



SPRING 2026

INAUGURAL EDITION

Table of Contents

1. Discretion, Disparity, and Exclusion: Reexamining Seattle’s SODA and SOAP Laws By Tessa Duclos-Mazzone.....	2
2. The Vulnerabilities of Equal Protection: Asian Americans, National Security, and the Limits of Judicial Review By: Mengze Jiang.....	17
3. Examining Justiciable Standards of Gerrymandering in Light of <i>Louisiana v. Callais</i> By: Marguerite Schoenfeldt.....	31
4. Obscenity and Overbreadth: Analyzing Idaho’s Children’s School and Library Protections Act By: Anika Neumeyer	43
5. Professional Regulation or Freedom of Speech?: The Implications of <i>Chiles v. Salazar</i> By Savannah Shuman	65

Discretion, Disparity, and Exclusion: Reexamining Seattle's SODA and SOAP Laws

By Tessa Duclos-Mazzone

Abstract

*Seattle's Stay Out of Drug Area and Stay Out of Areas of Prostitution laws are framed as public safety initiatives, addressing visible street-level crime in designated "hotspots." This paper argues that SODA/SOAP laws do not simply regulate criminal conduct but instead expand police discretion, perpetuating a system of spatial exclusion that risks arbitrary and unequal enforcement. Because exclusion orders can exclude individuals from major areas, including zones that contain transit, shelters, food services, and harm-reduction resources, these policies turn free access to public spaces into conditional access that is shaped by policing decisions. Drawing on *Kolender v. Lawson*, this paper situates SODA/SOAP laws within constitutional concerns about laws that allow for excessive discretion. It then connects these concerns to racial disparities in Seattle drug enforcement, where Black individuals have been arrested at a disproportionately high rate, despite evidence that drug use is not concentrated within that population. These disparities demonstrate how facially neutral laws can reproduce inequality through discretionary enforcement and spatial targeting. SODA/SOAP laws intensify this problem by layering public space restrictions onto already unequal policing patterns, resulting in groups who are already more likely to face police contact also being more likely to be excluded from essential public areas. While supporters present the laws as efficient, evidence and critics agree that they at most displace activity. Ultimately, SODA/SOAP laws function less as neutral public safety measures and more as systems of discretionary spatial control that undermine due process and equal protection principles.*

Introduction

There is an ever-present issue of public safety and visible street-level crime in Seattle.¹ Ongoing concerns are often around drug activity, prostitution, and general public disorder. SODA/SOAP laws have been recently introduced as policy tools aimed at addressing these issues.² SODA/SOAP laws define exclusion zones based on drug and prostitution-related activity and convictions.³ These policies follow a broader trend of location-based policing strategies.⁴ Supporters of these policies frame these laws as tools to reduce crime, specifically in high-activity areas, resulting in improved public safety and order in public spaces.⁵ There is a focus on designated “hotspots” of visible activity, which suggests that these laws are practical, place-based solutions.⁶ Although these laws are framed as simple public safety policies, the structure of the laws themselves raises deeper concerns. SODA/SOAP laws do not simply regulate criminal behavior; they restrict access to spaces.⁷ Judges can issue exclusion orders as a condition of pretrial release or post-conviction. This means that if an individual re-enters a designated SODA/SOAP zone, they are subject to arrest. Enforcement is conditional, as it depends on an officer’s presence and judgment. Officers exercise personal discretion over who to stop and when, effectively deciding when to enforce and aggressively apply the law.

¹ City Council News Releases, “Councilmember Morales’ statement on the passage of soda/soap legislation,” Seattle City Council Blog (2024), September 17, 2024, <https://council.seattle.gov/2024/09/17/councilmember-morales-statement-on-the-passage-of-soda-soap-legislation/>

² City Council News Releases, Seattle City Council Blog

³ Sebastian Robertson, “How will Seattle’s new soda and soap ordinances be enforced?”, King5 Local News (2024), <https://www.king5.com/article/news/local/how-will-seattle-proposed-soda-soap-zones-be-enforced/281-593660ed-6276-420c-8910-333f6677c131>

⁴ Guy Oron, “Seattle City Council passes soda and soap banishment laws despite public outcry,” Real Change (2024), <https://www.realchangenews.org/news/2024/09/27/seattle-city-council-passes-soda-and-soap-banishment-laws-despite-public-outcry>

⁵ City Council News Releases, Seattle City Council Blog

⁶ City Council News Releases, Seattle City Council Blog

⁷ Oron, “Seattle City Council passes soda and soap banishment laws despite public outcry”

Enforcement also depends on which areas police prioritize, potentially creating further inequalities in how city resources and attention are distributed. Authorizing discretion creates the potential for inconsistent enforcement and selective targeting. The ACLU highlights how laws expand police power beyond protecting public safety and into regulating access to public space. This has resulted in concern, as enforcement is based on observations and perceived status rather than clear violations, and the expansion of power expands the ability to misuse it as well.⁸ These laws reinforce existing inequalities and disproportionately impact vulnerable populations.⁹ As a result, the tension between public safety policy and civil rights protections is further exacerbated. Seattle’s SODA/SOAP laws do not regulate crime; they extend police discretion to controlling access to public space. Because that discretion operates within already unequal drug enforcement patterns, these laws risk turning formally neutral public safety policy into selective punishment. These concerns are not merely theoretical but reflect broader patterns in how discretionary policing operates in practice.

