. Thus, after further briefing by the parties, intervenors, and amici, we now turn to the question that we deferred in our previous decision—whether the FCC’s indecency policy violates the First Amendment.

DISCUSSION

I.

It is well-established that indecent speech is fully protected by the First Amendment. In most contexts, the Supreme Court has considered restrictions on indecent speech to be content-based restrictions subject to strict scrutiny.

... Broadcast radio and television, however, have always occupied a unique position when it comes to First Amendment protection. The categorization of broadcasting as different from all other forms of communication pre-dates Pacifica. And the Supreme Court has continuously reaffirmed the distinction between broadcasting and other forms of media since Pacifica. However, it was in Pacifica that the Supreme Court gave its fullest explanation for why restrictions on broadcast speech were subject to a lower level of scrutiny, relying on the twin pillars of pervasiveness and accessibility to children. While Pacifica did not specify what level of scrutiny applies to restrictions on broadcast speech, subsequent cases have applied something akin to intermediate scrutiny.

The Networks argue that the world has changed since Pacifica and the reasons underlying the decision are no longer valid. Indeed, we face a media landscape that would have been almost unrecognizable in 1978.

Moreover, technological changes have given parents the ability to decide which programs they will permit their children to watch. Every television, 13 inches or larger, sold in the United States since January 2000 contains a V-chip, which allows parents to block programs based on a standardized rating system. Moreover, since June 11, 2009, when the United States made the transition to digital television, anyone using a digital converter box also has access to a V-chip. In short, there now exists a way to block programs that contain indecent speech in a way that was not possible in 1978. In fact, the existence of technology that allowed for household-by-household blocking of “unwanted” cable channels was one of the principle distinctions between cable television and broadcast media drawn by the Supreme Court in Playboy. The Court explained:

The option to block reduces the likelihood, so concerning to the Court in Pacifica, that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem. The corollary, of course, is that targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own
homes may be the optimal place of receipt.

_Playboy_, 529 U.S. at 815, 120 S.Ct. 1878 (internal citation omitted).

We can think of no reason why this rationale for applying strict scrutiny in the case of cable television would not apply with equal force to broadcast television in light of the V-chip technology that is now available.

Nevertheless, as we stated in our previous decision, we are bound by Supreme Court precedent, regardless of whether it reflects today's realities. The Supreme Court may decide in due course to overrule _Pacifica_ and subject speech restrictions in the broadcast context to strict scrutiny. This Court, however, is "not at liberty to depart from binding Supreme Court precedent 'unless and until [the] Court reinterpret[s]' that precedent." The Networks, although they may wish it otherwise, seem to concede that we must evaluate the FCC's indecency policy under the framework established by the Supreme Court in _Pacifica_.

There is considerable disagreement among the parties, however, as to what framework _Pacifica_ established. The FCC interprets _Pacifica_ as permitting it to exercise broad regulatory authority to sanction indecent speech. In its view, the Carlin monologue was only the most extreme example of a large category of indecent speech that the FCC can constitutionally prohibit. The Networks, on the other hand, view _Pacifica_ as establishing the limit of the FCC's authority. In other words, they believe that only when indecent speech rises to the level of "verbal shock treatment," exemplified by the Carlin monologue, can the FCC impose a civil forfeiture. Because _Pacifica_ was an intentionally narrow opinion, it does not provide us with a clear answer to this question. Fortunately, we do not need to wade into the brambles in an attempt to answer it ourselves. For we conclude that, regardless of where the outer limit of the FCC's authority lies, the FCC's indecency policy is unconstitutional because it is impermissibly vague. It is to this issue that we now turn.

II.

It is a basic principle that a law or regulation "is void for vagueness if its prohibitions are not clearly defined." A law or regulation is impermissibly vague if it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." The First Amendment places a special burden on the government to ensure that restrictions on speech are not impermissibly vague. However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."

The vagueness doctrine serves several important objectives in the First Amendment context. First, the doctrine is based on the principle of fair notice. "[W]e assume that man is free to steer between lawful and unlawful conduct and we give him notice of what is prohibited so that he may act accordingly." Notice is particularly important with respect to content-based speech restrictions "because of [their] obvious chilling effect on free speech." Vague regulations "inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Second, the vagueness doctrine is based "on the need to eliminate the impermissible risk of discriminatory enforcement." "A vague law impermissibly delegates basic policy matters to [government officials] for resolution on an ad hoc and subjective basis...." Specificity, on the other hand, guards against subjectivity and discriminatory enforcement.
A.

The Networks argue that the FCC’s indecency test is unconstitutionally vague because it provides no clear guidelines as to what is covered and thus forces broadcasters to “steer far wider of the unlawful zone,” rather than risk massive fines. In support of their position, the Networks rely on the Supreme Court’s decision in Reno v. ACLU. Section 223(a) of the Communications Decency Act (“CDA”) prohibited transmitting “indecent” material to minors over the Internet while section 223(d) prohibited material that “in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” In addition to finding that the statute was not narrowly tailored, the Court found the statute unconstitutionally vague because “the many ambiguities concerning the scope of its coverage render[ed] it problematic for purposes of the First Amendment.” The Court found that the statute’s use of the “general, undefined terms ‘indecent’ and ‘patently offensive’ cover[ed] large amounts of nonpornographic material with serious educational or other value.” Because of the “vague contours” of the regulation, the Court held that “it unquestionably silence[d] some speakers whose messages would be entitled to constitutional protection.” The Networks argue that since Reno found this indecency regulation unconstitutionally vague, the FCC’s identically-worded indecency test for broadcasting must fall as well.

FCC argues the opposite—that Reno forecloses a vagueness challenge to the FCC’s policy. In Reno, the government argued that the CDA was “plainly constitutional” under the Pacifica decision. The Supreme Court rejected this argument, distinguishing Pacifica on the grounds that (1) the FCC is an expert agency that had been regulating the radio for decades; (2) the CDA was a categorical ban on speech while the FCC’s indecency regulation designated “when—rather than whether—it would be permissible to air such a program”; (3) the order at issue in Pacifica was not punitive; and (4) the broadcast medium had traditionally received the most limited First Amendment protection. According to the FCC, because the Court refused to find Pacifica controlling of the constitutional challenges to the CDA, we must find Reno equally inapplicable here.

As an initial matter, we reject the FCC’s argument that Reno forecloses the Networks’ vagueness challenge. When the Supreme Court distinguished Pacifica in Reno, it did so with respect to “the level of First Amendment scrutiny that should be applied to this medium,” not to its analysis of whether the statute was unconstitutionally vague. Broadcasters are entitled to the same degree of clarity as other speakers, even if restrictions on their speech are subject to a lower level of scrutiny. It is the language of the rule, not the medium in which it is applied, that determines whether a law or regulation is impossibly vague.

We also reject the Networks’ argument that Reno requires us to find the FCC’s policy vague. To be sure, the CDA’s definition of indecency was almost identical to the Commission’s, and language that is unconstitutionally vague in one context cannot suddenly become the model of clarity in another. However, unlike in Reno, the FCC has further elaborated on the definition of indecency in the broadcast context. For example, the FCC has outlined three factors that it purportedly uses to determine whether a broadcast is patently offensive, and has declared “fuck” and “shit” presumptively indecent. This additional guidance may not be sufficient to survive a vagueness challenge, but it certainly distinguishes the
FCC policy from the one struck down in *Reno*.

Finally, we reject the FCC’s argument that the Networks’ vagueness challenge is foreclosed by *Pacifica* itself. *Pacifica*, which did not reach the question of whether the FCC’s policy was unconstitutionally vague, was an intentionally narrow opinion predicated on the FCC’s “restrained” enforcement policy. The FCC’s policy has now changed and we would be hard pressed to characterize it as “restrained.” Thus, the questions left unresolved by *Pacifica* are now squarely before us, as the Supreme Court itself indicated in its opinion above.

B.

Having concluded that neither *Pacifica* nor *Reno* resolves the question, we must now decide whether the FCC’s indecency policy provides a discernible standard by which broadcasters can accurately predict what speech is prohibited. The FCC set forth its indecency policy in its 2001 *Industry Guidance*, in which the FCC explained that an indecency finding involved the following two determinations: (1) whether the material “describe[s] or depict[s] sexual or excretory organs or activities”; and (2) whether the broadcast is “patently offensive as measured by contemporary community standards for the broadcast medium.” Under the policy, whether a broadcast is patently offensive depends on the following three factors: (1) “the explicitness or graphic nature of the description or depiction”; (2) “whether the material dwells on or repeats at length” the description or depiction; and (3) “whether the material appears to pander or is used to titillate, or whether the materials appears to have been presented for its shock value.” Since 2001, the FCC has interpreted its indecency policy in a number of decisions, including *Golden Globes Order* and the orders on review here.

The FCC argues that the indecency policy in its *Industry Guidance*, together with its subsequent decisions, give the broadcasters sufficient notice as to what will be considered indecent. The Networks argue that the policy is impermissibly vague and that the FCC’s decisions interpreting the policy only add to the confusion of what will be considered indecent.

We agree with the Networks that the indecency policy is impermissibly vague. The first problem arises in the FCC’s determination as to which words or expressions are patently offensive. For instance, while the FCC concluded that “bullshit” in a “NYPD Blue” episode was patently offensive, it concluded that “dick” and “dickhead” were not. Other expletives such as “pissed off,” “up yours,” “kiss my ass,” and “wiping his ass” were also not found to be patently offensive. The Commission argues that its three-factor “patently offensive” test gives broadcasters fair notice of what it will find indecent. However, in each of these cases, the Commission’s reasoning consisted of repetition of one or more of the factors without any discussion of how it applied them. Thus, the word “bullshit” is indecent because it is “vulgar, graphic and explicit” while the words “dickhead” was not indecent because it was “not sufficiently vulgar, explicit, or graphic.” This hardly gives broadcasters notice of how the Commission will apply the factors in the future.

The English language is rife with creative ways of depicting sexual or excretory organs or activities, and even if the FCC were able to provide a complete list of all such expressions, new offensive and indecent words are invented every day. For many years after *Pacifica*, the FCC decided to focus its enforcement efforts solely on the seven “dirty” words in the Carlin
monologue. This strategy had its limitations—it meant that some indecent speech that did not employ these seven words slipped through the cracks. However, it had the advantage of providing broadcasters with a clear list of words that were prohibited. Not surprisingly, in the nine years between *Pacifica* and the FCC’s abandonment of this policy, not a single enforcement action was brought. This could be because we lived in a simpler time before such foul language was common. Or, it could be that the FCC’s policy was sufficiently clear that broadcasters knew what was prohibited.

The FCC argues that a flexible standard is necessary precisely because the list was not effective—broadcasters simply found offensive ways of depicting sexual or excretory organs or activities without using any of the seven words. In other words, because the FCC cannot anticipate how broadcasters will attempt to circumvent the prohibition on indecent speech, the FCC needs the maximum amount of flexibility to be able to decide what is indecent. The observation that people will always find a way to subvert censorship laws may expose a certain futility in the FCC’s crusade against indecent speech, but it does not provide a justification for implementing a vague, indiscernible standard. If the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so. And while the FCC characterizes all broadcasters as consciously trying to push the envelope on what is permitted, much like a petulant teenager angling for a later curfew, the Networks have expressed a good faith desire to comply with the FCC’s indecency regime. They simply want to know with some degree of certainty what the policy is so that they can comply with it. The First Amendment requires nothing less.

The same vagueness problems plague the FCC’s presumptive prohibition on the words “fuck” and “shit” and the exceptions thereto. Under the FCC’s current policy, all variants of these two words are indecent unless one of two exceptions apply. The first is the “bona fide” news” exception, which the FCC has failed to explain except to say that it is not absolute. The second is the artistic necessity exception, in which fleeting expletives are permissible if they are “demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.” In deciding whether this exception applies, the FCC “consider[s] whether the material has any social, scientific or artistic value.”

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There is little rhyme or reason to these decisions and broadcasters are left to guess whether an expletive will be deemed “integral” to a program or whether the FCC will consider a particular broadcast a “bona fide” news interview.”

The FCC created these exceptions because it recognized that an outright ban on certain words would raise grave First Amendment concerns. In the *Omnibus Order*, the FCC “recognize[d] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment’s free press guarantee.” Likewise, in applying the “artistic necessity” exception, the FCC noted that it was obligated to “proceed with due respect for the high value our Constitution places on freedom and choice in what the people say and hear,” particularly with respect to speech that has “social, scientific or artistic value.” It is these same concerns
that informed the FCC’s original “restrained” enforcement policy, which had the advantage of prohibiting the most egregious instances of indecent speech while minimizing the burden on protected speech.

The FCC’s current indecency policy undoubtedly gives the FCC more flexibility, but this flexibility comes at a price. The “artistic necessity” and “bona fide news” exceptions allow the FCC to decide, in each case, whether the First Amendment is implicated. The policy may maximize the amount of speech that the FCC can prohibit, but it results in a standard that even the FCC cannot articulate or apply consistently. Thus, it found the use of the word “bullshitter” on CBS’s The Early Show to be “shocking and gratuitous” because it occurred “during a morning television interview,” before reversing itself because the broadcast was a “bona fide news interview.” In other words, the FCC reached diametrically opposite conclusions at different stages of the proceedings for precisely the same reason—that the word “bullshitter” was uttered during a news program. And when Judge Leval asked during oral argument if a program about the dangers of pre-marital sex designed for teenagers would be permitted, the most that the FCC’s lawyer could say was “I suspect it would.” With millions of dollars and core First Amendment values at stake, “I suspect” is simply not good enough.

With the FCC’s indiscernible standards come the risk that such standards will be enforced in a discriminatory manner. The vagueness doctrine is intended, in part, to avoid that risk. If government officials are permitted to make decisions on an “ad hoc” basis, there is a risk that those decisions will reflect the officials’ subjective biases. Thus, in the licensing context, the Supreme Court has consistently rejected regulations that give government officials too much discretion because “such discretion has the potential for becoming a means of suppressing a particular point of view.”

We have no reason to suspect that the FCC is using its indecency policy as a means of suppressing particular points of view. But even the risk of such subjective, content-based decision-making raises grave concerns under the First Amendment. Take, for example, the disparate treatment of “Saving Private Ryan” and the documentary, “The Blues.” The FCC decided that the words “fuck” and “shit” were integral to the “realism and immediacy of the film experience for viewers” in “Saving Private Ryan,” but not in “The Blues.” Fox, 489 F.3d at 463. We query how fleeting expletives could be more essential to the “realism” of a fictional movie than to the “realism” of interviews with real people about real life events, and it is hard not to speculate that the FCC was simply more comfortable with the themes in “Saving Private Ryan,” a mainstream movie with a familiar cultural milieu, than it was with “The Blues,” which largely profiled an outsider genre of musical experience. But even if there were a perfectly benign way of explaining these particular outcomes, nothing would prevent the FCC from applying its indecency policy in a discriminatory manner in the future. As the Supreme Court explained in Forsyth:

It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. Accordingly, the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is
anything in the ordinance preventing him from doing so.

505 U.S. at 133 n. 10, 112 S.Ct. 2395 (internal quotation marks and citations omitted).

The FCC argues that its context-based approach is consistent with, indeed even required by, Pacifica. While Pacifica emphasized the importance of context in regulating indecent broadcasts, it did so in order to emphasize the limited scope of its holding, finding that the particular “context” of the Carlin monologue justified an intrusion on broadcasters rights under the First Amendment. It does not follow that the FCC can justify any decision to sanction indecent speech by citing “context.” Of course, context is always relevant, and we do not mean to suggest otherwise in this opinion. But the FCC still must have discernible standards by which individual contexts are judged.

The FCC assures us that it will “bend over backwards” to protect editorial judgment, at least in the news context, but such assurances are not sufficient given the record before us. Instead, the FCC should bend over backwards to create a standard that gives broadcasters the notice that is required by the First Amendment.

III.

Under the current policy, broadcasters must choose between not airing or censoring controversial programs and risking massive fines or possibly even loss of their licenses, and it is not surprising which option they choose. Indeed, there is ample evidence in the record that the FCC’s indecency policy has chilled protected speech.

For instance, several CBS affiliates declined to air the Peabody Award-winning “9/11” documentary, which contains real audio footage—including occasional expletives—of firefighters in the World Trade Center on September 11th. Although the documentary had previously aired twice without complaint, following the Golden Globes Order affiliates could no longer be sure whether the expletives contained in the documentary could be found indecent. In yet another example, a radio station cancelled a planned reading of Tom Wolfe’s novel I Am Charlotte Simmons, based on a single complaint it received about the “adult” language in the book, because the station feared FCC action. When the program was reinstated two weeks later, the station decided that it could only safely air the program during the “safe harbor” period.