Background

SODA stands for Stay Out of Drug Area, and SOAP stands for Stay Out of Areas of Prostitution.¹⁰ These laws allow courts to issue exclusion orders banning individuals from six designated SODA zones and one SOAP zone.¹¹¹² Qualifying for these exclusionary orders requires alleged involvement in drug or prostitution-related activity, meaning arrests for drug-related offenses, and even non-drug crimes with a “nexus,” or relation, to drug activity.¹³

⁸City Council News Releases, Seattle City Council Blog

⁹City Council News Releases, Seattle City Council Blog

¹⁰Robertson, “How will Seattle’s new soda and soap ordinances be enforced?”

¹¹Robertson, “How will Seattle’s new soda and soap ordinances be enforced?”

¹²Daniel Beekman, “Seattle City Council passes drug, prostitution “stay out” zones,” The Seattle Times (2024), <https://www.seattletimes.com/seattle-news/politics/seattle-city-council-passes-drug-prostitution-stay-out-zones/>

¹³Beekman, The Seattle Times

These exclusion orders can even apply to individuals who are cited or arrested, not necessarily convicted, supporting the critique of a probable broad application.¹⁴ Restrictions prohibit individuals from entering specified areas, which are mainly located downtown, in some of the city's busiest and most dense zones.¹⁵ Locations include Westlake Center, Chinatown-International District, Belltown, Pioneer Square, Capitol Hill, and University District. Each of these zones is home to a variety of public resources, including transportation hubs, harm reduction services, food banks and meal services, housing services, and more. Violating the order—meaning entering a zone—can result in arrest and/or additional criminal charges, with the SOAP ruling even creating a new gross misdemeanor called “promoting prostitution loitering.”¹⁶ Critics describe these laws as a form of “banishment” from public space, cutting off access to public resources including rehabilitation.¹⁷

Enforcement of SODA/SOAP laws is arbitrary, determined on officer observation of a suspected violation.¹⁸ Officers' discretion decides whether or not to stop and check a person's history.¹⁹ After initial contact, the individual may be cited or arrested.²⁰ The effectiveness of the law varies based on how actively individual officers and the SPD choose to enforce it.²¹ This structure means that enforcement is controlled by individual officer decisions rather than hard set rules.²² Supporters frame SODA/SOAP laws as tools to address crime “hotspots” and improve

¹⁴Oron, “Seattle City Council passes soda and soap banishment laws despite public outcry”

¹⁵Robertson, “How will Seattle's new soda and soap ordinances be enforced?”

¹⁶Beekman, “Seattle City Council passes drug, prostitution “stay out” zones”

¹⁷Oron, “Seattle City Council passes soda and soap banishment laws despite public outcry”

¹⁸“How will Seattle's new soda and soap ordinances be enforced?”, King5 Local News (2024), <https://www.king5.com/article/news/local/how-will-seattle-proposed-soda-soap-zones-be-enforced/281-593660ed-6276-420c-8910-333f6677c131>

¹⁹“How will Seattle's new soda and soap ordinances be enforced?”, King5 Local News (2024), <https://www.king5.com/article/news/local/how-will-seattle-proposed-soda-soap-zones-be-enforced/281-593660ed-6276-420c-8910-333f6677c131>

²⁰Beekman, “Seattle City Council passes drug, prostitution “stay out” zones”

²¹ Gee Scott and Ursula Reutin Show, “Former King County Sheriff criticizes removal of soda, soap enforcement,” MyNorthwest.com (2026), <https://mynorthwest.com/gee-and-ursula/seattle-soda-soap-enforcement/4182773>

²²Scott and Show, “Former King County Sheriff criticizes removal of soda, soap enforcement”

public safety.²³ The argument is that the laws target areas with high visible drug activity and street-level disorder, which is how specific zones were chosen.²⁴ Critics argue that the laws are ineffective, can simply displace activity, and risk expanding police authority rather than solving the systematic problems.²⁵ The laws disproportionately impact unhoused people and people with substance use disorders, especially because exclusion zones overlap with services.²⁶ This reflects a broader legal tension—while the law permits discretion, it also recognizes that said discretion can undermine the constitutional protections designed to limit it.