The FCC’s application of its policy to live broadcasts creates an even more profound chilling effect. In the case of the 2003 Billboard Music Awards broadcasts, Fox had an audio delay system in place to bleep fleeting expletives. It also pre-cleared the scripts of the presenters. Ritchie, however, departed from her script and used three expletives in rapid sequence. While the person employed to monitor and bleep expletives was bleeping the first, the following two slipped through. Even elaborate precautions will not protect a broadcaster against such occurrences. The FCC argues that Fox should simply implement a more effective screening system, but, short of giving up live broadcasting altogether, no system will ever be one hundred percent effective. Instead, Fox may decide not to ask individuals with a history of using profanity to present at its awards shows. But, of course, this will not prevent someone who wins an award—such as Cher or Bono—from using fleeting expletives. In fact, the only way that Fox can be sure that it won’t be sanctioned by the FCC is by refusing to air the broadcast live.
This chilling effect extends to news and public affairs programming as well. Broadcasters may well decide not to invite controversial guests on to their programs for fear that an unexpected fleeting expletive will result in fines. The FCC points to its "bona fide news" exception to show that such fears would be unfounded. But the FCC has made clear that it considers the decision to apply this exception a matter within its discretion. Otherwise, why not simply make an outright news exception? During the previous proceedings before this Court, amicus curiae gave the example of a local station in Vermont that refused to air a political debate because one of the local politicians involved had previously used expletives on air. The record contains other examples of local stations that have forgone live programming in order to avoid fines. For instance, Phoenix TV stations dropped live coverage of a memorial service for Pat Tillman, the former football star killed in Afghanistan, because of language used by Tillman’s family members to express their grief. A station in Moosic, Pennsylvania submitted an affidavit stating that in the wake of the FCC’s new policy, it had decided to no longer provide live, direct-to-air coverage of news events “unless they affect matters of public safety or convenience.” If the FCC’s policy is allowed to remain in place, there will undoubtedly be countless other situations where broadcasters will exercise their editorial judgment and decline to pursue contentious people or subjects, or will eschew live programming altogether, in order to avoid the FCC’s fines. This chill reaches speech at the heart of the First Amendment.

The chill of protected speech has even extended to programs that contain no expletives, but which contain reference to or discussion of sex, sexual organs, or excretion. For instance, Fox decided not to re-broadcast an episode of “That 70s Show” that dealt with masturbation, even though it neither depicted the act or discussed it in specific terms. The episode subsequently won an award from the Kaiser Family Foundation for its honest and accurate depiction of a sexual health issue. Similarly, an episode of “House” was re-written after concerns that one of the character’s struggles with psychiatric issues related to his sexuality would be considered indecent by the FCC.

As these examples illustrate, the absence of reliable guidance in the FCC’s standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature. Sex and the magnetic power of sexual attraction are surely among the most predominant themes in the study of humanity since the Trojan War. The digestive system and excretion are also important areas of human attention. By prohibiting all “patently offensive” references to sex, sexual organs, and excretion without giving adequate guidance as to what “patently offensive” means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive. To place any discussion of these vast topics at the broadcaster’s peril has the effect of promoting wide self-censorship of valuable material which should be completely protected under the First Amendment.

IV.

For the foregoing reasons, we strike down the FCC’s indecency policy. We do not suggest that the FCC could not create a constitutional policy. We hold only that the FCC’s current policy fails constitutional scrutiny. The petition for review is hereby GRANTED.
“FCC’s Rules Against Nudity, Profanity Will Be Reviewed”

Wall Street Journal
June 28, 2011
Brent Kendall & Amy Schatz

The constitutionality of federal rules that effectively bar the broadcast of nudity and profanity when children are likely to be tuned in will be taken up by the Supreme Court in its next term, the justices said Monday.

The case, brought by broadcasters seeking to overturn the Federal Communications Commission’s curbs on indecent broadcast speech, sets up an opportunity for the Roberts Court to break new ground on free-speech rights.

The Supreme Court hasn’t directly addressed the First Amendment issues raised by the FCC’s longstanding rules against broadcast indecency since a 1978 decision that allowed the agency to fine a radio station for broadcasting a monologue on dirty words by the late comedian George Carlin.

A divided court ruled for the FCC in 2009, finding the agency’s stepped-up efforts to combat indecency were a legally permissible exercise of the agency’s administrative powers. Now the court has indicated it would hear broadcasters’ arguments that the FCC’s rules are unconstitutional and no longer necessary as cable and broadband have broken the hold federally licensed broadcasters once had over what Americans listen to on the radio and watch on television.

FCC rules prohibit station owners from airing indecent content, including images and words, between the hours of 6 a.m. and 10 p.m., when children are more likely to be in the audience. Although stations can air all of the racy content they want in the late evening and early morning hours, they generally don’t out of concern they might offend advertisers and viewers.

One case before the court involves Fox Television broadcasts of the 2002 and 2003 Billboard Music Awards in which Cher and Nicole Richie uttered expletives. Another case involves ABC’s airing of a 2003 episode of “NYPD Blue” that depicted a woman’s naked buttocks. The Supreme Court will consider one appeal that consolidates the two cases.

The FCC found Fox was in violation of indecency prohibitions but didn’t sanction the network. In the “NYPD Blue” case, the agency fined 45 ABC network-owned or affiliated stations that aired the episode.

Fox is a division of News Corp., which also owns The Wall Street Journal. “We look forward to the Supreme Court’s review of the significant constitutional issues in the case. We are hopeful that the court will ultimately agree that the FCC’s indecency enforcement practices trample on the First Amendment rights of broadcasters,” a Fox spokesman said Monday.

An FCC spokesman said the agency “is hopeful that the Court will affirm the commission’s exercise of its statutory responsibility to protect children and families from indecent broadcast programming.”...
The Supreme Court agreed on Monday to decide whether the Federal Communications Commission’s policies banning nudity, expletives and other indecent content on broadcast television and radio violated the Constitution.


The *Pacifica* decision, which upheld the commission’s finding that George Carlin’s classic “seven dirty words” radio monologue was indecent, cemented the F.C.C.’s ability to police the public airwaves.

But in the subsequent 33 years, the media landscape has markedly changed, causing several justices to question in recent decisions whether those standards were still relevant in a world of unfiltered cable television, Internet, film and radio.

The case is an appeal by the F.C.C. of a ruling in 2010 by the United States Court of Appeals for the Second Circuit that said the commission’s policy against “fleeting expletives” and other indecency, which it measures on a case-by-case basis, was “unconstitutionally vague.”

The Supreme Court reframed the case slightly, saying it would hear arguments only on whether the F.C.C.’s “indecency enforcement regime” violated the free speech or due process clauses of the Constitution.

At issue are two live broadcasts on the Fox network of the Billboard Music Awards. In the first, in 2002, Cher used an obscenity while accepting an award. In 2003, Nicole Richie, while presenting an award, used two vulgarities in explaining how hard it was to remove cow manure from a purse.

The Supreme Court will also consider whether the appeals court was warranted in overturning a fine against ABC stations for the 2003 broadcast of an episode of the then-popular ABC series “NYPD Blue” that included a naked woman.

The Fox case has previously come before the court. In 2009, the Supreme Court ruled in a 5-4 decision that the commission had followed proper administrative procedures when it invoked the ban on expletives during certain hours against broadcasters. But several justices, including at least one on each side of the decision, expressed skepticism that the ban on expletives was constitutional.

The Obama administration and the F.C.C. asked the Supreme Court to overturn the recent appeals court decision, saying it would keep the agency from effectively policing the airwaves.

“We are pleased the Supreme Court will review the lower court rulings that blocked the F.C.C.’s broadcast indecency policy,” a spokesman for the F.C.C. said in a statement. “We are hopeful that the court will affirm the commission’s exercise of its statutory responsibility to protect children.
and families from indecent broadcast programming."

Fox said in a statement that it was "hopeful that the court will ultimately agree that the F.C.C.'s indecency enforcement practices trample on the First Amendment rights of broadcasters." ABC also said it believed that the Second Circuit was correct and that the Supreme Court should affirm that decision.

The appeals court ruled that the F.C.C.'s policy was inconsistent, in part because the commission ruled that Fox stations violated its policy with the language on the awards shows while it allowed the use of the same language in a broadcast of the film "Saving Private Ryan."

While the Pacifica case gave the F.C.C. the authority to regulate indecent speech like the Carlin monologue, which made deliberate and repetitive use of vulgarities, it left uncertain whether the use of an occasional expletive could be punished. The F.C.C. later said it could, and it has generally ruled that broadcasters could not allow indecent material from 6 a.m. to 10 p.m. All of the incidents at issue occurred within those protected hours.

The F.C.C. case was one of 11 that the court accepted on Monday for its next term.

Justice Sonia Sotomayor, who was a judge on the Second Circuit before being appointed to the Supreme Court, recused herself from consideration of the F.C.C. case.
"F.C.C. Indecency Policy Rejected on Appeal"

New York Times
July 13, 2010
Edward Wyatt

A federal appeals court struck down a Federal Communications Commission policy on indecency Tuesday, saying that regulations barring the use of "fleeting expletives" on radio and television violated the First Amendment because they were vague and could inhibit free speech.

The decision, which many constitutional scholars expect to be appealed to the Supreme Court, stems from a challenge by Fox, CBS and other broadcasters to the F.C.C.'s decision in 2004 to begin enforcing a stricter standard of what kind of language is allowed on free, over-the-air television.

The stricter policy followed several incidents that drew widespread public complaint, including Janet Jackson's breast-baring episode at the 2004 Super Bowl and repeated instances of profanity by celebrities, including Cher, Paris Hilton and Bono, during the live broadcasts of awards programs. The Janet Jackson incident did not involve speech but it drew wide public outrage that spurred a crackdown by the F.C.C.

In a unanimous three-judge decision, the Court of Appeals for the Second Circuit in New York said that the F.C.C.'s current policy created "a chilling effect that goes far beyond the fleeting expletives at issue here" because it left broadcasters without a reliable guide to what the commission would find offensive.

The appeals court emphasized that it was not precluding federal regulation of broadcast standards. "We do not suggest that the F.C.C. could not create a constitutional policy," the court said. "We hold only that the F.C.C.'s current policy fails constitutional scrutiny."

But if the commission decides to appeal the ruling—the latest in a string of court decisions questioning its ability to regulate media—it almost certainly runs the risk that the Supreme Court could reverse longstanding precedents that subject broadcast content to indecency standards that are not allowed for any other media.

Julius Genachowski, the chairman of the F.C.C., said in a statement that the commission was "reviewing the court's decision in light of our commitment to protect children, empower parents, and uphold the First Amendment."

In a statement, Fox said it was extremely pleased by Tuesday's decision. "We have always felt that the government's position on fleeting expletives was unconstitutional," said the company, a unit of the News Corporation. "While we will continue to strive to eliminate expletives from live broadcasts, the inherent challenges broadcasters face with live television, coupled with the human element required for monitoring, must allow for the unfortunate isolated instances where inappropriate language slips through."

The case, known as Fox Television Stations Inc. v. F.C.C., has already been to the Supreme Court on a technical matter that did not involve its constitutionality. In 2009, the justices ruled that the F.C.C.'s indecency standard was not "arbitrary and capricious" and therefore was allowable.
Rodney A. Smolla, a First Amendment scholar who is president of Furman University in Greenville, S.C., said that the Supreme Court had been clear in ruling that when the government created rules about what a person could and could not say, "you have to be very specific about what is in bounds and what is out of bounds."

"This decision demands of the F.C.C. that it regulate with precision and not use general terms like 'indecency,'" Mr. Smolla said.

Before 2004, the F.C.C. consistently held that occasional, spontaneous use of certain words that were otherwise prohibited did not violate its indecency standards. But as complaints multiplied over the celebrity obscenities and the Janet Jackson episode, the F.C.C., under Michael K. Powell, then its chairman, tightened its standard and Congress increased the potential fine for indecency violations tenfold, to up to $325,000 per episode.

Tuesday's decision takes the F.C.C. back to the Supreme Court's ruling in 1978 in F.C.C. v. Pacifica Foundation, which upheld the commission's finding that George Carlin's classic "seven dirty words" radio monologue, with its deliberate and repetitive use of vulgarities over 12 minutes, was indecent. At that time, the court left open the question of whether the use of "an occasional expletive" could be punished.

In 2009, when the Supreme Court first rejected the appeals court's ruling, justices, including Clarence Thomas, who was in the majority of the 5-4 decision, and Ruth Bader Ginsburg, who dissented, indicated that they had questions about the First Amendment issues in the F.C.C. indecency policy and whether existing standards were still relevant.

The appeals court picked up on that theme in Tuesday's decision, noting that the media landscape was much different in 2010 than it was in 1978.

"Technological changes have given parents the ability to decide which programs they will permit their children to watch," the appeals court said. Noting that it was bound by the Supreme Court's Pacifica decision, the court said that it nevertheless wondered why broadcasters were still subject to restrictions that, in the case of cable television, would be found to violate the First Amendment.

Ted Lempert, president of Children Now, said that while the court's decision was troubling, it also emphasized the need for clarity about broadcast standards. "It's of concern because the F.C.C. has been a critical protector of children's interests when it comes to media," he said, adding that he expects that the commission will try to construct a more targeted approach to keeping indecency off the airwaves at times when children are likely to be watching.
Reacting to a Supreme Court order to take a new look at “indecency” on radio and TV, the Second Circuit Court suggested on Tuesday that constitutional law on free speech may need to be updated for the Digital Age, especially now that “new offensive and indecent words are invented every day.” Even so, applying First Amendment doctrine as it now exists, the three-judge panel struck down the Federal Communications Commission’s ban on the day and evening broadcast of even single “fleeting expletives.” If the Obama Administration plans to continue defending the ban, the case could be on its way back to the Supreme Court.

In a 32-page opinion that makes liberal use of the actual four-letter versions of the “F-Word” and “S-Word” and variations of them, the Circuit Court said the FCC’s six-year-old ban is unconstitutionally vague, because it is littered with exceptions that make it unclear to broadcasters what is allowed and what is not. The case is Fox Television Stations, et al., v. FCC (lead Circuit Court docket is 06-1760). With “massive fines” and free speech rights vitally at stake, the Court said, the broadcast industry is taking the option of censoring itself—including its news programs—to avoid violating the policy.

The Circuit Court looked back, quite skeptically, at the Supreme Court’s 1978 Supreme Court ruling that first upheld FCC authority to regulate “indecent” radio or TV broadcasts (FCC v. Pacifica Foundation), and noted that broadcasters and the FCC are still in dispute about just how much authority the Commission has under that ruling. But the Circuit Court said it need not resolve that dispute, since it found that the current policy adopted in 2005 simply fails a traditional First Amendment test for vagueness.

The panel, in an opinion written by Circuit Judge Rosemary S. Pooler and joined by Circuit Judge Peter W. Hall and Senior Circuit Judge Pierre N. Leval, readily accepted the broadcast networks’ argument that “the world has changed” since the Pacifica decision. It commented:

“We face a media landscape that would have been almost unrecognizable in 1978. Cable television was still in its infancy. The Internet was a project run out of the Department of Defense with several hundred users. Not only did Youtube, Facebook, and Twitter not exist, but their founders were either still in diapers or not yet conceived. In this environment, broadcast television undoubtedly possessed as ‘uniquely pervasive presence in the lives of all Americans.’

“The same cannot be said today. The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus. Cable television is almost as pervasive as broadcast—almost 87 percent of households subscribe to a cable or satellite service—and most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control....The Internet, too, has become omnipresent, offering access to everything from viral videos to feature films and, yes, even broadcast television programs.”
It went on to note that technological change has given parents clear control over what their children can see and hear on television.

Noting that the Supreme Court had considered such changing circumstances in deciding to give cable TV full, rather than qualified, First Amendment protection from government regulation, the Circuit Court said it could “think of no reason why this rationale for applying strict scrutiny in the case of cable television would not apply with equal force to broadcast television” in light of the parental control technology now available.

Still, it conceded that, as a lower federal court, it was bound by Supreme Court precedent, “regardless of whether it reflects today’s realities. The Supreme Court may decide, in due course, to overrule Pacifica and subject speech restrictions in the broadcast context to strict scrutiny.” But it has not done so yet, so, the panel said, it was bound not to anticipate such a change.

But, rather than sort out just what Pacifica means in the present communications environment, the panel simply resorted to vagueness doctrine, and found that the Commission had been unable to show, with any clarity, just what is now banned, and what is now allowed, on radio and TV in either entertainment or news programming. It thus nullified the policy outright.

The Circuit Court had the case returned to it by the Supreme Court in April last year in a 5-4 decision. The majority ruled then that the FCC’s ban on “fleeting expletives” did not violate the federal statutes under which the FCC operates. But that ruling did not resolve the broadcast industry’s constitutional challenges to the ban, leaving that to the Second Circuit in the first instance, leading to Tuesday’s ruling.

The FCC now has the option of seeking en banc review by the full Second Circuit, or of taking the case on to the Supreme Court, if it wishes to try to resurrect the ban.
The Supreme Court said yesterday that the Federal Communications Commission may penalize even the occasional use of certain expletives on the airwaves but left for another day the question of whether such a policy is constitutional.

The court's narrow ruling said the FCC—prompted by Cher's use of the F-word during a 2002 live broadcast and similar remarks by what Justice Antonin Scalia called "foul-mouthed glitteratae from Hollywood"—was justified in changing its policy in 2004 to fine broadcasters up to $325,000 every time certain words are allowed on the air.

"The commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children," Scalia wrote for the five-member conservative majority.

Fox Television Stations and other networks had challenged FCC’s actions under the Administrative Procedure Act. They said the agency did not adequately explain why it changed its policy, which previously held that one-time utterances of expletives did not constitute a violation of FCC rules.

The networks also challenged the rule under the First Amendment, but, like the U.S. Court of Appeals for the Second Circuit in New York, the Supreme Court did not rule on the question of constitutionality.

"Whether [the policy] is unconstitutional will be determined soon enough, perhaps in this very case," Scalia wrote in sending the case back to the appeals court. In the meantime, any suppressed "references to excretory and sexual material surely lie at the periphery of First Amendment concern."

The Parents Television Council, which had strenuously lobbied the commission to adopt the tougher stance, called the ruling "an incredible victory for families." It called on the FCC to "use today's opinion to . . . rule on the merits of the tens of thousands of indecency complaints currently awaiting review at the Commission."

Fox said it was disappointed but "optimistic that we will ultimately prevail when the First Amendment issues are fully aired before the courts."

Justices Clarence Thomas, who aligned with the majority, and Ruth Bader Ginsburg, who dissented, expressed constitutional concerns. Thomas said he was "open" to reviewing the court's decisions that gave the FCC constitutional authority to police the airwaves, and Ginsburg said there is "no way to hide the long shadow the First Amendment casts over what the commission has done."

The lingering constitutional question and instability at the FCC make it unclear how
the commission will react to the decision. Two seats on the five-member agency are empty, and Julius Genachowski, President Obama’s nominee to head the FCC, has not been confirmed by the Senate. Genachowski seems not to take as high an interest in violations of indecency rules as the previous chairman, Kevin Martin, who made the crackdown a priority.

But Jessica Zufolo, an analyst at the research firm Medley Global Advisors, said Genachowski will hear from members of Congress who strongly support rules on broadcast indecency.

“Congress is very bullish on upholding the FCC’s indecency rules, so we expect a tremendous amount of pressure on the FCC in the aftermath of this decision,” Zufolo said.

Chief Justice John G. Roberts Jr. joined Justices Anthony M. Kennedy, Samuel A. Alito Jr., Thomas and Scalia in the majority that upheld the FCC’s action in the case, FCC v. Fox Television Stations. Six of the nine justices wrote separate, occasionally biting opinions to explain their decisions and criticize the others.

The court made it through an hour of oral arguments in the fall and yesterday’s decision announcement without using the offending words. But Scalia yesterday recounted some of the events that led to the FCC’s change of policy by substituting what he said “we will call the F-word and the S-word.”

First, there was Cher, who responded to her critics after winning an award at the 2002 Billboard Music Awards by saying, to use Scalia’s alternative, “So F ‘em.” Celebrity Nicole Richie complained on air that getting the S-word out of a Prada purse was not so “F-ing simple,” Scalia recalled.

Those and other incidents—such as Janet Jackson’s exposed breast during the 2004 Super Bowl halftime show, not an issue in this case—outraged the public.

But the appeals court struck the agency’s toughened rules, saying it had failed to “articulate a reasoned basis” for the policy change.

Scalia and the majority disagreed, saying the commission was fulfilling its mission from Congress to patrol the airwaves for descriptions or depictions of sexual or excretory functions, whether used literally or as expletives.

“Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives,” Scalia wrote.

But Justice Stephen G. Breyer said the agency does not have “the freedom to change major policies on the basis of nothing more than political considerations or even personal whim.” His dissent was joined by Justices John Paul Stevens, David H. Souter and Ginsburg.

It has been 30 years since the court considered the afternoon radio broadcast of comedian George Carlin’s “Filthy Words” monologue and decided that the government can police the nation’s airwaves without violating the First Amendment.

Plaintiffs in this case represent two classes: those who objected to the union's 2005 Hudson notice and those that did not [unions must explain basis for assessment and the right to object]. After issuing their 2005 Hudson notice, union officials voted to approve a special assessment to fund a "Political Fight Back Fund" to combat against what the union perceived as potentially unfavorable contemplated government action. Plaintiffs filed suit claiming the assessment and the subsequent fee increase violated their First, Fifth, and Fourteenth Amendment rights. In 2007 the district court found for the plaintiffs, holding that an additional Hudson notice should have been provided. In 2010, the Ninth Circuit reversed. The court applied a balancing test under Hudson, balancing the union's interest in avoiding free rider issues against the employees' interest in avoiding compelled subsidy of speech.

Questions Presented: (1) May a State, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a notice that includes information about that assessment and provides an opportunity to object to its exaction? (2) May a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures?
by this case, we conclude that a second notice is not required, and we reverse the judgment of the district court.

I

A

Congress has long recognized the "important contribution of the union shop to the system of labor relations." The Supreme Court has underscored this Congressional policy by enforcing the right of a union, as the exclusive collective bargaining representative of its employees, to require nonunion employees to pay a fair share of the union's costs. However, the Supreme Court has also recognized the First Amendment limitation on collection of fees from dissenting employees for the support of ideological causes not germane to the union's duties as collective-bargaining agent.

In Hudson, the Supreme Court established certain procedural safeguards to balance these interests by requiring "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." Notices issued pursuant to this language have become known as "Hudson notice[s]."

After receiving a Hudson notice, "the nonunion employee has the burden of raising an objection, but ... the union retains the burden of proof" as to the appropriate proportion of fair share fees. It is the policies underlying Hudson that inform the determination of whether a Hudson notice is adequate: "Basic considerations of fairness, as well as concern for the First Amendment rights at stake, ... dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee."

B

This appeal involves the adequacy of a Hudson notice given by SEIU Local 1000 (the "Union"), the exclusive bargaining agent for California state employees. The Union and the State of California have entered into a series of Memoranda of Understanding controlling the terms and conditions of employment for employees, including a provision requiring that all State employees in these bargaining units join the Union as formal Union members, or if opting not to join, pay an "agency" or "fair share" fee to the Union for its representational efforts on their behalf. The agency fee is calculated as a percentage of the Union dues paid by members of the Union.

The Union issues a Hudson notice to all nonmembers every June. The constitutionally required notice is meant to provide nonmembers with an adequate explanation of the basis of the agency fee. The notice contains information regarding the Union's expenditures from the most recently audited prior year, broken down by major category of expense and then, within each category, allocated between "chargeable" and "non-chargeable" classifications. "Chargeable" expenses are those that are "germane" to the union's representational functions, and can be charged to all nonmembers of the union. "Non-chargeable" expenses are those unrelated to the union's representational functions, such as partisan political expenditures or purely ideological issues. The union may charge nonmembers for non-chargeable expenses, but the nonmember has the option to object, and only be charged a reduced agency fee based upon the percent
of the union’s total expenditures that can be classified as “chargeable.” In addition, the nonmember is not charged for certain union-sponsored benefits, such as a credit union credit card, that are not available to nonmembers.

The financial information in the notice forms the basis for calculating the fee to be paid by nonmembers during the ensuing fee year. The notice also provides that for thirty days after the notice is issued, nonunion employees can object to the collection of the full agency fee, and elect instead to only pay a reduced rate during the upcoming fee year based on the percentage ratio of chargeable expenditures to total expenditures. During that thirty day period, nonmembers can challenge the Union’s calculation of its chargeable and non-chargeable expenses, to be resolved by an impartial decision maker.

A given agency fee is in effect from July 1 through June 30 of the following year (the “fee year”), at which point the agency fee set forth in the Union’s next Hudson notice goes into effect. The 2005 Hudson notice set the agency fee to be paid by nonunion employees as 99.1% of the Union dues. The reduced agency fee of 56.35% of Union dues would be charged to nonmembers who objected to paying the full agency fee, and who requested a reduction pursuant to the procedures and deadlines outlined in the notice. The notice explicitly stated dues and fees were subject to change without further notice to fee payers.

During the summer of 2005, the legislative bodies within the Union debated and approved a temporary assessment (also referred to as a dues and fees increase) equal to .0025, or .25% of Union members’ gross wages. The increase took effect at the end of September 2005 and terminated at the end of December 2006, and was expected to raise $12 million for the Union.

Specifically, on July 30, 2005 the Union’s Budget Committee proposed an emergency temporary assessment to create what was termed in the agenda item introducing it as a “Political Fight Back Fund.” This agenda item stated the Fund “will be used for a broad range of political expenses” in response to several “anti-union” propositions on the November 2005 special election ballot in California, and that the fund “will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement.” On August 27, 2005 Union delegates voted to implement the temporary dues increase. On August 31, 2005, the Union sent a letter to all members and agency fee payers stating that they were subject to the new increase, and that the fund would be used “to defeat Propositions 76 and 75,” other future attacks on the Union pension plan, and other activities.

The Union material indicated that the fund would be used for political activities. Yet, in response to inquiries, the Union specifically stated it intended to split the increase “between political actions and collective bargaining actions.” Further, not all of the political activities fell into the “non-chargeable” category. The assessment itself included no spending limitations, and the money was actually used for a range of activities, both political and not, and both chargeable and not. Pursuant to the increase, the Controller began collecting additional fees from Plaintiffs at the end of September 2005.

Plaintiffs represent two classes of nonunion employees, those who objected to the Union’s 2005 Hudson notice (“objectors”) and those who did not (“nonobjectors”) (collectively “Plaintiffs”). Plaintiffs initiated
this action in November 2005, alleging the assessment violated their First, Fifth, and Fourteenth Amendment rights under 42 U.S.C. § 1983. Plaintiffs filed for summary judgment, and the Union filed a cross-motion for partial summary judgment. The district court granted Plaintiffs’ motion in its entirety, and partially granted and partially denied the Union’s motion. This timely appeal followed.

We review de novo a district court’s grant of summary judgment on the sufficiency of the Hudson notice. On review, we must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.

II

A

In reviewing the adequacy of the Hudson notice, we employ our usual standard of review, as dictated by Hudson. In that case, the Supreme Court articulated the legal standard to be applied in this analysis as a balancing test, stating that “[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union’s ability to require every employee to contribute to the cost of collective-bargaining activities.”

The Plaintiffs argue we should abandon the balancing test established in Hudson, in favor of strict scrutiny review. They argue that this case involves compelling their speech on political issues, and that therefore the government-mandated speech cases, and their application of strict scrutiny should apply. . . . We disagree.

First, Hudson itself articulated the legal standard to be applied, and we are not free to reject the balancing test mandated by the Supreme Court.

Second, we articulated the test in Grunwald v. San Bernardino City Unified Sch. Dist., 994 F.2d 1370 (9th Cir.1993). We noted in that case that in challenges to the First Amendment procedure used by unions, the union need not employ procedures that “would minimize further the burden on agency fee payers.” “The test, after all, is not whether the union and the [employer] have come up with the system that imposes the least burden on agency fee payers, regardless of cost (a test no system could possibly satisfy); rather we inquire whether the system reasonably accommodates the legitimate interests of the union, the [public employer] and nonmember employees.”

Therefore, we will apply the normal Hudson balancing and reasonable accommodation test we have used in the past when deciding challenges to Hudson notice procedures.

B

Applying the balancing test, we conclude that the Union did not violate the Hudson requirements. The Supreme Court in Hudson recognized the impossibility of determining the chargeability of a union’s anticipated expenditures at the outset of the fee year, and specifically approved calculating the present year’s objector fee based on the prior year’s total expenditures. The Supreme Court explained, “We continue to recognize that there are practical reasons why absolute precision in the calculation of the charge to nonmembers cannot be expected or required. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year.” Hudson thus struck a balance between the
rights and burdens in this context, acknowledging that a union is not constitutionally required to take any and all steps demanded by fee payers to insure that its annual fee notice accurately predicts its actual spending in the upcoming year.

Use of the prior year method is a practical necessity because, for large public sector unions, the Hudson notice must be based on audited financial statements, with the union’s chargeable percentage calculation verified by an independent auditor, and the union must send its fee payers the independent auditor’s report with its Hudson notice. The audit requirement renders impossible any method of determining the chargeability of the upcoming fee year’s expenditures other than basing it on the prior year’s actual expenditures, because one cannot audit anticipated future expenditures. Until the money has been spent, the auditor cannot determine whether the expenditures which the union claims it made for certain expenses were actually made for those expenses.

The inevitable effect of the Hudson “prior year” method is a lag of at least one year between the time when a union incurs expenditures and when the audited ratio of its chargeable expenditures to total expenditures is applied to calculate the objectors’ fee for the next year. Fluctuation is inherent in such a method: in each year, objectors may be “underpaying” or “overpaying” fees when compared to the chargeable percentage of the union’s actual expenditures in that year because under Hudson ‘s “prior year” method the fee is based upon the chargeable percentage of the prior year’s actual expenses, but the inevitable effect of the Hudson method is that these over-and undercharges even out over time. The Hudson notice can never be more than a prediction, which will inevitably be incorrect as to the union’s actual expenditures. The Hudson notice is not, and cannot be expected to be, more than that.

C

The district court faulted the Union for failing to make an accurate prediction in its June 2005 Hudson notice of its actual expenditures in the remainder of that fee year due to the subsequent enactment of the temporary increase. Yet, under the normal Hudson procedure, any payments over and above the Union’s actual chargeable expenditures in the 2005 fee year would be incorporated into the rate for the next fee year. The Supreme Court has determined that this is sufficiently accurate to comply with the constitutional restrictions. There is no principled distinction to be drawn between the paradigmatic Hudson procedure and the one employed here.

Indeed, in the usual Hudson notice situation, the actual chargeable percentage of a union’s actual spending in any given year, as well as the precise dollar amount of dues and fees, will likely vary from the prior year’s figures set forth in the applicable Hudson notice. The Plaintiffs allege the Union did not provide a procedure that would avoid the risk that nonmembers’ funds from the special assessment would be used, even temporarily, to finance nonchargeable activities, but merely offered dissenters the possibility of a rebate. Therefore, the Plaintiffs reason, the procedure is unconstitutional. This construction takes the central Hudson concepts completely out of context and applies them in a way that would not only invalidate the fee increase, but would invalidate the very procedural system decreed by the Supreme Court in Hudson. Plaintiffs appear to argue that because the
assessment was to be used for "purely" political reasons, it could not be constitutionally collected from nonmembers in the first place, and that any collection and then later incorporation of the non-chargeable amount into a future agency fee objector rate would be tantamount to an impermissible rebate of the earlier fee. Yet, the Union had already reduced the fee for objecting nonmembers, and has demonstrated that the assessment was not purely non-chargeable, nor intended to be so. Further, the record belies the assertion that the charges were used "purely" for non-chargeable expenses.

The section of Hudson discussing rebates did not condemn the advance reduction procedure the Union used here, but rather a "pure rebate" system where the union collects a fee that is equal or nearly equal to full dues, and then provides a rebate of the non-chargeable portion to objectors only at the end of the fee year. Here the Union charged objectors only 56.35% of the temporary increase, the chargeable percentage set forth in the June 2005 notice, rather than 100% of the increase followed by a later rebate.

Additionally, the district court's direction that a union must issue a second Hudson notice when it intends "to depart drastically from its typical spending regime and to focus on activities that [are] political or ideological in nature," is practically unworkable. Union spending may vary substantially from year to year—in one year there may be a new collective bargaining agreement negotiated, resulting in a high chargeable percentage for objectors that is followed by an election year that results in a low chargeable percentage for objectors. In fact, for example, the chargeable percentage for 2006, the year incorporating the fee increase spending, was higher than that for the 2005 Hudson notice.

Hudson 's prior year method assumes and accepts that a union has no "typical spending regime," and that even though spending might vary dramatically, a single annual notice based upon the prior year's audited finances is constitutionally sufficient. Otherwise, a union's Hudson notice for an upcoming partisan political election year, following a negotiating year, could not be based upon the union's actual total expenditures in the previous year because the union would intend in the coming fee year to "depart drastically from its previous spending regime and to focus on activities that are political or ideological in nature." Yet, this is the system set out by Hudson, and no following case has questioned its continuing vitality. The fact that a projection of expenditures may differ from actual expenditures should surprise no one. The key analytic point for Hudson purposes is that proper notice is given and subsequent adjustments made.

The district court's conclusion was also at odds with our precedent. The district court required the Union to come up with a system that imposes the least burden on agency fee payers. However, the legal requirement for unions in this situation is to establish a system that merely "reasonably accommodates the legitimate interests of the union, the [public employer] and nonmember employees[]." . . . The 2005 notice satisfied the standards established by Hudson.