Legal Limitations

Police discretion is a fundamental feature of the legal system, not a flaw.²⁷ Police officers are expected to make decisions based on observed behavior and context and are given the freedom to act on reasonable suspicion, a lower standard than probable cause.²⁸ Policing requires interpreting behavior, deciding when to intervene, and deciding where to prioritize enforcement.²⁹ Officer discretion is necessary and often unavoidable because the law cannot anticipate every situation, which includes making decisions about who to stop, when and where to enforce, and with what degree to respond.³⁰ Discretion is legally recognized and operationally necessary.

²³City Council News Releases, Seattle City Council Blog

²⁴City Council News Releases, Seattle City Council Blog

²⁵City Council News Releases, Seattle City Council Blog

²⁶Jazmyn Clark, “ACLU-Wa Statement on the city of Seattle’s passage of drug, prostitution ‘stay out’ zones”, ACLU Washington (2024),

<https://www.aclu-wa.org/press-releases/aclu-wa-statement-city-seattles-passage-drug-prostitution-stay-out-zones/>

²⁷ “The void-for-vagueness doctrine in criminal law,” library of Congress, Congress.Gov (2025),

<https://www.congress.gov/crs-product/IF13091>

²⁸ “The void-for-vagueness doctrine in criminal law,” Library of Congress

²⁹ “The void-for-vagueness doctrine in criminal law,” Library of Congress

³⁰ “The void-for-vagueness doctrine in criminal law,” library of Congress, Congress.Gov (2025),

<https://www.congress.gov/crs-product/IF13091>

Still, while discretion is necessary, it should not be unlimited. Laws should not give police unrestricted discretion, especially to decide what counts as an arrestable/citable offense. I would like to introduce *Kolender v. Lawson*, 461 U.S. 352 (1983): argued on November 8, 1982, and decided May 2, 1983:

A California statute requires persons who loiter or wander on the streets to identify themselves and to account for their presence when requested by a peace officer. The California Court of Appeal has construed the statute to require a person to provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a stop under the standards of *Terry v. Ohio*, 392 U. S. 1. The California court has defined "credible and reliable" identification as "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself.

Appellee, who had been arrested and convicted under the statute, brought an action in Federal District Court challenging the statute's constitutionality. The District Court held the statute unconstitutional and enjoined its enforcement, and the Court of Appeals affirmed.

Held: The statute, as drafted and as construed by the state court, is unconstitutionally vague on its face within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to

determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. Pp. 461 U. S. 355-36³¹

Here, the court struck down a ruling that gave police too much discretion due to concern that enforcement was arbitrary and discriminatory.³² The Constitution requires limits to be set on how discretion is exercised for the sole purpose of safeguards against discriminatory practices.

Kolender v. Lawson demonstrates that discretion must be structured and constrained instead of open-ended and up to interpretation, which often leads to abuse of discretion and discrimination.

Because the enforcement of SODA/SOAP laws depends heavily on officer discretion, the structure raises important constitutional concerns about how laws are applied in practice. As ruled, laws must provide clear and consistent standards so individuals understand what conduct is prohibited.³³ When enforcement depends on officer interpretation rather than fixed rules, individuals cannot predict when they will be stopped, where, or if they will face consequences when stopped. This creates a practice of arbitrary enforcement, where outcomes vary based on the officer rather than the law itself.³⁴ This arbitrary enforcement creates a risk of disproportionate and discriminatory enforcement. SODA/SOAP laws rely on officer observation and judgment, mirroring this same kind of discretionary system courts have warned against and restricted in precedent.

Evidence of Disparities

The Equal Protection Clause of the 14th Amendment exists to protect against abuses of discretion within the law that lead to discrimination. Laws can be read as neutral while still

³¹ *Kolender v. Lawson* 461 U.S. 352 (1983),” JUSTIA U.S. Supreme Court, <https://supreme.justia.com/cases/federal/us/461/352/>

³² *Kolender v. Lawson*, JUSTIA U.S.

³³ *Kolender v. Lawson*, JUSTIA U.S.

³⁴ *Kolender v. Lawson*, JUSTIA U.S.

producing unequal outcomes, which is where enforcement comes into play. Law matters not only because of what it says on paper, but because of how it is applied and enforced in real life. In practice, discretionary systems can lead to selective and discriminatory enforcement that amplifies existing inequalities. Legal systems account for systemic inequality in enforcement, highlighting how unequal enforcement can occur through targeting groups and certain areas.³⁵ Discretionary policing raises concerns when it results in patterned inequality, even with a lack of explicit discrimination. The law permits discretion as a necessary part of policing, but it also recognizes the risks that accompany it.

Drug law enforcement in Seattle produces unequal outcomes, and these disparities are driven by enforcement decisions. Drug enforcement in Seattle is highly racially disproportionate, as Black residents make up a small percentage of Seattle's population but still make up a majority of those arrested for drug offenses.³⁶ These disparities are especially pronounced for drug delivery arrests, a crime that would warrant an exclusion order from a SODA zone. These patterns are consistent and therefore not isolated incidents.