The Supreme Court's decision in Davenport v. Washington Education Ass'n, 551 U.S. 177, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007), does not lead us to a contrary conclusion. In Davenport, the Supreme Court held the Hudson requirements outline a minimum set of procedures by which a public sector
union in an agency shop relationship could meet its constitutional requirements, and that state legislatures may place limitations on a union’s entitlement to fees above those laid out in Hudson. Davenport arose in the context of the state of Washington enacting legislation requiring unions to give all nonmembers the objector fee rate unless they affirmatively agreed to be charged for non-chargeable activities (in contrast to the California rule where silence equals consent, rather than dissent). Davenport held that while the “silence equals consent rule” is constitutional, it is also constitutional for a state to make a “silence equals dissent” rule. Under Davenport, it is state legislatures, rather than courts, that have the power to implement higher standards. This holding does not alter our conclusion in this case that the 2005 notice was adequate to cover the subsequent dues increase, as Davenport does not speak to such a situation.

III

The Union’s notice in this case complied with the Hudson procedural requirements. Therefore, we reverse the district court, and remand with instructions to deny the Plaintiffs’ motion for summary judgment. We also reverse the denial of defendant’s motion for partial summary judgment regarding the consent of nonobjectors under California law, and remand with instructions to grant the motion. We reverse the award of nominal damages to Plaintiffs.

REVERSED AND REMANDED.

WALLACE, Circuit Judge, dissenting:

I dissent from the majority’s opinion because it is not faithful to the principles guiding the Court’s decision in Chicago Teachers Union v. Hudson, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). The majority begins from an inaccurate account of the interests at stake, and applies the procedures set forth in Hudson without due attention to the distinguishing facts of this case. The result is contrary to well-established First Amendment principles.

I

I begin with the legal authorization for the agency shop system because it provides the framework for my evaluation of the issues in this case, and because I am of the view that the majority’s opinion presents an incomplete account of the relevant legal principles.

A.

The National Labor Relations Act allows the states to regulate their labor relationships with public sector employees. Many states, including California, allow public-sector unions and government employers to enter into “agency-shop” arrangements. Defendant SEIU Local 1000 (Union) is the designated bargaining representative for California state employees, pursuant to such an agency-shop arrangement. The Union is legally obligated to represent equally all employees in the bargaining unit. The Union levies a fee on every employee whom it represents in collective bargaining, even if the employee refuses to join the Union. The fees paid by bargaining unit employees who are not members of the Union are commonly known as “agency fees” or “fair share fees.” Plaintiffs in this case are eight nonmembers of the Union, representing a class of approximately 28,000 public employees, who are required to pay an agency fee.

Agency-shop arrangements present First Amendment concerns. These concerns are particularly sharp in the public sector: “agency-shop arrangements in the public
sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment.” The Court explained in Davenport that “[r]egardless of one’s views as to the desirability of agency-shop agreements, . . . it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees.”

Despite the infringement of First Amendment rights engendered by the agency-shop arrangement, the Supreme Court has deemed such arrangements to be constitutionally permissible in principle. The Court has determined that agency-shop arrangements are “justified by the government’s interest in promoting labor peace and avoiding the ‘free-rider’ problem that would otherwise accompany union recognition.”

Importantly, however, a union “[m]ay not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent.” Instead, nonmembers may only be compelled to contribute a fair share of costs germane to collective bargaining. As a corollary, nonmembers have a constitutional right to “prevent the Union’s spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.” “The amount at stake for each individual dissenter does not diminish this concern. For, whatever the amount, the quality of respondents’ interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear.”

B.

In addition, procedural protections are constitutionally required in connection with a union’s assessment and collection of an agency fee. In Hudson, the Court considered whether a union’s procedure for the collection of agency fees adequately protected the distinction between germane collective bargaining costs and nonchargeable political expenditures. The Court explained that procedural protections were constitutionally required in this context for two reasons:

First, although the government interest in labor peace is strong enough to support an “agency shop” notwithstanding its limited infringement on nonunion employees’ constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee—the individual whose First Amendment rights are being affected—must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.

Hudson, 475 U.S. at 302-03, 106 S.Ct. 1066.

The Court held that, “[s]ince the agency shop itself is ‘a significant impingement on First Amendment rights,’ . . . the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee’s ability to protect his rights.”

In Hudson, the defendant, a teacher’s union, had implemented a fair share fee calculated as the proportion of chargeable expenditures in the preceding fiscal year, that is, those expenses related to collective bargaining and contract administration. The union also established a procedure for the consideration
of nonmembers’ objections. The union failed, however, to provide nonmembers with any explanation of how the fair share fee was calculated or explanation of the union’s procedures. The Court held that the union’s procedure was inadequate for three reasons: “because it failed to minimize the risk that nonunion employees’ contributions might be used for impermissible purposes, because it failed to provide adequate justification for the advance reduction of dues, and because it failed to offer a reasonably prompt decision by an impartial decisionmaker.”

First, the procedure at issue in Hudson was constitutionally deficient because it merely offered dissenters the possibility of a rebate; it failed to minimize the possibility that dissenters’ funds would be used for an improper purpose in the first place. The Court stressed that the union should not be permitted to exact an agency fee from dissenters “without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.”

Second, the union’s procedures were held constitutionally deficient because employees had not been provided with sufficient information about the basis of the proportionate share: “[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union’s fee.” In Abood, the Court had stated that it was a union’s duty to provide “the facts and records from which the proportion of political to total union expenditures can reasonably be calculated.” The Court went further in Hudson, holding that the union was required to provide this information without awaiting an objection.

Third, Hudson held that there must be a dispute resolution procedure. The Court stated that a union must provide both “a reasonably prompt opportunity to challenge the amount of the fee” as well as “a reasonably prompt decision by an impartial decisionmaker.” The procedure at issue in Hudson was inadequate because it was controlled by the union and did not provide for an impartial decisionmaker. The Court further held that a union must provide an “escrow for the amounts reasonably in dispute while such challenges are pending.”

Drawing on these considerations, Hudson outlined three requirements for a union’s collection of an agency fee: (1) “an adequate explanation of the basis for the fee,” (2) a “reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker,” and (3) “an escrow for the amounts reasonably in dispute while such challenges are pending.”

C.

Surprisingly, in the case before us the majority characterizes the Hudson “test” as a “balancing test” or “reasonable accommodation test.” The majority chooses, moreover, to highlight the Union’s interests, stating that Congress has recognized the “important contribution of the union shop to the system of labor relations,” and that “[t]he Supreme Court has underscored this Congressional policy by enforcing the right of a union, as the exclusive collective-bargaining representative of its employees, to require nonunion employees to pay a fair share of the union’s costs.”

The majority puts its finger on the wrong side of the scale. A union has no “right” to the collection of agency fees, and Hudson does not call for merely a “reasonable accommodation” of employees’
constitutional rights. From the framework described above, I view the Union's procedures much differently than the majority. I fear that the majority's account of the interests at stake, compounded by its view of the operative legal test, invites confusion. Indeed, it tampers with vitally important First Amendment principles.

1. I cannot begin from the proposition that we are required to balance the "rights" of the Union against the rights of the employees it represents. While the majority insists that the only way "to faithfully characterize the procedures set out in Hudson " is to "balance" the Union's "right" to collect agency fees against the first amendment rights of non-union employees, it is the majority that is unfaithful to Hudson and her progeny. The Union's collection of fees from nonmembers is authorized by an act of legislative grace, not by any inherent "right" of the Union to the possession of nonmembers' funds. This should be clear to all. In Davenport, the Court explained that its agency-fee cases "were not balancing constitutional rights in the manner [the union] suggests, for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees." Along similar lines, the Second Circuit has held that it is error to approach the agency-fee issue "with a balancing test in which the cost to the union and the practicality of the procedures were to be weighed against the dissenters' First Amendment interests."

Davenport considered a Washington state law prohibiting labor unions from using the agency-shop fees of nonmembers for election-related purposes unless the nonmember affirmatively consented. The Court considered whether this restriction on a union's spending of agency fees, as applied to public-sector labor unions, violated the First Amendment. The Court emphatically determined that the restriction did not: "[t]he notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive." The union had no right to the funds; instead, "[w]hat matters is that public-sector agency fees are in the union's possession only because Washington and its union-contracting government agencies have compelled their employees to pay those fees."

Viewed properly, the collection of agency fees is authorized by legislative policy considerations pertaining to labor relations. There are several justifications for an agency shop, but only one is implicated in this case: to prevent free-riding by nonmembers who benefit from the union's collective bargaining activities. Political and ideological expenditures fall outside "the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified."

Thus, the majority is mistaken. The Union's interest in this case is not a "right" to nonmembers' funds. The Union's interest lies in receiving a fair contribution to its collective bargaining expenses. The Union has no legitimate interest, however, in collecting agency fees from nonmembers to fill its political war-chest.

2. The majority describes Hudson as a "reasonable accommodation test." The majority points to the following statement from Hudson: "[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require
every employee to contribute to the cost of collective-bargaining activities.” The majority also states that a union need not take “any and all steps demanded by fee payers.” The majority looks to our decision in *Grunwald v. San Bernardino City Unified School District*, which stated: “[t]he test . . . is not whether the union and the [employer] have come up with the system that imposes the least burden on agency fee payers, regardless of cost.” 994 F.2d 1370, 1376 n. 7 (9th Cir.1993).

But there is a wide gap between taking “any and all steps demanded by fee payers”—that is, a least-restrictive means test—and what the majority endorses. While *Hudson* does not require a union to adopt procedures that impose the least intrusive burden on fee payers possible, the majority affords the union undue leniency. The majority ignores *Hudson*’s instruction that, because employees’ First Amendment interests are implicated by the collection of an agency fee, “the procedure [must] be carefully tailored to minimize the infringement.” To eliminate any doubt, in the footnote appended to this statement, the Court cites several cases holding that when First Amendment rights are implicated, the government must avoid burdening those rights.

*Hudson* emphasized, moreover, that “procedural safeguards often have a special bite in the First Amendment context.” In the agency fee context, *Hudson* described the goal of procedural protections as to “minimize the risk that nonunion employees’ contributions might be used for impermissible purposes” *even temporarily*, and to “facilitate a nonunion employee’s ability to protect his rights[.]” I therefore conclude that the majority’s “reasonable accommodation test” is misguided and is inconsistent with case law that we are required to follow.

II.

The Union’s procedures in this case should be evaluated in light of the principles set forth in *Hudson* and the legitimate interests at stake. As the majority has already set forth the facts of this case in some detail, I recite them only where particularly relevant to my views or where additional detail is warranted. I also seek to draw more attention to the well-reasoned decision of the district court.

A.

***

In the Summer of 2005, shortly after the expiration of the period for objection to the June 2005 *Hudson* notice, the Union’s legislative bodies began discussing a temporary dues increase. The proposal was described as an “Emergency Temporary Assessment to Build a Political Fight-Back Fund.” The agenda for a July 30, 2005 Council Meeting described the purpose of the assessment as follows: “[t]he funds from this emergency temporary assessment will be used specifically in the political arenas of California to defend and advance the interests of members of Local 1000. . . .” The agenda continued to describe:

These temporary emergency assessments are made necessary by political attacks on state employees and other public workers launched by Governor Schwarzenegger and his allies which threaten the wages, benefits and working conditions of Local 1000 members, and undermine the services they provide to the people of California.

The Union contemplated that the “Political Fight-Back Fund” would not be used for the “regular costs of the union . . . such as office
rent, staff salaries or routine equipment replacement.” Instead, the Fund would be used “for a broad range of political expenses.”

The Union approved the temporary assessment at the end of August 2005. The Union’s yearly Hudson notice had been issued in June 2005, and that notice did not mention the possibility of the later-enacted temporary assessment. After passage of the temporary assessment, the Union sent a letter to members and nonmembers, dated August 31, 2005, informing them that “Local 1000 delegates voted overwhelmingly for a temporary dues increase to create a Political Fight-Back Fund.” The letter stated that the funds collected from the dues increase would be used for several political purposes: (1) to defeat two propositions appearing on the November 2005 ballot (Propositions 75 and 76); (2) to “defeat another attack on [the] pension plan” in June 2006; and (3) “[i]n November 2006 ... to elect a governor and lawmakers who support public employees and the services [they] provide.” The letter explained that the $45 per month cap on dues would not apply to the temporary assessment. For sake of clarity, I point out that this letter did not constitute “notice” as contemplated in Hudson. The letter did not provide an explanation for the basis of the additional fees being imposed, and it did not provide nonmembers with an opportunity to object to the additional fees.

After receiving the Union’s letter, some nonmembers attempted to object to the temporary assessment. For example, plaintiff Dobrowolski contacted the Union to lodge his objection to the “Political Fight-Back Fund.” He was told, in effect, that there was nothing he could do about it; he was not allowed to object. The Union thereafter sent a letter to nonmembers, like plaintiff Dobrowolski, who attempted to object to the increase in fees. That letter, dated October 27, 2005, stated in part:

The Union has received your objection to the dues increase. We understand that you are a political objector and a fee payer in the Union and that you have raised an objection to paying this increase because you believe the money will be directed solely to political activities by the Union. We understand your frustration about paying a little more to the Union when you have not seen a new contract with a pay increase. However, we hope that by explaining the Union’s position concerning this dues and fees increase, you will better understand our position...

When we have a campaign that is split between political actions and collective bargaining actions the Union is required by law to annually audit the expenditures for those activities; the Union will fully comply with this requirement. However, the Supreme Court has stated that this audit must occur at the end of the fiscal year in which the activities take place, because next year’s objecting fee-payer rate must be based on that audit.

This campaign will entail much workplace organizing divided over two fiscal years. At the end of each year, the Union’s expenses for these activities will be audited, and the amount of expense which is not germane to collective bargaining will be used to set the objecting fee-payer rate for the next year. Presently you are an objecting fee-payer who pays the audited rate for this year.
year, you will be able to exercise your objection again and pay the audited rate set for that year, based on the Union’s expenditures this year. That rate will fully account for any political actions of the nature to which you have objected.

The temporary assessment took effect at the end of September 2005. At that time, the Controller of the State of California, defendant Steve Westly, began deducting the additional fees automatically from all nonmember employees’ paychecks. Although the assessment was “temporary,” it was certainly not of short duration, lasting from September 2005 until the end of December 2006.

B.

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There are several important features of the district court’s [grant of] summary judgment [in plaintiffs’ favor]. First, the district court addressed the burden imposed by the temporary special assessment. The Union argued that nonmembers who had objected to the June 2005 Hudson notice were assessed only a 14.09% increase in the deduction from the objector’s salary. The district court opined that the figure was “somewhat misleading” because it ignored the fee increase imposed on nonunion employees who had not objected to the Union’s June 2005 Hudson notice. The district court indicated that the Union’s quantification of the temporary assessment was misleading in other respects as well, and that the actual increase in fair share fee for nonmembers ranged, on average, from 25% to 33%. The district court deemed this “a material change in the amount of funds nonunion employees were required to contribute to Union expenditures.” The district court concluded, “the fair share fees paid by both objectors and nonobjectors actually increased by a much greater margin than Defendants would like to suggest.”

Second, the district court discussed the characterization of the temporary special assessment. Plaintiffs asserted that the fund was intended solely for political and ideological purposes. The Union characterized the assessment as “an ordinary dues and fees increase” because, in retrospect, some of the expenses funded through the temporary assessment were eventually deemed chargeable to nonmembers. The district court thought the Union’s position “def [ied] logic.” The Union had described the proposed assessment as a political fund, and specifically stated that the fund was not to be used for regular costs.

Third, taking all of the above together, the district court concluded that the June 2005 notice did not provide potential objectors with sufficient information to gauge the propriety of the Union’s fee, in light of the temporary special assessment. The June 2005 Hudson notice could not provide adequate notice as to the temporary assessment because it relied on categories that were not relevant to the temporary assessment. According to the Union’s statements, the temporary special assessment was intended for a specific purpose and would not be used for regular expenses. The district court pointed out that, “after implementing the increase, the Union took the position that nonunion employees had already been given an opportunity to make an informed decision as to the Assessment by means of the 2005 Hudson notice. The Union now turns a blind eye to the inconsistency inherent in asking nonunion employees to compare apples, in the form of the prior year’s financials, to
oranges, in the form of a new Assessment.”

Finally, the district court concluded that the appropriate remedy was a second Hudson notice, relying on Wagner v. Professional Engineers in California Government, 354 F.3d 1036, 1041 (9th Cir. 2004). This remedy had to be made available to nonmembers regardless of whether they had objected to the June 2005 Hudson notice, because: “[i]n order for any nonunion employees’ failure to object to have any legal significance, the 2005 Hudson Notice must have been valid and sufficient to cover the Assessment.” The district court held that objectors to the second Hudson notice would be entitled to a refund, with interest, of any withheld amounts.

III.

In this case, the Union failed to protect adequately the First Amendment rights of nonmembers from whom it collected an agency fee. In collecting agency fees from nonmembers, the Union is subject to constraints that are both procedural and substantive in nature. Procedurally, the Union did not provide nonmembers with sufficient information to gauge the propriety of the agency fee. The Union’s June 2005 Hudson notice was insufficient in light of the temporary assessment. Notably, the Union adopted no other procedures to protect nonmembers’ First Amendment rights upon imposition of the temporary assessment. Nonmembers were provided no additional notice, opportunity to object, dispute resolution procedure, and so forth. Compounding these procedural failures, there is a substantive problem. The temporary assessment is suspect, because it was instituted shortly after the June general Hudson notice and was explicitly and exclusively intended to fund the Union’s political activities. The temporary assessment was a special purpose fund that would not be used for regular Union costs and therefore represented a departure from the Union’s typical spending regime. I do not believe the Union sufficiently minimized the risk that nonmembers’ funds would be used to subsidize political and ideological activities in light of these circumstances.