These disparities are not explained by racial group behavior, as according to the ACLU Seattle Drug Enforcement report as of 2008, most people who use and sell drugs in Seattle are white.³⁷ This means that there is a mismatch between enforcement and actual crime. Enforcement targets Black individuals disproportionately, despite actual drug activity not being concentrated in that group. If these disparities cannot be explained by differences in offending rates, they raise serious concerns that enforcement practices, rather than underlying behavior, are driving unequal arrest outcomes.³⁸ Enforcement patterns are shaped by decision-making and

³⁵ "Equal protection prophylaxis," Harvard Law Review (2024), <https://harvardlawreview.org/print/vol-138/equal-protection-prophylaxis/>

³⁶BECKETT, *Race and Drug Law Enforcement in Seattle*

³⁷BECKETT, *Race and Drug Law Enforcement in Seattle*

³⁸BECKETT, *Race and Drug Law Enforcement in Seattle*

police discretion, not individual behavior, demonstrating how these unequal outcomes are produced by the application of the law, not who commits the crime.

Drug policing is concentrated in specific geographic areas that are solidified into “Drug Zones” under SODA laws.³⁹ Police target locations like downtown Seattle, the International District, and other areas where there is “concentrated drug activity.” This enforcement focuses on visible street-level crime rather than general drug use. Because these areas are more heavily policed, it is more likely that individuals in these areas will be arrested, and because targeting specific spaces leads to targeting specific populations, spatial targeting has a direct relationship with racial disparities in arrests and imprisonments. Spatial enforcement strategies produce predictable and unequal outcomes, demonstrating that race-based disparities in Seattle drug enforcement are not the result of differences in criminal behavior but of how and where laws are enforced—further demonstrating the role of discretion in producing unequal outcomes.

Spatial Extension of Discretion

SODA/SOAP laws turn existing discretionary policing patterns into a method of control over public space, creating a legal problem as they encroach on due process and equal protection laws.⁴⁰ Under SODA/SOAP laws, enforcement becomes about more than just individual conduct—how someone acts or what they do—and moves into regulating where they are allowed to be. In turn, officers effectively decide who can remain in public areas and who gets excluded from these public resources and gathering spaces.⁴¹ This expands discretion by layering spatial exclusion onto existing discretionary policing. Laws regulating space rather than clear conduct risk becoming vague in application, especially when individuals are punished based on presence

³⁹BECKETT, *Race and Drug Law Enforcement in Seattle*

⁴⁰Robertson, “How will Seattle’s new soda and soap ordinances be enforced?”

⁴¹Scott and Show, “Former King County Sheriff criticizes removal of soda, soap enforcement”

instead of clearly defined violations. SODA/SOAP laws therefore effectively transform discretionary policing into discretionary control over public space.

Law enforcement, especially as relates to drug crime, is already concentrated in areas that have transitioned into SODA/SOAP zones.⁴² This results in the same group of individuals that are already subject to higher enforcement as a result of selective enforcement also being more liable to be targets. Spatial targeting leads to increased and repeated police contact and, as a result, an increased likelihood of exclusion orders. Even when laws are facially neutral, applying them in already unequal enforcement zones produces predictable and patterned disparities.⁴³ SODA/SOAP laws do not create new enforcement patterns or offer a new approach or solution and instead intensify existing disparities.

The most impactful consequence of the exclusion orders is that SODA/SOAP zones overlap with areas where essential services are located. These include (but are not limited to) shelters, food distribution centers, harm reduction services, rehabilitation centers and transit hubs, all things crucial to people's survival and participation within society.⁴⁴ Exclusion orders therefore restrict not only the movement and location of individuals but their access to basic resources, which are often necessary for survival. This creates a legal issue wherein enforcement and punishment are effectively tied to being in public spaces and areas to which people need access.

Furthermore, impact falls disproportionately on unhoused individuals and those with substance use disorders, groups who often seek out and utilize public services the most.⁴⁵ SODA/SOAP laws push selective enforcement to become a system that makes access to public

⁴²Robertson, "How will Seattle's new soda and soap ordinances be enforced?"

⁴³"Equal protection prophylaxis," Harvard Law Review

⁴⁴Clark, "ACLU-Wa Statement on the city of Seattle's passage of drug, prostitution 'stay out' zones"

⁴⁵Clark, "ACLU-Wa Statement on the city of Seattle's passage of drug, prostitution 'stay out' zones"

space both conditional and effectively determined by police discretion and approval.

SODA/SOAP laws do not simply regulate behavior but restructure who is allowed to occupy public space, embedding discretionary enforcement into the geography of the city and raising serious constitutional concerns about arbitrary and unequal application.