A.

I first consider the adequacy of the Union’s June 2005 Hudson notice in light of the temporary assessment.

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The Union submits that the Supreme Court has approved the retrospective method by which it calculates the yearly agency fee: a “look-back” procedure, by which the Union sets the agency fee for the upcoming year according to the proportion of chargeable versus nonchargeable expenditures in the prior year. However, the Union’s June 2005 Hudson notice was not adequate to provide an explanation of the basis for the agency fee extracted from nonmembers’ paychecks for the temporary assessment. To reiterate the obvious, the June 2005 Hudson notice provided no information regarding the temporary assessment, as it was enacted subsequently, in August 2005. The Union would respond that the notice was adequate to cover such future contingencies. How could that be? The temporary special assessment resulted in approximately a 25% increase in fair share fees—a fairly substantial increase. Because the temporary assessment was exempted from the dues cap, higher-earning employees might experience an effective or actual increase that was even greater. Moreover, while the assessment was “temporary,” it was in effect for the bulk of the 2005 fee year, from the end of September 2005 until commencement
of the next fee year in July 2006.

The district court further held that the fee increase was material, and I agree. The temporary special assessment might therefore have affected a fee payer’s decision to object pursuant to the June 2005 Hudson notice. Indeed, because the Union refused to give nonmember employees an opportunity to object when information about the temporary assessment was disclosed, these nonmembers were essentially left in the “dark” about the nature of the agency fee during the time period in which they were required to file objections. In other words, even though the special assessment significantly altered the magnitude and intended use of the agency fee, the Union and the majority believe that nonmember employees were required to object before the material information was revealed. Such an approach simply cannot be reconciled with the procedures set forth in Hudson.

The Union would respond, I venture, by asserting that the temporary assessment did not alter the agency fee as a percentage of total union dues. The June 2005 Hudson notice disclosed that the agency fee was 99.1% of membership dues, and that the objectors’ agency fee was 56.35% of membership dues. The temporary assessment did not affect these percentages. But such an argument rests on the faulty premise that, if nonmembers’ fees remain constant as a percentage of members’ dues through a given fee year, any absolute increase in fees is protected from scrutiny by the yearly Hudson notice, that is, that the proportionate share is what matters, and because this was not altered there can be no constitutional violation.

I am not convinced that the proportionate share is all that matters in evaluating the adequacy of a Hudson notice. From the standpoint of a potential objector, the magnitude of the increase in fees imposed by the temporary assessment could very well be material. This increase, as an absolute amount, could affect a nonmember’s decision to object or not to object even if the percentage fee remained static. And these nonmembers are the ones whose First Amendment rights are in jeopardy—not the Union’s. Moreover, the temporary assessment was exempted from the cap on dues. Thus, even though the fair share fee remained constant as a basic percentage under the temporary assessment, because the assessment was exempted from the $45 per month cap on dues, some employees would in fact experience a proportionately greater share in monthly fee deductions. This is inconsistent with a static-percentage justification for the Union’s failure to provide additional notice regarding the temporary assessment.

Furthermore, by exempting the temporary assessment from the cap, the Union acted contrary to the June 2005 Hudson notice. The June 2005 Hudson notice, stated: “currently 1.0% of monthly gross salary and are presently capped at a maximum of $45 per month.” Exceptions from the cap, or the elimination of it, was not contemplated in the June 2005 Hudson notice. The Union’s June 2005 Hudson notice also stated: “[d]ues are subject to change without further notice to fee payers.” I cannot put much weight in this sweeping reservation of assumed authority; in any event, the notice did not disclose that the cap could be eliminated. For these additional reasons, I conclude that the temporary assessment might be a material factor in a nonmembers’ decision to object.

I conclude that the Union’s June 2005 notice did not fulfill its obligations under Hudson.
The purpose of a Hudson notice is to enable informed consent or objection. The Union’s June 2005 Hudson notice was inadequate to provide fee payers with a basis on which to adjudge the propriety of the Union’s agency fee, and to decide whether or not to object.

Because the Union’s June 2005 Hudson notice was inadequate, an employee’s failure to object to it does not constitute an effective waiver, an abandonment of a known right. Until Hudson’s requirements are satisfied, employees must be afforded subsequent opportunities to object.

The June 2005 Hudson notice was not adequate to provide notice as to the temporary assessment for an additional reason, which warrants separate attention. The temporary assessment was a special purpose fund. The Union envisioned the temporary assessment as a political fundraising vehicle, to build a “Political Fight-Back Fund.” The Union contemplated that the temporary assessment would provide a distinct source of capital for political activities and that it would not be used for the regular expenses of the union. Recognizing the unique character of the temporary assessment has two implications.

First, the June 2005 Hudson notice could not be adequate to enable nonmembers’ informed objection to the agency fee. The June 2005 Hudson notice contemplated ordinary expenditures; the temporary special assessment stood apart from that. As the district court stated, the union asked nonmembers to compare “apples, in the form of the prior year’s financials, to oranges, in the form of a new [a]ssessment, an [a]ssessment which was not to be utilized for Union operations but was instead earmarked for discrete political purposes.” Even if agency fees remained constant as a percentage of total member dues, nonmembers might well object to paying increased fees for purely political purposes; for example, they might object in light of the departure from the Union’s normal spending regime.

Second, as a substantive matter, the Court has repeatedly stressed that a union may extract from nonmembers “only those fees and dues necessary to performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.” In Lehnert, the Court outlined a framework for evaluating whether an activity was germane to a union’s role as exclusive bargaining agent: “chargeable activities must (1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding ‘free riders’; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.”

To protect the distinction between chargeable and non-chargeable activities, a union is required to adopt procedures that minimize the risk that nonmembers will be compelled to subsidize political or ideological activities with which they do not agree. In Hudson, the Court explained, “[t]he Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.”

The temporary assessment was contemplated as a political fundraising vehicle; it therefore cannot be justified by the interest in preventing nonmembers from free-riding on the Union’s collective bargaining efforts. The temporary assessment clearly burdened the speech of
nonmembers. But the Union undertook no efforts, in connection with the imposition of the temporary assessment, to minimize the impact on nonmembers' First Amendment rights. Taking these considerations together, I conclude that, in connection with the imposition and collection of the temporary assessment, the Union did not fulfill its obligation to be mindful of nonmembers' First Amendment rights.

The Union and the majority seek to evade the fact that the temporary assessment was enacted to fund political activities by arguing that the fund was ultimately used for some expenses that were chargeable to nonmembers. I agree with the district court's assessment of the Union's post hoc rationalization: "[f]ollowing the union's logic it should be required only to show that some small fraction of this fund was used for chargeable purposes in order to justify subverting its Hudson responsibilities." The district court further reasoned that, even if the temporary assessment was not intended solely for political purposes, it was indeed intended predominantly for political purposes. As such, the district court continued, "it is clear that the Union's intent was to depart drastically from its typical spending regime and to focus [the temporary special assessment funds] on activities that were political or ideological in nature."

In sum, the Union's procedures were not adequate under the circumstances. The June 2005 Hudson notice was inadequate to provide nonmembers with sufficient information from which to evaluate the propriety of the Union's agency fee. After enacting the temporary special assessment, the Union made no effort whatsoever to minimize the infringement of nonmembers' rights. The Union did not provide notice regarding the temporary assessment; the Union also did not provide nonmembers with an opportunity to object to the temporary assessment. The Union did not provide a procedure for resolving disputes and did not place disputed amounts in escrow. Indeed, when nonmembers attempted to object to the temporary assessment, they were refused a forum for their dispute and were never provided with the opportunity to obtain the decision of a neutral hearing officer.

IV.

This brings me to the crux of the Union's argument: that Hudson approved calculating an agency fee as the proportion of chargeable to nonchargeable expenses in the prior fiscal year. The Union asserts that the prior-year method is virtually required here, as it is a large public sector union and must calculate its agency fee on the basis of audited financial reports. Because of the audit requirement, moreover, the Union asserts that it could not prospectively apportion the temporary assessment between chargeable and nonchargeable expenses.

The majority agrees that the Union complied with its obligations. The majority recites that "absolute" precision cannot be expected or required in the calculation of an agency fee, and that the Union cannot be "faulted" for calculating its agency fee on the basis of the prior fiscal year's expenditures. Further, the majority states that the Union could not deviate from the prior-year method of calculating the agency fee with respect to the special assessment. The majority explains that the prior-year method makes lag inherent; in any given year, an objector might be "underpaying or overpaying," but "the inevitable effect of the Hudson method is that these over- and undercharges even out over time."

This strikes me as a strange argument when
dealing with a First Amendment challenge. First, the Hudson notice procedure is not per se adequate to protect the rights of nonmembers in all situations. Instead, where, as here, there is a substantial deviation from the normal Hudson process, adaptation is required. Second, the prior-year calculation method does not establish the adequacy of the June 2005 Hudson notice nor does it demonstrate that the Union’s procedures were adequate when viewed as a whole.

A.

We should not measure the Union’s conduct by the discrete Hudson procedures alone. Hudson establishes a floor. In Davenport, the Court stressed, “we have described Hudson as ‘outlin[ing] a minimum set of procedures by which a [public-sector] union in an agency-shop relationship could meet its requirement under Abood.’”

Here, the temporary assessment was not like the Union’s ordinary dues and not like the facts presented in Hudson. Several features of the special assessment distinguish this case. The temporary assessment was imposed mid-year and not in the normal course of the Hudson process. The temporary assessment imposed a material increase in agency fees over those contemplated in the Hudson notice, and was exempt from the dues cap (which was inconsistent with the Hudson notice). Hudson did not consider a fee increase outside of a normal periodic notice process. Likewise, Hudson did not contemplate a special-purpose assessment, as here. Even assuming the Union did here what was done in Hudson, it could not be sufficient to satisfy its duties in light of the unique circumstances of this case.

I cannot agree with the proposition that the Union’s June 2005 Hudson notice satisfied the Union’s obligations to nonmembers until issuance of the next yearly Hudson notice. The Union’s mid-year conduct cannot be insulated from scrutiny. Rather, there must be some limitation on a union’s imposition of fee increases between Hudson annual notices.

B.

The Union contends that it complied with the procedures set forth in Hudson, because the Court approved the calculation of an agency fee based on the proportion of the prior year’s chargeable to nonchargeable expenditures. Indeed, in a footnote, the Court stated that a union “cannot be faulted for calculating its fee on the basis of its expenses during the preceding year.” The Union represents, furthermore, that its hands were tied with regard to the temporary assessment, because it is required to base its agency fee calculation on audited financial statements.

The prior-year calculation method used here does not satisfy all of the Union’s obligations, however. The Union’s allocation of expenses as chargeable or nonchargeable presents a distinct issue in the adequacy of its Hudson notice. Thus, even if the Union “cannot be faulted” for relying on prior-year expenditures in calculating the agency fee, it is not relieved from its other Hudson obligations. The Union must still provide adequate notice to enable an informed decision, an opportunity to lodge objections, a prompt hearing on objections by a neutral decisionmaker, and escrow of any amounts in dispute. Even if we look only to compliance with Hudson, therefore, the Union still falls short of the mark.

I recognize that the Union, in relying on prior-year expenditures as the basis for its agency fee, is subject to an audit requirement. In my view, application of the
audit requirement relates to the appropriate remedy in this case, a question we do not reach. A district court, with a proper record, could evaluate the audit requirement in light of the temporary assessment. Indeed, the purpose of an audit is to verify that a union actually spent the amount of money it claims; the audit is not intended to verify the union’s allocation as a “legal, not an accounting, decision regarding the appropriateness of the allocation of expenses to the chargeable and non-chargeable categories.” In any event, the audit requirement does not relate to the other Hudson protections implicated by this case, and is ultimately of limited help to the Union. Even a temporary violation of the First Amendment is a significant violation.

V.

The majority construes the issue in this appeal as “whether a union is required . . . to send a second notice when adopting a temporary, mid-term fee increase.” By framing narrowly the issue in this case, the majority shifts attention to the remedy adopted by the district court. But the district court’s remedy is only one consideration in this case—one we do not even reach—and should not be set up as a strawman for attack.

In this case, the Union’s provision of an annual Hudson notice was insufficient to enable nonmembers to protect their First Amendment rights upon imposition of the temporary assessment. The Union, furthermore, made no effort to minimize the infringement of nonmember’s First Amendment rights despite substantially increasing the fees extracted from their paychecks. I believe that the majority’s opinion does not carry out the principles of Hudson. I therefore dissent.
The U.S. Supreme Court will decide whether a state may constitutionally condition employment on the payment of a special union "political action" assessment without first providing notice and the opportunity to object.

In Chicago Teachers Union v. Hudson (475 U.S. 292), the Court recognized certain procedural safeguards for the First Amendment rights of nonunion employees who are required to bear a fair share of union costs. The procedural safeguards include so-called Hudson notices, by which unions must explain the basis for a particular assessment and the right to object.

This case addresses a special assessment made by Service Employees International Union, Local 1000, which is the exclusive bargaining agent for California state employees. Under an agreement between the state and the union, all employees within the covered bargaining units must pay a fair share of the cost of representation, including nonmembers.

In August 2005, the union approved a special assessment to pay political expenses for the defeat of certain anti-union ballot propositions.

A class of nonunion employees sued, alleging that the special assessment violated their First Amendment rights because it was made without the required Hudson notices. But the 9th Circuit decided that Hudson notices sent in June 2005 in conjunction with the union's assessment of annual dues satisfied constitutional requirements.

"The district court faulted the union for failing to make an accurate prediction in its June 2005 Hudson notice of its actual expenditures in the remainder of that fee year due to the subsequent enactment of the temporary increase. . . .

"Yet, under the normal Hudson procedure, any payments over and above the union's actual chargeable expenditures in the 2005 fee year would be incorporated into the rate for the next fee year. The Supreme Court has determined that this is sufficiently accurate to comply with the constitutional restrictions," the court said.

A decision from the Supreme Court is expected next term.

The U.S. Supreme Court agreed Monday to review an appeals court’s ruling that a union is not required, in addition to an annual fee notice to members, to send a second notice when adopting a temporary, mid-term fee increase.

In its Dec. 10 decision, the Ninth Circuit Court of Appeals reversed the judgment of a district court in *Knox v. California State Employees Association, Local 1000, Service Employees International Union.*

The appeals court argued that the district court’s direction that a union must issue a second notice when it intends “to depart drastically from its typical spending regime and to focus on activities that (are) political or ideological in nature” is “practically unworkable.”

“Union spending may vary substantially from year to year—in one year there may be a new collective bargaining agreement negotiated, resulting in a high chargeable percentage for objectors that is followed by an election year that results in a low chargeable percentage for objectors,” the court wrote.

The National Right to Work Legal Defense Foundation, who represented Dianne Knox and the class of plaintiffs in the case, argues that the appeals court’s ruling “effectively forces nonunion California state employees to fund union political activism.”

The foundation, based in Springfield, Va., is a nonprofit organization that provides free legal aid to employees whose human or civil rights have been violated by “compulsory unionism abuses,” according to its website.

Pointing to a separate Supreme Court decision, the foundation argues that public employees forced to pay union dues as a condition of employment must be notified of how much their dues are spent on union activities unrelated to collective bargaining—such as members-only events and political activism—and given a chance to opt out of paying for the activities.

However, CSEA union officials issued a “special assessment” in 2005 to raise money from all state employees for a union political fund, regardless of their membership status. Nonunion employees were not given a chance to opt out, the foundation says.

In 2007, the district court ruled that the CSEA had to provide a notice to nonunion employees about the assessment, allow them to opt out of paying into the fund, provide a refund of monies spent on union boss politics and pay interest from dates of the deduction to nonmembers who chose to opt out. The Ninth Circuit reversed that ruling.

Subsequently, in March, attorneys with the legal foundation filed a petition for a writ of certiorari for the plaintiffs with the nation’s high court.

On Monday, the Court included the case on its list of certiorari granted.

Mark Mix, president of the National Right to Work Legal Defense Foundation, said he was happy the Court decided to review the case.
"Allowing the Ninth Circuit's ruling to stand would further undermine state employees' First Amendment rights and encourage union bosses to extract more forced dues from nonunion workers as a condition of employment," he said in a statement.

The foundation has posed two questions to the Court:

- May a State, consistent with the First and Fourteenth Amendments, condition employment on the payment of a special union assessment intended solely for political and ideological expenditures without first providing a notice that includes information about that assessment and provides an opportunity to object to its exaction?

- Also, may a State, consistent with the First and Fourteenth Amendments, condition continued public employment on the payment of union agency fees for purposes of financing political expenditures for ballot measures?
"Unions and Forced Political Speech"

National Review Online
June 1, 2011
Frank Miniter

The Service Employees International Union (SEIU) is being dragged to the Supreme Court for alleged First Amendment infringements. In *Knox v. SEIU, Local 1000*, the Court will decide whether the union forced non-members to pay for political speech and failed to give proper notice.

This court fight began in 2005. Before Arnold Schwarzenegger became another fallen star left blushing on the society pages, he took on the unions; he scared them so much, in fact, that SEIU, Local 1000 decided to garnish the wages of California’s public employees—including 28,000 public workers who were not union members—as an “Emergency Temporary Assessment to Build a Political Fight-Back Fund.” This political war chest paid for political ads and other efforts to defeat Proposition 75, a measure that would have restricted the use of union dues for political purposes, and Proposition 76, which would have imposed a cap on state spending.

If you’re wondering how a union can take money from people who are not union members, then you need an introduction to modern union rules in states without strong right-to-work laws—that is, laws that allow workers to refuse to pay union dues or join unions (though even then they are still covered by the union contract). Like 25 others, California is not a right-to-work state. As a result, those who have the privilege to work in unionized shops, or for the state of California itself, have to fund whatever union is recognized as their “monopoly bargaining representative.” So though the 28,000 state employees represented in the class-action suit were not members of SEIU, Local 1000, they had to pay SEIU 99.1 percent of full union dues.

The other 0.9 percent was knocked off because that’s what the union spends on members-only benefits. In addition, non-members could pay a reduced fee of 56.35 percent—funding only the union expenses that are “chargeable” to non-members against their will under Supreme Court precedent—if they formally objected. According to the Court, non-members cannot be forced to fund political activities—and under *Chicago Teachers Local No. 1 v. Hudson*, unions cannot collect money from non-members unless they first provide a breakdown of the fees and offer a chance to object. This is called a “Hudson notice,” and unions typically provide them annually.

So when SEIU, Local 1000—after sending out its Hudson notice for the year—decided to take an additional portion of all employees’ paychecks for political ads, it was standing on dubious ground. Even those who objected had to pay 56.35 percent of the new fees—a number calculated based on the previous year’s budget, not on where these new funds would actually be spent. And though the union did send out a letter explaining the new charge, it did not provide a new Hudson notice. Eight plaintiffs filed a class-action suit.

U.S. District Court Judge Morrison C. England Jr. quickly issued a temporary restraining order that prevented the state controller from further garnishing the employee’s salaries to fund the political ads.
but then the judge lifted the order and refused to issue a permanent injunction.

After Governor Schwarzenegger lost the votes on his referenda—partly because of ads paid for in this way—the plaintiffs appealed their case with the help of the National Right to Work Legal Defense Foundation. They won a lower-court decision, but the SEIU appealed the case to the Ninth Circuit.

The lawsuit went before a three-judge panel at the Ninth Circuit, which voted 2-1 in favor of the SEIU. How did the Ninth Circuit justify permitting a union to garnish non-members’ wages to fund ideological ads?

SEIU, Local 1000, claimed its “Political Fight-Back Fund”—the fund it had originally said, in the summer of 2005, was designated “for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities”—was actually used for a variety of expenditures, not just political speech. The two-judge majority at the Ninth Circuit overlooked SEIU’s Orwellian rewriting of fact.

Judge Sidney R. Thomas wrote for the majority at the Ninth Circuit that the “Supreme Court has underscored . . . Congressional policy by enforcing the right of a union, as the exclusive collective-bargaining representative of its employees, to require nonunion employees to pay a fair share of the union’s costs.” He found that “the Union material indicated that the fund would be used for political activities. Yet, in response to inquiries, the Union specifically stated it intended to split the increase ‘between political actions and collective bargaining actions.’ Further, not all of the political activities fell into the ‘non-chargeable’ category.”

He also noted that the practice of calculating the rate for objectors based on the previous year’s expenditures is allowed by Supreme Court precedent—ignoring the special circumstance that this money was collected specifically for the purpose of political activity.

James Young, the staff attorney for the National Right to Work Legal Defense Foundation who litigated the case before the Ninth Circuit and will likely argue the case before the U.S. Supreme Court, said, “The First Amendment protects free speech and the freedom of association. In Knox, the union forced public employees to pay an ‘emergency fee’ that their own materials said was for political ads and other expenditures. This is unconstitutional, as it is forced speech. The Ninth Circuit got it wrong.”

To prove his point, Young points to the aforementioned case Chicago Teachers Local No. I v. Hudson, which held that “the constitutional requirements for the Union’s collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.”

In his dissent, the third judge on the Ninth Circuit panel, J. Clifford Wallace, wrote, “I dissent from the majority’s opinion because it is not faithful to the principles guiding the [U.S. Supreme] Court’s decision in Chicago Teachers Union v. Hudson.” Wallace quoted another Supreme Court case, Davenport v. Wash. Education Association, which held that “regardless of one’s views as to the
desirability of agency-shop agreements... it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees."

Finally, Wallace pointed out the obvious constitutional infringement when he wrote, "The Union’s interest lies in receiving a fair contribution to its collective bargaining expenses. The Union has no legitimate interest, however, in collecting agency fees from nonmembers to fill its political war-chest."

No kidding.

Seen from a broader perspective, if unions in non-right-to-work states are allowed by the Supreme Court to tap the salaries of nonmembers for political advocacy, then those members have lost not only their right to free speech, but also their Fifth Amendment right to property.

So as the Left has been wildly claiming that Wisconsin’s Scott Walker, New Jersey’s Chris Christie, and Ohio’s John Kasich are attacking public employees’ rights, SEIU has been actually guilty of this charge. After all, there is no constitutional right to collectively bargain, but there are individual rights to free speech and association.

The Supreme Court must rule in favor of the plaintiffs in Knox and force SEIU, Local 1000, to return the monies it garnished from their wages. It wouldn’t be the first time they’ve overruled the Ninth Circuit.

Hopefully, the U.S. Supreme Court will return First Amendment rights to California’s public employees.
Federal Aviation Administration v. Cooper

10-1024

Ruling Below: Cooper v. F.A.A., 596 F.3d 538 opinion amended and superseded on denial of reh'g, 622 F.3d 1016 (9th Cir. 2010) cert. granted, 10-1024, 2011 WL 516398 (U.S. June 20, 2011).

Plaintiff Stanmore Cooper applied for and received FAA medical certification to fly 5 times between 1994 and 2004. Each time plaintiff Cooper did not disclose he had been diagnosed with HIV and was on antiretroviral medications. In 1995 Cooper qualified for Social Security long-term disability benefits after disclosing his HIV status to the SSA. Cooper received benefits through August 1996. From 2002 to 2005 Cooper was investigated in connection with Operation Safe Pilot culminating in 3 indictments for making false statements to a government agency. In 2006 Cooper pled guilty to one count of making and delivering a false official writing. Cooper filed suit in 2007 claiming the interagency exchange of his medical records violated the Privacy Act and caused him to suffer embarrassment and emotional distress. The district court ruled for the government. The court found no issue of triable fact as to whether the government had failed in its record keeping duties but also found that the term “actual damages” in the Privacy Act was ambiguous. The court applied the canon of sovereign immunity finding that due to the ambiguity, the government did not clearly consent to be sued for the kind of damages put forth by Cooper. In 2010, the Ninth Circuit reversed, holding that the only plausible reading of the term “actual damages” included Cooper’s damages and thus the sovereign immunity canon was inapposite.

Question Presented: Whether a plaintiff who alleges only mental and emotional injuries can establish “actual damages” within the meaning of the civil remedies provision of the Privacy Act, 5 U.S.C. § 552a(g)(4)(A).

Stanmore Cawthon COOPER, Plaintiff-Appellant,

v.

FEDERAL AVIATION ADMINISTRATION; Social Security Administration; VRW United States Department of Transportation, Defendants-Appellees.

United States Court of Appeals for the Ninth Circuit

Filed February 22, 2010

[Excerpt; some footnotes and citations omitted.]

MILAN D. SMITH, JR., Circuit Judge:

The Privacy Act of 1974, 5 U.S.C. § 552a et seq. (the Act), prohibits federal agencies from disclosing “any record which is contained in a system of records by any means of communication to any person, or to another agency” without the consent of “the individual to whom the record pertains,” unless the disclosure falls within one or more enumerated exceptions to the Act. The Act also creates a private cause of action against an agency for its wilful or intentional violation of the Act that has “an
adverse effect on an individual,” and allows for the recovery of “actual damages” sustained as a result of such a violation.

Plaintiff Stanmore Cawthon Cooper claims to have sustained actual damages as the result of an interagency exchange of information performed as part of a joint criminal investigation by Defendants Federal Aviation Administration (FAA), Social Security Administration (SSA), and Department of Transportation (DOT) (collectively, the Government). Cooper seeks actual damages for nonpecuniary injuries, such as humiliation, mental anguish, and emotional distress, as a result of the unauthorized interagency disclosure of his medical information; he does not claim any pecuniary or out-of-pocket losses.

Because Cooper seeks damages only for nonpecuniary injuries, the district court granted summary judgment to the Government, after holding that the Act allows recovery only for pecuniary damages. We hold that actual damages under the Act encompasses both pecuniary and nonpecuniary damages. We reverse and remand to the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Medical Certificates and Disability Benefits

Cooper first obtained a private pilot certificate in 1964 and has been flying airplanes intermittently ever since. To operate an aircraft lawfully, one must be issued a pilot certificate and a valid airman medical certificate. The FAA requires that a pilot periodically renew his or her medical certificate to ensure that the pilot satisfies current FAA medical requirements. The medical certificate renewal application requires an applicant to disclose any illnesses, disabilities, or surgeries the applicant has had during his or her lifetime, and to identify any medications being taken at the time of application.

Cooper was diagnosed with HIV in 1985. He knew he would not qualify for a renewal of his medical certificate if he disclosed his medical condition because, at that time, the FAA did not issue medical certificates to individuals with HIV who were taking antiretroviral medications. Accordingly, Cooper grounded himself and chose not to renew his medical certificate.

In 1994, however, Cooper applied for and received a medical certificate from the FAA, but without disclosing that he had HIV or was taking antiretroviral medication. Cooper renewed his medical certificate again in 1998, 2000, 2002, and 2004, each time knowingly withholding required information about his medical condition. Cooper explains that he chose to withhold that information because of the "social stigma" associated with HIV and his sexual orientation. Cooper feared that knowledge of his status as a gay man with HIV would result in discrimination against him in employment, housing, and public accommodation. As a result, he disclosed his sexual orientation and medical condition only to close friends and family.

In August 1995, after his symptoms worsened, Cooper applied to the SSA for long-term disability benefits under Title II of the Social Security Act, 42 U.S.C. § 401 et seq. Cooper disclosed his HIV status to the SSA, comfortable in his understanding that the medical information disclosed in his application would be held confidential and would only be used by the SSA for its determination of Cooper’s eligibility for disability benefits. Cooper qualified for the
benefits, which he received from August 1995 to August 1996.

B. Operation Safe Pilot

In 2002, the Office of the Inspector General (OIG) for the DOT and the OIG for the SSA, who are charged with investigating crimes related to their respective agencies, collaborated to investigate a California pilot who had consulted two different sets of doctors in a scheme to obtain simultaneously medical certifications to fly from the FAA and disability benefits from the SSA. From this investigation grew "Operation Safe Pilot," a joint criminal investigation conducted by the DOT-OIG and SSA-OIG that sought to uncover efforts by medically unfit individuals to obtain FAA certifications to fly. Operation Safe Pilot was initially proposed as a nationwide endeavor, but was ultimately approved as a regional project, limited to Northern California.

In July 2002, the FAA, which is part of the DOT, provided the DOT-OIG with the names and other identifying information for active certified pilots. In November 2003, the DOT-OIG sent the SSA-OIG information relating to approximately 45,000 pilots in Northern California, consisting of the pilots’ names, dates of birth, social security numbers, and genders. The SSA-OIG cross-checked the DOT-OIG’s information against the information in the SSA-OIG’s databases, and in March or April 2004, the SSA-OIG provided the DOT-OIG with three separate spreadsheets summarizing its analysis: (1) a spreadsheet listing the names and social security numbers for the 45,000 pilots; (2) a spreadsheet listing pilots who had received Title II benefits; and (3) a spreadsheet listing pilots who had received Title XVI benefits. SSA-OIG and DOT-OIG agents then examined the spreadsheets to identify entries suggesting fraud.

C. The Investigation and Prosecution of Cooper

Upon review of the spreadsheets, the agents identified Cooper as a person of interest because the agencies’ compiled data revealed that Cooper was certified to fly by the FAA, yet had received disability benefits from the SSA. Acting on that information, the agents acquired Cooper’s medical file from the FAA, which revealed that Cooper had never disclosed his HIV to the FAA, and his disability file from the SSA, which contained information relating to Cooper’s HIV.

In January 2005, the agents conducted a series of meetings with FAA Flight Surgeons to obtain their views as to whether the pilots identified by the investigation, including Cooper, had falsified their medical certificate applications and if so, whether that falsified information was material to the FAA’s decision to certify the pilots. After reviewing Cooper’s FAA medical file and SSA disability file, the FAA Flight Surgeons concluded that the FAA would not have issued Cooper an unrestricted medical certificate had it known of his HIV.

At that point, the agents arranged an interview with Cooper to ask him about his medical certificate applications. In March 2005, the agents met with Cooper, at which time he confessed to having intentionally withheld his medical condition from the FAA. That same month, the FAA issued an emergency order revoking Cooper’s pilot certificate due to his misrepresentations to the FAA.

In August 2005, Cooper was indicted on three counts of making false statements to a
government agency under 18 U.S.C. § 1001. In 2006, he pleaded guilty to one count of making and delivering a false official writing, a misdemeanor under 18 U.S.C. § 1018. He was sentenced to two years of probation and fined $1,000.

D. The District Court's Decision

In March 2007, Cooper filed a lawsuit in the Northern District of California against the Government. Cooper alleged that the FAA, DOT, and SSA willfully or intentionally violated the Act by conducting their interagency exchange of his records. He claims that this unlawful disclosure caused him “to suffer humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress.”

In spring 2008, both parties moved for summary judgment. The district court concluded there was no genuine issue of material fact that the Government had failed to uphold its record-keeping obligations under the Act, but that there was a triable issue of fact as to whether the Government’s violation was intentional or willful. However, because the district court found the term “actual damages” to be ambiguous, and construed the waiver of sovereign immunity strictly in favor of the Government, it ruled against Cooper, holding that due to the strictly nonpecuniary nature of his damages, there was no genuine issue of material fact as to his having suffered actual damages under the Act. The district court never reached the issue of whether the Government’s failure to comply with the Act proximately caused an adverse effect on Cooper.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a district court’s grant of summary judgment de novo. Viewing the evidence in the light most favorable to Cooper, we determine “whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law.”

III. DISCUSSION

The Act forbids federal agencies from disclosing an individual’s records without that individual’s written consent, unless the disclosure falls within one of the Act’s narrow exceptions. Congress passed the Act “to protect the privacy of individuals identified in information systems maintained by Federal agencies” by regulating “the collection, maintenance, use, and dissemination of information by such agencies.” To that end, the Act furnishes federal agencies with “detailed instructions for managing their records and provides for various sorts of civil relief to individuals aggrieved by failures on the Government’s part to comply with the [Act’s] requirements.”

If a federal agency fails to comply with the Act’s record-keeping requirements, an individual may file a civil action against the agency in district court if the unauthorized disclosure has “an adverse effect” on the individual. If the individual demonstrates “that the agency acted in a manner which was intentional or willful,” the individual can recover “actual damages sustained by the individual as a result of the” agency’s violation of the Act, “but in no case shall a person entitled to recovery receive less than the sum of $1,000.” Thus, to prevail on a claim under the Act, a plaintiff must prove that: (1) the government agency failed to uphold its record-keeping obligation; (2) the agency acted intentionally or willfully in failing to execute its responsibility; (3) the failure proximately caused an adverse effect on the plaintiff; and (4) the plaintiff
sustained actual damages.

In light of the ruling of the district court, the sole issue before us on appeal is the meaning of “actual damages” as used in the Act. The Supreme Court has not expressly addressed the issue. In Doe v. Chao, the Court held that the Act requires proof of “some actual damages” to recover the Act’s minimum statutory damages of $1,000. 540 U.S. at 627, 124 S.Ct. 1204. But the Court did not address “the precise definition of actual damages,” though it recognized the disparate views of Courts of Appeals on the question.

In Fitzpatrick v. IRS, the Eleventh Circuit held that actual damages “permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries.” In Johnson v. IRS, the Fifth Circuit reached the opposite conclusion, holding that “the term ‘actual damages’ under the Act does indeed include damages for physical and mental injury for which there is competent evidence in the record.”

Unlike the Fifth, Sixth, and Eleventh Circuits, we have not previously decided the meaning of actual damages under the Act.