Counter Argument - In Summary

Supporters argue that SODA/SOAP laws provide a targeted response to visible, concentrated street-level crime.⁴⁶⁴⁷ The laws are framed as addressing specific locations of drug activity, not specific populations.⁴⁸ SODA/SOAP laws thus offer a preventive tool that allows police to intervene before situations escalate.⁴⁹ Supporters argue that excluding individuals from high crime areas can reduce crime and improve safety for residents and businesses, and that concentrating enforcement in these areas is efficient and responsive to community concerns. The use of discretion is not seen as a flaw but rather a necessary feature of policing, as the flexibility is necessary to assess situations and respond in a timely manner.⁵⁰ SODA/SOAP laws give officers an additional tool, not unlimited power, and outcomes depend on how discretion is used.⁵¹

Rebuttal - In Summary

Still, evidence calls these assumptions about outcomes into question. Evidence shows that SODA/SOAP laws have not consistently reduced crime or improved safety outcomes.⁵²

⁴⁶City Council News Releases, Seattle City Council Blog

⁴⁷Scott and Show, “Former King County Sheriff criticizes removal of soda, soap enforcement”

⁴⁸City Council News Releases, Seattle City Council Blog

⁴⁹Scott and Show, “Former King County Sheriff criticizes removal of soda, soap enforcement”

⁵⁰The void-for-vagueness doctrine in criminal law, Library of Congress

⁵¹Scott and Show, “Former King County Sheriff criticizes removal of soda, soap enforcement”

⁵²City Council News Releases, Seattle City Council Blog

Furthermore, critics argue that similar policies have failed to address underlying causes of drug activity and street-level crime before, with nothing to set SODA/SOAP laws apart.⁵³ While people claim that SODA/SOAP laws increase effectiveness, the evidence does not support those claims—in reality, these laws may simply displace activity instead of reducing it.⁵⁴ Prior evidence shows that drug enforcement in Seattle is concentrated in specific areas regardless of overall drug offense rates.⁵⁵ These patterns are not driven by public safety needs but by where police choose to focus resources. Overall, the laws reflect and reproduce existing enforcement priorities rather than objectively targeting harm. Rather than functioning as neutral tools for improving public safety, SODA/SOAP laws operate within and amplify existing patterns of discretionary enforcement, producing outcomes that conflict with their stated goals and raise serious concerns about fairness and legality.

Conclusion

SODA/SOAP laws are not public safety laws—in reality, they function as systems of discretionary spatial control, as regulation is not focused on behavior but on access to public space. Enforcement depends on officer discretion and spatial targeting, demonstrating that the real power of these laws is in how they are applied. This issue reflects a broader legal problem of discretionary systems, as they can produce unequal outcomes even while appearing neutral. When who is allowed into or excluded from public space is dictated effectively by police discretion, implicit bias and spatial targeting come into play, ultimately resulting in vulnerable populations being the most directly affected. As a result, SODA/SOAP laws reflect wider

⁵³Clark, “ACLU-Wa Statement on the city of Seattle’s passage of drug, prostitution ‘stay out’ zones”

⁵⁴ Amy Sundberg, “Seattle public drug crackdown not leading to promised booking deferrals,” *The Urbanist* (2026), <https://www.theurbanist.org/seattle-public-drug-crackdown-not-leading-to-deferrals/>

⁵⁵BECKETT, *Race and Drug Law Enforcement in Seattle*

tensions in urban policing and public order, which are ultimately dangerous to our community members. The legal issue is not whether police may exercise discretion at all, but whether that discretion is sufficiently constrained to protect against arbitrary and unequal enforcement. Even if appearing legally valid, laws can be and are still problematic in practice. As SODA/SOAP laws demonstrate, when discretionary enforcement is embedded within legal structures, they risk undermining the very constitutional protections that are meant to constrain it.

Bibliography

Beckett, Katherine. *Race and Drug Law Enforcement in Seattle*. ACLU, 2008.

https://www.aclu.org/wp-content/uploads/publications/race20and20drug20law20enforcement20in20seattle_20081.pdf.

Beekman, Daniel. “Seattle City Council Passes Drug, Prostitution ‘Stay Out’ Zones.” *The Seattle Times*, 2024.

<https://www.seattletimes.com/seattle-news/politics/seattle-city-council-passes-drug-prostitution-stay-out-zones/>.

City Council News Releases. “Councilmember Morales’ Statement on the Passage of SODA/SOAP Legislation.” *Seattle City Council Blog*, 2024.

<https://council.seattle.gov/2024/09/17/councilmember-morales-statement-on-the-passage-of-soda-soap-legislation/>.

Clark, Jazmyn. “ACLU-WA Statement on the City of Seattle’s Passage of Drug, Prostitution ‘Stay Out’ Zones.” ACLU of Washington, 2024.