A. Intrinsic Sources

Declaring the meaning of actual damages is a matter of statutory interpretation. “The purpose of statutory construction is to discern the intent of Congress in enacting a particular statute.”

Our search for Congress’s intent begins with “the plain meaning of the language in question.” If the relevant language is plain and unambiguous, our task is complete. To discern the text’s plain meaning, “words will be interpreted as taking their ordinary, contemporary, common meaning.”

Unfortunately, there is no ordinary or plain meaning of the term actual damages because it is a legal term of art. As a result, ordinary dictionaries are of no assistance in clarifying the plain meaning of the term. Neither the American Heritage Dictionary of English Language nor Webster’s Third New International Dictionary contains an entry for actual damages.

Black’s Law Dictionary defines “actual damages” as “[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses.” Unfortunately, that definition sheds little light on the type of injury or loss Congress intended plaintiffs to be able to prove under the Act. Simply because a statute authorizes the recovery of damages to compensate for injuries does not mean that the statute authorizes the recovery of damages for any type of loss.

The Eleventh and Fifth Circuits, in Fitzpatrick and Johnson, agreed that the meaning of the term actual damages is ambiguous. In Fitzpatrick, the Eleventh Circuit concluded there is “no consistent legal interpretation” of actual damages, and observed that “courts have used ‘actual damages’ in a variety of circumstances, with the interpretation varying with the context of use.” In Johnson, the Fifth Circuit concluded that “the term ‘actual damages’ has no plain meaning or consistent legal interpretation.” Similarly, we have recognized the shifting sense we have attributed to the term. The term is “chameleon,” as its meaning changes with the specific statute in which it is found.

Since there is no plain meaning to the term actual damages, as used in the Act, we next consult the term in its statutory context, looking to the language of the entire statute,
its structure, and purpose.

Congress articulated a clear purpose behind the Act, stating that “the right to privacy is a personal and fundamental right protected by the Constitution of the United States.” To protect that right, Congress passed the Act “to provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies . . . to . . . be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual’s rights under this Act.”

Congress’s intent that the Act offer relief in the form of “any damages” resulting from a violation of one’s right of privacy begs the question of what types of injuries typically result from the violation of such a right. The Supreme Court has observed that “[i]n the ‘right of privacy’ cases the primary damage is the mental distress from having been exposed to public view.” The related common-law tort of defamation also provides monetary relief for nonpecuniary harms. In defamation cases, the Supreme Court has stated that “the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” Accordingly, in her dissent in Doe v. Chao, Justice Ginsburg, commenting on the Act’s purpose of providing relief for “any damages,” stated “Act violations commonly cause fear, anxiety, or other emotional distress—in the Act’s parlance, ‘adverse effects[,]’” and that in such cases, “emotional distress is generally the only harm the claimant suffers.” One can readily envision circumstances in which these types of injuries might flow from the disclosure of one’s confidential medical records, which often contain some of the most sensitive and intimate information about one’s physical, mental, and emotional well-being, and sexual orientation. Given the nature of the injuries that most frequently flow from privacy violations, it is difficult to see how Congress’s stated goal of subjecting federal agencies to civil suit for any damages resulting from a willful or intentional violation of the Act could be fully realized unless the Act encompasses both pecuniary and nonpecuniary injuries.

Congress signaled its intent, throughout the Act, to extend monetary recovery beyond pure economic loss. The Act obligates agencies to maintain a records system that “shall . . . establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.” Further, the Act provides a civil remedy for an agency’s failure “to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the . . . character . . . of . . . the individual that may be made on the basis of such record.” Congress’s use of language to ensure that a federal agency’s record-keeping practices do not result in embarrassment or harm to one’s character bolsters a construction of actual damages that reaches nonpecuniary damages.

Further, a contrary reading of the Act seems unreasonable in light of how we and other courts have construed the term “adverse effect.” The Act provides actual damages for intentional or wilful violations that have an adverse effect on an individual. Our circuit and at least seven others have recognized
that a nonpecuniary harm, such as emotional distress, may constitute an adverse effect under the Act. Even the Eleventh Circuit acknowledged in Fitzpatrick that humiliation or an emotional injury can qualify as an adverse effect. To recognize that the Act entitles one to actual damages for an adverse effect related to one’s mental or emotional well-being, or one’s character, as we and other circuits have previously done, while holding that one injured under the Act cannot recover actual damages for nonpecuniary injuries, would be an unreasonable construction of the Act. Indeed, such a reading would essentially render the provision of actual damages meaningless in cases where the plaintiff’s injury relates to his or her character, or mental or emotional health, even though such cases are common under the Act.

B. Extrinsic Sources

The parties in this case have argued at length about how the Act’s legislative history supports their respective positions on the meaning of actual damages.

The statutory text itself is the “authoritative statement” of a statute’s meaning. However, courts can and do consult extrinsic materials, such as legislative history, for guidance in construing an ambiguous statute. But courts resort to extrinsic materials “only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”

In this case, the Act’s legislative history is not a reliable source for the meaning of actual damages because both sides of the argument can readily find support for their respective positions in that history. Accordingly, it is not surprising that in Fitzpatrick and Johnson, the Eleventh and Fifth Circuits conducted their own thorough reviews of the legislative history of the Act, only to arrive at diametrically opposing constructions of the same term. For these reasons, we decline to wade through the “murky, ambiguous, and contradictory” legislative history of the Act in the vain hope of finding clear guidance concerning the meaning of the term “actual damages.”

Moreover, legislative history is of no help to us in construing the scope of the Government’s waiver of sovereign immunity at issue in this case, because “the ‘unequivocal expression’ of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report.”

However, one extrinsic source that does shed some reliable light on the meaning of the term actual damages in the Act is the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et seq. In 1970, only four years before Congress passed the Act, Congress enacted the FCRA with the express purpose of requiring consumer reporting agencies [to] adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.


In enacting the FCRA, Congress recognized that this country’s banking system has produced a complex system of credit
reporting, involving consumer reporting agencies gathering and evaluating a wide range of personal and sensitive information, such as “credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.” Congress passed the FCRA to ensure that “consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.” To that end, the FCRA prohibits credit reporting agencies from releasing consumer credit reports except as provided under 15 U.S.C. § 1681b(a).

Thus, not only did Congress enact the Act and the FCRA within a few years of each other, but they were passed to address an identical concern growing out of closely analogous circumstances. In both cases, Congress acknowledged that vast databases of personal information are being gathered by agencies-in one case, federal agencies, and in the other, credit reporting agencies—and sought to circumscribe these agencies in the manner they gather, maintain, and use that sensitive information. Ultimately, Congress passed both laws with the purpose of protecting an individual’s right of privacy from being violated by the disclosure of private information.

Further, the Act and the FCRA provide similar remedies. The FCRA creates a private right of action for injured consumers to recover any “actual damages” caused by an agency’s negligent or willful violation of the FCRA. Most importantly, we have held that actual damages under the FCRA encompass damages for emotional distress. Other courts have held similarly.

“[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.” The presumption is appropriate in this case. Therefore, our construction of the identical language in the FCRA, a statute closely analogous in purpose and time as the Act, is a reliable extrinsic source that buttresses a construction of the Act to mean that actual damages encompass both pecuniary and nonpecuniary damages.

Having reviewed the text, purpose, and structure of the Act, as well as how actual damages has been construed in other closely analogous federal statutes, we hold that Congress intended the term actual damages in the Act to encompass both pecuniary and nonpecuniary injuries.

C. Sovereign Immunity Canon

The district court held that the term actual damages is ambiguous and, consequently, applied the sovereign immunity canon in the Government’s favor, construing actual damages narrowly to encompass only pecuniary damages. Our finding of clear congressional intent in the statute itself—its purpose, structure, and language—and external support in the language and construction of the FCRA mandates reversal of the district court’s decision.

The sovereign immunity canon holds that “[a] waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text.” To the extent there are any ambiguities in the statutory text, those ambiguities must be strictly construed in favor of the sovereign. Therefore, “[t]o sustain a claim that the Government is liable for awards of nonpecuniary monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims.”

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Cooper argues that the canon applies only where the initial waiver of immunity is in question. Because the Act expressly authorizes a private cause of action against the Government for damages, Cooper contends that the canon is of no use in construing the meaning of actual damages.

Cooper's position is not supported by applicable case law. In *United States v. Nordic Village, Inc.*, the Court applied the sovereign immunity canon to hold that 11 U.S.C. § 106(c) does not waive the federal government’s sovereign immunity from an action seeking monetary recovery in bankruptcy. The Court acknowledged that § 106(c)’s companion provisions, § 106(a) and § 106(b), plainly waive immunity with regard to monetary relief, and that § 106(c) waives immunity as to some form of relief (e.g., declaratory relief). Despite the waiver, the Court did not limit its application of the sovereign immunity canon; it proceeded to analyze the canon as to the scope of the waiver. Because the language of § 106(c) was “susceptible of at least two interpretations that do not authorize monetary relief,” the Court applied the canon to hold that § 106(c) “fails to establish unambiguously that the waiver extends to monetary claims,” and ruled in the government’s favor. Thus, the sovereign immunity canon remains relevant and applicable beyond the initial waiver of sovereign immunity for purposes of gauging the scope of the waiver.

Applying the canon to this case, if actual damages is susceptible of two plausible interpretations, then the sovereign immunity canon requires the court to construe the term narrowly in favor of the Government, holding that nonpecuniary damages are not covered. For the reasons explained above in Part III.A-B, we conclude that when read in connection with the text of the entire Act, the Act’s remedial scheme, and its underlying purpose of providing relief for “any damages” resulting from a violation of the privacy interests protected by the Act, the term actual damages is unambiguous. Given Congress’s clear intent to furnish monetary relief for some injuries that are nonpecuniary in nature, and are proximately caused by an agency’s wilful or intentional violation of the Act, we do not deem a construction that limits recovery to pecuniary loss plausible.

The district court erred by failing to consider the full panoply of sources available to it for evaluating the scope of the Government’s waiver of sovereign immunity under the Act. Rather, the district court relied on the sovereign immunity canon alone, to the exclusion of the traditional tools of statutory construction. “The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction.”

Moreover, the scope of a waiver of sovereign immunity can be ascertained only by reference to the congressional policy underlying the statute.

Congress enacted the Act to secure a citizen’s “right to privacy[, which] is a personal and fundamental right protected by the Constitution of the United States.” “Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.” In connection with compensating constitutional injuries under 42 U.S.C. § 1983, another federal statute that seeks to provide compensation for injuries resulting from government misconduct, the Supreme Court has stated, “to further the purpose of § 1983, the rules
governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question[.]" Similarly, to achieve the policy underlying the Act, the privacy right should be tailored to the particular interests implicated by the Act. Those interests will, in most cases, result in injuries that go beyond mere financial loss (e.g., embarrassment, mental anguish, emotional distress). In light of the inherently noneconomic interests central to the Act, we cannot plausibly construe actual damages under the Act to exclude nonpecuniary damages.

IV. CONCLUSION

Applying traditional tools of statutory interpretation, we hold that in using the term actual damages, Congress clearly intended that when a federal agency intentionally or willfully fails to uphold its record-keeping obligations under the Act, and that failure proximately causes an adverse effect on the plaintiff, the plaintiff is entitled to recover for both pecuniary and nonpecuniary injuries. As a result, we reverse and remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.
ORDER

The opinion filed February 22, 2010, and published at 596 F.3d 538, is hereby amended by deleting footnote 2 (and renumbering succeeding footnotes) on pages 2825-26 of the slip opinion (also found at 596 F.3d 538, 543-44).

With this amendment, the panel votes to deny the petition for panel rehearing. Judge M. Smith votes to deny the petition for rehearing en banc, and Judges Bright and Hawkins so recommend.

The full court was advised of the petition for rehearing en banc. After a request for a vote by an active judge, a vote was taken, and a majority of the active judges of the court failed to vote for a rehearing en banc.

The petitions for panel rehearing and rehearing en banc are DENIED. Further petitions for rehearing and rehearing en banc shall not be entertained.

MILAN D. SMITH, JR., Circuit Judge, concurring in the order denying rehearing en banc:

I write to respond briefly to the dissent filed with this order.

The Privacy Act (Act) unequivocally waives sovereign immunity. Under the Act, if a "court determines that [an] agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of . . . actual damages sustained by the individual as a result of the refusal or failure” to comply with the Privacy Act. In light of that unconditional waiver, we appropriately followed Justice Cardozo’s admonition: “The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.”

Our dissenting colleague mistakenly asserts that our opinion waives the sovereign immunity of the United States. In fact, Congress did so. Thus, the issue in this case is not the existence of a waiver, but rather the scope of that express waiver, as contemplated in the Act. To that end, we correctly construed the waiver to allow the recovery of nonpecuniary damages, based upon clear congressional intent.

I

The sovereign immunity canon requires that governmental waivers of sovereign immunity be “unequivocally expressed.” The canon has clearly been satisfied in this case. The Act categorically waives the federal government’s immunity from suit and indisputably authorizes the recovery of “actual damages.” The government’s
surrender to liability for damages is in the plain text of the Act itself, leaving us only to construe the scope of that surrender.

To construe the scope of this waiver, the panel followed controlling precedent directing the panel to look to the policies or objectives underlying the Act.

II

The dissent wrongly concludes that the court's observation that the term "actual damages," standing alone, is ambiguous necessarily means that the Act does not waive sovereign immunity for nonpecuniary damages. Our jurisprudence has clarified that "rather than focusing just on the word or phrase at issue, this court looks to the entire statute to determine Congressional intent." "Thus, the structure and purpose of a statute may also provide guidance in determining the plain meaning of its provisions."

Accordingly, we looked to several sources manifesting the Act's overall objective. We noted the Act's preambular statement of purpose, wherein Congress stated that "the purpose of this act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies to be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." We highlighted the Act's requirement that agencies maintain records "to protect against any anticipated threats or hazards... which could result in... embarrassment." We also observed the Act provides a remedy for an agency's violation that inhibits a fair determination relating to one's "character." Such sources provided helpful guidance in discerning Congress's remedial aim in enacting the Act.

Understanding that "statutory language cannot be construed in a vacuum," the panel construed the term "actual damages" in its proper context, to conclude that it unequivocally encompasses nonpecuniary damages. When a statute is ambiguous, the doctrine of sovereign immunity is useful as "a tool for interpreting the law." When a statute is not ambiguous, however, "there is no need for us to resort to the sovereign immunity canon." Because "there was no ambiguity left for us to construe," the application of the sovereign immunity canon was unnecessary in this case.

Further, "the sovereign immunity canon is just that-a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction." Based upon the clear congressional intent as to the scope of "actual damages" under the Privacy Act, this court properly concluded that the government could not "carry the day by invoking general maxims of judicial policy."

III

The dissent misconstrues the relationship between the requirement of showing an "adverse effect" and that of "actual damages." In Doe v. Chao, the Court held that "an individual subjected to an adverse effect has injury enough to open the courthouse door." A majority of the circuits in this country, including our own, has held that mental distress or emotional harm is sufficient to constitute an adverse effect.

Under the dissent's view, a plaintiff is entitled to establish standing for an injury under the Act that results in a nonpecuniary harm, but is not entitled to seek actual damages for such a nonpecuniary injury. Such a construction of the Act would clearly frustrate the intent of Congress. In contrast,
our opinion is true to the overall objective of the Act, allowing a plaintiff who demonstrates a nonpecuniary adverse effect to have the opportunity to recover nonpecuniary damages, to the extent the plaintiff can proffer the requisite degree of competent evidence that there is a real and tangible nonpecuniary injury. Our opinion is also consistent with the familiar rule of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.

IV

Controlling precedent in cases such as Franchise Tax Board, Hopi Tribe, and Town & Country, requires us to construe the scope of the Act’s unequivocal waiver of sovereign immunity in light of the underlying congressional policy, and with the purpose of achieving the remedial goal of that waiver. The multiple sources the panel consulted reveal a clear and focused intent on the part of Congress to grant complete relief to those injured by willful violations of the Act. Given that intent, Congress’s provision that the federal government be liable for “actual damages” constitutes an unequivocal expression of the federal government’s waiver of its own sovereign immunity for nonpecuniary injuries. The panel concluded there was no other plausible explanation for this unqualified language.

In conclusion, our dissenting colleague reminds us that “[o]nly Congress has the keys to unlock our country’s Treasury.” But Congress used its keys and opened that door for plaintiffs injured by willful violations of the Act when it expressly gave plaintiffs the right to sue the government for actual damages. A court must not act “as a self-constituted guardian of the Treasury [to] import immunity back into a statute designed to limit it.”

V

The panel’s decision is compelled by the precedents of the Supreme Court and this court for construing the scope of a waiver of sovereign immunity, and the court properly denied rehearing this case en banc.