<https://www.aclu-wa.org/press-releases/aclu-wa-statement-city-seattles-passage-drug-prostitution-stay-out-zones/>.

Gee Scott and Ursula Reutin Show. “Former King County Sheriff Criticizes Removal of SODA, SOAP Enforcement.” *MyNorthwest.com*, 2026.

<https://mynorthwest.com/gee-and-ursula/seattle-soda-soap-enforcement/4182773>.

Harvard Law Review. “Equal Protection Prophylaxis.” *Harvard Law Review*, 2024.

<https://harvardlawreview.org/print/vol-138/equal-protection-prophylaxis/>.

Kolender v. Lawson, 461 U.S. 352. 1983.

<https://supreme.justia.com/cases/federal/us/461/352/>.

Library of Congress. “The Void-for-Vagueness Doctrine in Criminal Law.” *Congress.gov*, 2025. <https://www.congress.gov/crs-product/IF13091>.

Oron, Guy. “Seattle City Council Passes SODA and SOAP Banishment Laws Despite Public Outcry.” *Real Change*, 2024.
<https://www.realchangenews.org/news/2024/09/27/seattle-city-council-passes-soda-and-soap-banishment-laws-despite-public-outcry>.

Robertson, Sebastian. “How Will Seattle’s New SODA and SOAP Ordinances Be Enforced?” *KING 5 Local News*, 2024.
<https://www.king5.com/article/news/local/how-will-seattle-proposed-soda-soap-zones-be-enforced/281-593660ed-6276-420c-8910-333f6677c131>.

Sundberg, Amy. “Seattle Public Drug Crackdown Not Leading to Promised Booking Deferrals.” *The Urbanist*, 2026.
<https://www.theurbanist.org/seattle-public-drug-crackdown-not-leading-to-deferrals/>.

Weisburst, Emily K. ““Whose Help Is on the Way?”: The Importance of Individual Police Officers in Law Enforcement Outcomes.” *The Journal of Human Resources*, 2024.
<https://pmc.ncbi.nlm.nih.gov/articles/PMC11323075/>.

The Vulnerabilities of Equal Protection: Asian Americans, National Security, and the Limits of Judicial Review

By: Mengze Jiang

Chief Justice John Roberts once said, “The way to stop discrimination [based on] race is to stop discriminating [based on] race.”⁵⁶ From the Reconstruction era to the present, despite the Fourteenth Amendment's promise of racial equality, the Supreme Court's fluctuating rulings have cast a shadow over the cause of racial equality in the United States. Even more disappointing is that Justice Roberts' views are the same as the Supreme Court's past rulings on racial equality since the Civil Rights Movement. While attempting to achieve racial equality, the lack of specific, enforceable guidelines and clear standards for achieving these goals has left room for maneuver in practicing racial inequality. More worryingly, with the instability of domestic politics and the international situation, it is becoming increasingly unclear whether the Constitution can protect the racial equality rights of Asian Americans and Chinese Americans, in particular.

To begin with, the existence of constitutional amendments should not be equated with the achievement of racial equality, especially considering the significant flexibility afforded to the Supreme Court by its exclusive power of constitutional interpretation. In *Plessy v. Ferguson* (1896), the Supreme Court upheld Louisiana's segregationist law; the reasoning behind this decision was that “‘separate,’ but ostensibly ‘equal,’ facilities for Black and [White] did not violate the Fourteenth Amendment's guarantee of equal protection under the law to all American

⁵⁶John Roberts, *Top 25 Quotes by John Roberts: A-Z Quotes*, A-Z Quotes (June 28, 2007), https://www.azquotes.com/author/12443-John_Roberts.

citizens.”⁵⁷ Thus, the Supreme Court legitimized segregation and the de facto racist inequality within it. Segregation not only perpetuates racism in terms of living conditions and social resources but also sustains the existence and influence of racism in the political sphere. Later, in the South, staunch segregationists and Democrat party loyalists became entrenched in the federal government, allowing the Democrats to wield outsized influence over national legislation and resource allocation.⁵⁸ Thus, a negative cycle emerged through cooperation between the Supreme Court and Congress. When traditionally oppressed racial minorities are segregated, it is almost impossible for them to make a change because the distribution of resources is under the control of segregationist politicians. The lack of necessary resources, such as public utilities and education, makes it difficult for racial minorities to climb the class ladder and exert influence in government.

Therefore, it is unsurprising to see a series of Supreme Court cases and social movements in which racial minorities fought for equality and rights after WWII. “Black leaders added a fifth freedom to President Roosevelt's list: freedom from racial segregation.”⁵⁹ From this, people can see the birth of the Double V movement. This movement marks the time when the US began to emphasize the values of freedom and equality, not only in foreign affairs, but also domestically, where American social movements placed pressure on the government to secure equality and human rights for all citizens. Specifically, in 1944, Black civil rights proponents won a huge political victory from the Supreme Court in *Smith v. Allwright* (1944), a landmark decision which ruled that “the South's system of racially restrictive primary elections violated the Fifteenth Amendment.”⁶⁰ This decision created an important legal precedent that gave legal backing to the

⁵⁷ Lee C. Bollinger & Geoffrey R. Stone, *A Legacy of Discrimination: The Essential Constitutionality of Affirmative Action*. 18 (2023).

⁵⁸ Ibid: 20

⁵⁹ Ibid: 20

⁶⁰ Ibid: 20

Civil Rights movement. However, judicial victories do not always lead to larger victories. Comprehensive economic and administrative discrimination will not disappear with a single decision in a voting rights case. “Black veterans were shortchanged: the US Employment Service discriminated when it came to job placements, especially in the South.”⁶¹ A lack of job opportunities inevitably leads to economic weakness, especially considering that African Americans have long suffered social, political, and economic oppression in American history. Moreover, most of the historically Black colleges and universities were in the South, which left Black veterans from the North without access to educational resources.⁶² Lack of access to education further increases the difficulty in finding employment, which leads to a lack of economic resources, which coupled with a lack of educational resources, keeps racial minorities trapped in a negative cycle. Therefore, breaking down racial inequalities in education is one of the vital steps towards ending the negative cycle that racial minorities suffer from.

The first shift in the constitutional understanding of racial equality appeared in 1954. In *Brown v. Board of Education of Topeka, Kansas* (1954), “[the] unanimous ruling did not mince words: ‘in the field of public education the [*Plessy*] doctrine of ‘separate but equal’ [is unfunctional]. Separate educational facilities are inherently unequal.”⁶³ *Brown* upheld racial equality in schools, and, more importantly, the Supreme Court outlawed segregation. This overturned the long-standing misbelief that segregation would protect people from the mixing of races to preserve racial purity as a legitimate state interest, so long as “equal” meant “equal.”⁶⁴ Besides, it is noteworthy that Justice Warren's ruling did not seem to interpret *Brown's* decision only from a constitutional perspective but rather from a combination of social and educational

⁶¹ Ibid: 21

⁶² Ibid: 21

⁶³ Ibid: 25

⁶⁴ Ibid: 27

needs. Warren argued that “[it] is doubtful that any child may reasonably be expected to succeed in life if he is denied the [educational opportunity].”⁶⁵ In other words, Warren believed that if students could not get a good education, it would affect the probability of a student's future success, and the next generation's failure would lead to the country's failure as a whole. Again, Warren's opinion demonstrates the importance of the right to education in achieving racial equality.

However, as the composition of the Supreme Court changed, the Supreme Court issued judgments that opposed previous precedent. “By the 1970s, the liberal-leaning Warren Court that delivered *Brown* included [a] strong conservative perspective.”⁶⁶ More robust conservative views inevitably brought about a different understanding of the issue of racial equality. *Regents of the University of California v. Bakke* (1978) is an example of this shift in perspective. In the *Bakke* case, Allan *Bakke* believed the UC admissions system ignored his excellent grades and gave his spot to a less qualified student who was part of a racial minority. In the decision for this case, “the [Supreme Court] ruled that, in higher education, the formal guarantee of a fixed number of seats [...] for minorities was prohibited.”⁶⁷ Thus, since this case, schools have been unable to reserve places for specific groups or set a predetermined percentage of the total admissions. In the *Bakke* case, the Supreme Court appeared to raise additional requirements for upholding racial equality in school admissions and addressed white opposition to Affirmative Action. However, worryingly, the Supreme Court failed to define the difference between protecting diversity and granting preferential treatment based on race. Specifically, the Supreme Court was unable to explain the extent of diversity schools should achieve, and the weight racial factors should carry in the admissions process. As a result, once admissions officials prove or claim there is no

⁶⁵ Ibid: 28

⁶⁶ Ibid: 46

⁶⁷ Ibid: 49

pre-established racial quota system, they could avoid violating the Supreme Court opinion in the *Bakke* case. Therefore, admissions officials gained more operational flexibility.

Although the Supreme Court has continued to emphasize the principle of racial equality in cases following *Bakke*, its rulings have not changed the lack of clear standards and guidelines in the college admissions system for considering an applicant's race. In *Grutter v. Bollinger* (2003), similar to *Brown*, the Supreme Court held, “universities, in particular, law schools, represent the training ground for [many national] leaders; [to] cultivate a set of leaders with legitimacy [for citizens], [the path to leadership must be] visibly open to talented and qualified individuals of every race and ethnicity.”⁶⁸ From this, in the public interest and in the interest of civil society, the Supreme Court once again upheld diversity and equality in education. However, people may find that respect for diversity and the desire for equality do not necessarily imply practical support for racial equality, as the Supreme Court has yet to clearly define how racial factors will be applied in admissions. As stated above, the blurred lines and greater flexibility of action give admissions officers immeasurable decision-making power in the admissions process. Asian students become victims of this power, which is challenging to constrain in practice. As the *Harvard Law Review* points out, court-recognized diversity grounds grant universities the power to limit the number of Asian students without incurring any liability.⁶⁹ Therefore, it can be seen that the admissions principles centered on vague diversity are seriously flawed, namely that Asian Americans may be systematically disadvantaged in admissions without triggering a review of the equal protections of the school admissions system, because the concept of diversity in effect legitimizes the control of the number of Asian students as a reasonable institutional purpose rather than a constitutional violation.