O’SCANNLAIN, Circuit Judge, dissenting from the order denying rehearing en banc, joined by KOZINSKI, Chief Judge, and GOULD, TALLMAN, BYBEE, CALLAHAN, BEA, and N.R. SMITH, Circuit Judges:

The Supreme Court has consistently held that the sovereign immunity of the United States may be waived only by an unequivocal expression in statutory text. Today, our court neglects this principle by leaving in place a decision that the term “actual damages” in the Privacy Act, 5 U.S.C. § 552a(g)(4)(A), is sufficient to deem sovereign immunity waived for nonpecuniary damages, even though the opinion itself admits that the term is not defined in the statute, has no plain meaning, has no fixed legal meaning, and indeed, is a “chameleon.” Cooper v. FAA, 596 F.3d 538, 544-45 (9th Cir.2010). Even more troubling, the opinion relies on abstract legislative intent and an interpretation of the Privacy Act that the Supreme Court recently rejected in Doe v. Chao, 540 U.S. 614, 124 S.Ct. 1204, 157 L.Ed.2d 1122 (2004). The effect of today’s order is to open wide the United States Treasury to a whole new class of claims without warrant. In so doing, we exacerbate a circuit split that had been healing under the strong medicine of recent sovereign immunity jurisprudence. Hence, it is most unfortunate that we did not rehear this case en banc.
A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the Government’s sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign. "[T]he ‘unequivocal expression’ of elimination of sovereign immunity that we insist upon is an expression in statutory text." A statute’s legislative history cannot supply a waiver that does not appear clearly in any statutory text. . . .

A

Here, the court all but admits that the statutory term “actual damages” does not unequivocally express a waiver for nonpecuniary damages. According to our court’s opinion, “there is no ordinary or plain meaning of the term actual damages.” Cooper, 596 F.3d at 544 (emphasis added). Indeed, definitional analysis “sheds little light on the type of injury or loss Congress intended plaintiffs to be able to prove.” In addition, the court concedes that two other circuits “agree[ ] that the meaning of the term actual damages is ambiguous.” It also states that “we have recognized the shifting sense we have attributed to the term.” The term, the court concludes, is a “chameleon,” as its meaning changes with the specific statute. Our court’s own rationale, therefore, indicates that the statute does not waive sovereign immunity for nonpecuniary damages.

B

Notwithstanding such textual infirmities, the opinion resorts to the “clear purpose behind the [Privacy] Act” purportedly embodied in the Act’s preamble, the way that Congress “signaled its intent” in the Act’s recordkeeping provision, and the “presumption” that Congress intended the Act to mirror the Fair Credit Reporting Act. But the proper conclusion to draw from the sources on which the court relies, if any can be drawn at all, is precisely the opposite of that drawn by the court. Assuming that recourse to a preamble is appropriate in the circumstances of this case, the Act’s preamble uses the term “any damages,” not the narrower term “actual damages.” That the preamble differs from the operative provision indicates a difference in meaning, not, as the court concludes, an equivalence in meaning. In addition, the recordkeeping provision requires agencies to prevent “embarrassment” but, notably, does not state that such harm is compensable. Finally, the court’s intuiting of congressional intent from our interpretation of the term “actual damages” in the Fair Credit Reporting Act, conflicts with the statement mere pages earlier that the meaning of the term “actual damages” varies from statute to statute.

Although my colleague’s concurrence insists that the majority opinion “correctly construed the waiver to allow the recovery of nonpecuniary damages,” Concurrence at 1019, the opinion itself concedes that if the term “actual damages is susceptible of two plausible interpretations, then the sovereign immunity canon requires the court to construe the term narrowly in favor of the Government [and] hold[ ] that nonpecuniary damages are not covered.” The language used in the preamble and recordkeeping provision, and the various ways the term is used in other statutes, make evident that it is indeed susceptible to an alternative plausible interpretation. By its own logic, the court should have construed the term narrowly.

C

But it is the court’s recourse to the Privacy Act’s standing provision that is the most
troubling, because it conflicts with the Supreme Court’s interpretation of the very provision of the Privacy Act at issue in this case. In *Doe v. Chao*, the Court distinguished standing to sue under the Privacy Act (which extends to all who suffer an “adverse effect”) from the right to damages. The Court stated that the term “adverse effect” has the “limited but specific function” of “identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing.” “That is, an individual subjected to an adverse effect has injury enough to open the courthouse door, but without more has no cause of action for damages under the Privacy Act.” Here, the court jumbles the two concepts, interpreting the term “actual damages” broadly with respect to the type of damages available simply because the term “adverse effect” is interpreted broadly with respect to standing. Not appropriate, said the Supreme Court quite clearly in *Doe*.

II

It is apparent that this case involves an important question of federal law. “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” Sovereign immunity allows for majoritarian democracy, preventing the discouragement by courts of government action. We ignore at our peril the well-established clear statement rule for waivers of sovereign immunity, which puts Congress, not the courts, in charge.

Concern over the impact of a waiver of sovereign immunity is particularly appropriate in this case. Even the dissent in *Doe*, which sought to expand damages under the Privacy Act, admitted that by its enactment “Congress did not want to saddle the Government with disproportionate liability.” Congress was prescient. Because more and more government records are accessible online through the Internet, they are easier to share. The proliferation of electronic records raises the stakes of a broader waiver of sovereign immunity, increasing the fiscal exposure of the United States to the tune of a $1000 minimum statutory award per claim. Only Congress has the keys to unlock our country’s Treasury. The role of the courts is to ensure that Congress has used them in each case.

III

For these reasons, I must respectfully dissent from the order denying rehearing en banc.

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"Supreme Court to Review Pilot’s Privacy Suit"

San Francisco Chronicle
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Bob Egelko

The U.S. Supreme Court agreed Monday to hear the Obama administration’s request to dismiss a lawsuit by a San Francisco pilot against federal agencies that disclosed his HIV-positive status during a fraud investigation, a case that could determine the scope of a post-Watergate privacy law.

At issue in Stan Cooper’s case is whether agencies that reveal an individual’s medical records or other private information can be sued for causing emotional distress. The Obama administration argued that the 1974 Privacy Act allows damages only for financial losses, which Cooper did not claim in his suit.

The Ninth U.S. Circuit Court of Appeals in San Francisco ruled in February 2010 that Cooper could seek damages for emotional harm. The Supreme Court granted review of the administration’s appeal Monday and will hear the case in the term that begins in October. The issue of whether plaintiffs can seek damages for emotional harm under the Privacy Act has divided the nation’s appeals courts in other cases.

Cooper’s lawyer, James Wood, said the case would affect the continuing vitality of a law that was passed in response to revelations of break-ins and surveillance of private citizens during President Richard Nixon’s administration.

“More often than not, embarrassment and humiliation are the only damages,” Wood said. “Unless these are compensable, it’s a free license to the government” to break the law.

Cooper, a small-plane pilot, started flying in 1964 but gave up his license after he was diagnosed HIV-positive in 1985, when FAA rules still denied licenses to anyone with the AIDS virus.

Cooper reapplied for a license in 1994 without disclosing his condition. His health briefly worsened in 1995 and he applied for Social Security benefits, with the assurance that his medical records would remain confidential. Although the FAA repealed its HIV ban several years later, the agency revoked Cooper’s license in 2005 after obtaining his medical records from the Social Security Administration. The FAA’s investigation was part of “Operation Safe Pilot,” which examined records of 47,000 Northern California pilots to see if they had committed fraud in obtaining Social Security benefits or a pilot’s license.

Cooper pleaded guilty to a misdemeanor charge in 2006 and was fined $1,000. The FAA restored his license later that year.

The Supreme Court case is FAA vs. Cooper, 10-1024.
Perhaps lost in all the understandable attention to yesterday’s Supreme Court decision in the Wal-Mart class action case, the Court also granted cert. in a potentially significant privacy law case, FAA v. Cooper.

... The formal question presented in the case is:

Whether a plaintiff who alleges only mental and emotional injuries can establish “actual damages” within the meaning of the civil remedies provision of the Privacy Act, 5 U.S.C. 552a(g)(4)(A).

The Privacy Act concerns the federal government’s handling of personal information, and it includes restrictions on the ability of one federal agency to provide that information to other agencies. Cooper, an airline pilot, had HIV and concealed it when he renewed the medical certifications required for his pilot’s license. When his condition deteriorated he applied for disability from the Social Security Administration, which later provided information about Cooper’s HIV status to the FAA in an investigation. Cooper alleged that action violated the Privacy Act, but he did not claim damages related to the loss of his license and his job, presumably because his own concealment of his HIV status was a federal crime (for which he was convicted and put on probation).

An injured plaintiff can recover “actual damages” for “intentional or willful” violations of the Privacy Act. But what are “actual damages” in this context? Do they include the emotional harm Cooper claims he suffered? In this case, the Ninth Circuit said it might. The Fifth Circuit has reached the same conclusion previously, but the Sixth and Eleventh Circuits have made the opposite determination. Now the Supreme Court will sort it out.

This gets very complicated, not only because of the ephemeral nature of many privacy harms, but also because this case involves hotly contested issues of sovereign immunity. Under a well-established rule, the government can be sued for damages only when Congress clearly says so in a statute. In essence, the Ninth Circuit decision in Cooper said that the Privacy Act clearly allows private lawsuits, and that the nature of the damages available was a distinct question. The government responds that even the Ninth Circuit found “actual damages” a nebulous concept, so it could hardly qualify as the type of “clear statement” necessary to subject the government to liability.

This dispute could yield a relatively narrow and technical decision. On the other hand, combined with the Court’s earlier decision limiting the availability of Privacy Act damages awards in Doe v. Chao, it could remove one of the last meaningful potential penalties for violations of the Act. Or, if the Court makes more expansive statements, those could provide precedent for arguments either supporting or opposing the award of compensatory damages for the emotional harm caused by privacy violations beyond just the narrow confines of the Privacy Act.

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A unanimous panel of the U.S. Court of Appeals for the 9th Circuit ruled on February 22 that Stanmore Cawthon Cooper, a gay pilot whose Social Security Disability medical file was unlawfully shared by the Social Security Administration with investigators from the Federal Aviation Administration and the Department of Transportation, was entitled to seek damages for non-pecuniary injuries under the federal Privacy Act. The ruling in Cooper v. FAA, 2010 Westlaw 597486, reverses a determination by U.S. District Judge Vaughn Walker (N.D.Cal.) that the statute’s authorization of damages for “actual injuries” must be narrowly construed to be limited only to pecuniary losses resulting from a violation of the statute.

Cooper, who had a pilot's license beginning in 1964, learned he was HIV+ in 1985, but decided not to disclose this to the FAA, because he was worried about confidentiality concerning his sexual orientation and HIV status. He actually allowed his medical certification from the FAA to lapse at one point, knowing that the agency was grounding pilots who were taking anti-retroviral medications. In 1994, he reapplied for a medical certificate from the FAA, but did not disclose his HIV status or medication situation on the application, and a new certificate was issued. However, his HIV-related symptoms worsened and in 1995 Cooper applied to the Social Security Administration for disability benefits, which were awarded to him from August 1995 to August 1996. Cooper did not notify the FAA about this development concerning his health.

In July 2002, the FAA launched an investigation into possible fraud by pilots failing to disclose adverse health information to the agency. They launched a data matching program in Northern California, where they sent a list of all holders of active FAA medical certifications, together with their social security numbers, to the Social Security Administration, which then reported back to them all of the pilots on the list who had sought disability benefits from the agency. Cooper's name was on the list. He was subsequently confronted with this, and pled guilty to a count of making and delivering a false official writing, a misdemeanor for which he was fined $1,000. Upset that the Social Security Administration had disclosed medical information to the FAA that was supposed to be confidential, Cooper launched this lawsuit, and won a ruling from the district court that the agencies had violated the Privacy Act by failing to obtain his authorization to disclose his Social Security medical records. But Judge Walker, as noted above, refused to award damages, since Cooper’s injuries were entirely psychological (emotional distress, etc.).

The court of appeals found that there is a split of circuit authority on the question whether non-pecuniary injuries are compensable under the Privacy Act, but that it was a question of first impression for the 9th Circuit. The panel unanimously
concluded that in light of the purpose and function of the statute, it was clear that such injuries should be compensable. Indeed, elsewhere in the statute in relating the legislative purposes, the law mentions compensating “all injuries,” and there is a clear recognition in other federal privacy statutes and in the Supreme Court’s constitutional privacy jurisprudence that frequently the main injury resulting from a breach of privacy is embarrassment or emotional distress. Consequently, it would be unreasonable to construe the statute to deny compensation for such injuries. The case was remanded to Judge Walker for a determination whether the disclosure caused any non-pecuniary injuries to Cooper that should be compensated. If any qualifying injury is shown, the statute authorizes damages of at least $1,000.

Given the split of circuit authority, it is possible that the government will seek en banc review and/or an appeal to the Supreme Court. Cooper is represented on the appeal by Raymond A. Cardozo, Tiffany Renee Thomas, James M. Wood and David J. Bird from the firm of Reed Smith LLP.
The 9th Circuit is hearing an interesting case involving the Privacy Act—Cooper v. Federal Aviation Administration, No. C 071383 VRW (N.D. Cal. 2008). The Federal Aviation Administration (FAA) shared information about pilot Stanmore Cooper’s HIV positive status with other government agencies. The district court found this information sharing to be improper under the Privacy Act, 5 U.S.C. § 552a:

Because DOT-OIG transmitted Cooper’s records to another agency without his prior consent and this use does not fall within the routine use or another exception to 5 USC § 552a(b), the DOTOIG’s use of Cooper’s record was unlawful under 5 USC § 552a(b).

However, the fact that an agency violates the Privacy Act does not mean that a plaintiff can obtain redress. In a decision I find wrongheaded—both as a matter of statutory interpretation as well as normative policy—the U.S. Supreme Court has held that the Privacy Act requires that a plaintiff prove actual damages before being able to get monetary relief under the Act. See Doe v. Chao, 540 U.S. 614 (2004). The Supreme Court reached this conclusion even though the Privacy Act has a liquidated damages provision:

[T]he United States shall be liable to the individual in an amount equal to the sum of . . . actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000.

5 U.S.C. § 552a(g)(4).

In order to receive the liquidated damages of $1000, plaintiffs must first demonstrate they are “entitled to recovery” and prove actual damages.

I believe the holding in Chao is misguided because the very function of a liquidated damages provision is to address difficulties in proving harm. Privacy Act violations often involve harms that are not akin to traditional types of injuries. Privacy harms caused by misuse or improper dissemination of information are more abstract in nature and often can’t be directly linked to financial losses or physical injury. Nevertheless, they are harms, and without a way for plaintiffs to recover damages for such harms, there is not a sufficient incentive for plaintiffs to bring Privacy Act lawsuits and for agencies to follow the Privacy Act.

Unfortunately, until Congress amends the Privacy Act to more clearly establish that liquidated damages can be recovered without proof of actual damages, plaintiffs must establish actual damages.

The issue in Cooper is what kind of damages can constitute actual damages. Can emotional/mental damages alone constitute actual damages?
There's a circuit split on the issue. As the district court noted:

Two circuits that have addressed the definition of actual damages in the context of the Privacy Act examined the statute's legislative history to reach different conclusions. In *Fitzpatrick v. Internal Revenue Service*, the Eleventh Circuit focused on the evolution of the Privacy Act's damages provisions and noted that while early versions of the legislation included provisions for punitive damages and general damages, these damages provisions were not included in the version that became law. The court found support in the legislative history for a narrow reading of actual damages and held that "actual damages' as used in the Privacy Act permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries."

In *Johnson v. Department of Treasury*, the Fifth Circuit reached the opposite conclusion. The court noted that one of the Privacy Act's stated purposes is requiring federal agencies to "be subject to civil suit for any damages which occur as a result of willful or intentional" violation. After a lengthy analysis of the legislative history, the Fifth Circuit concluded that the plaintiff there could recover for proven mental injuries.

The district court in *Cooper* sided with *Fitzpatrick*, reasoning that the Act was ambiguous about what actual damages constituted and such ambiguity should be resolved in favor of the government.

I disagree. If *Doe v. Chao* is combined with a rule that actual damages must involve physical injury or financial loss, then it becomes extremely difficult for plaintiffs to recover under the Privacy Act. There will be a large group of cases where plaintiffs suffer Privacy Act violations but can't get damages because privacy harms are often emotional harms. When they wrote their seminal article, *The Right to Privacy*, inspiring a significant development of privacy law, Samuel Warren and Louis Brandeis recognized that privacy was an "injury to the feelings" and that the law at the time (1890) had evolved sufficiently to redress such harms that did not constitute physical injuries or financial loss.

It would certainly be ironic if the Privacy Act wouldn't recognize the nature of most privacy harms. Agencies could violate the Privacy Act, improperly sharing and disseminating information, and in a large number of cases, then be able to argue that there's no harm. Why should Congress have bothered to pass the Privacy Act limiting such practices and providing plaintiffs with a remedy if in many of these cases there would be no cognizable harm and plaintiffs won't be able to recover any damages? It seems like a wrongheaded interpretation to me.

If we must live with *Doe v. Chao*, at the very least, to avoid making a total mockery of the Privacy Act, emotional/mental harm must be sufficient to establish actual injury.