⁶⁸ Ibid: 69

⁶⁹ Note, *The Harvard Plan That Failed Asian Americans*, 131 Harv. L. Rev. 616 (2017).

The pressure and potential inequalities faced by Asian American students when applying to U.S. higher education have translated into actual discontent. In their work, Golden and Linari point out that Asian American students are in an awkward position. Asian Americans neither enjoy the racial privileges enjoyed by other minorities nor possess the inherited wealth and lineage advantages of upper-class whites.⁷⁰ The setbacks experienced in the higher education admissions process have naturally led to dissatisfaction among Asian Americans, especially Chinese Americans, with the process and even with Affirmative Action. According to a study of Chinese public opinion on WeChat by Marc P. Johnston-Guerrero and Kai Zhao, Chinese immigrants' racially-based perceptions, cross-lingual understanding of Affirmative Action, and the influence of Chinese culture on their thinking patterns play an essential role in negative perceptions of Affirmative Action.⁷¹ Specifically, in China's higher education admissions process, a student's ranking in their province's Gaokao (National College Entrance Examination) is the only measure. This means that schools only know a student's ranking within their province and decide whether to admit them based on whether their scores meet the published admission cut-off scores. Therefore, schools are unaware of and do not consider factors such as the student's gender, ethnicity, or family economic status. In contrast, as mentioned earlier, the inclusion of race and other factors in American higher education without a unified and transparent standard naturally leads to suspicion and distrust within the Chinese community.

It was amid this discontent and skepticism that the Supreme Court heard *Students for Fair Admissions v. President and Fellows of Harvard College* (2022). In its ruling, the Supreme Court stated that, under the strict scrutiny principle, "the universities could not [measurably]

⁷⁰ Daniel Golden & Nancy Linari, *The Price of Admission: How America's Ruling Class Buys Its Way into Elite Colleges—and Who Gets Left Outside the Gates*, 209 (2019).

⁷¹ Marc P. Johnston-Guerrero & Kai Zhao, *Is Affirmative Action Interfering with the Chinese Dream in America? Exploring WeChat Users' Views on Affirmative Action in the US*, *College Admissions*, 25 Race Ethnicity & Educ., 939 (2020).

demonstrate their compelling interests [...], failed to avoid racial stereotypes, and did not offer a logical endpoint for when race-based admissions would cease.”⁷² Although the Supreme Court rejected the racial discrimination admissions policies of Harvard University and the University of North Carolina at Chapel Hill, it did not articulate a feasible alternative standard. In other words, the Supreme Court still, to a certain extent, merely repeated the judgment in the *Bakke* case. The court's opinion was that universities should not consider race itself as a factor, but rather consider how race affects the applicant's life.⁷³ However, this form of consideration is logically contradictory. Because, to some extent, considering the impact of race on applicants is also to consider the racial factor. At the same time, this method is also impractical because the Supreme Court has not provided a standard for distinguishing between race and racialized experiences. Not to mention that it is impossible to monitor or impose constraints on the subjective judgments of admission officers during the recruitment process. Specifically, university admissions officers can continue to follow the original admission standards without being accused, as long as their statements do not independently take the applicant's race into account. It is pessimistic that in the SFFA case, the plaintiffs seemingly challenged an unequal policy that gave admissions officers absolute power. However, Asian-American applicants still could not obtain any substantive protection.

However, it would be a grave mistake to assume that racial inequality faced by Asian and Chinese communities in American society is limited to the education sector. On the contrary, the racist pressures faced by Asian Americans stem not only from within the United States but also from international political issues. Taking the *Bakke* case as an example again, beyond blurring the lines and processes in higher education admissions, the impact of the *Bakke* case extended to

⁷² *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

⁷³ *Ibid.*

erase the influence of affirmative action in job hiring and education admission, potentially harming all racial minorities in the broader social sectors. After the *Bakke* decision, Ronald Reagan saw a potential political opportunity and assured his voters that he would “[...] dismantle ‘federal guidelines or quotas which require race, ethnicity, or sex [...] to be the principal factor in hiring or education.’”⁷⁴ Even though American society once welcomed Affirmative Action as a representative of the civil rights movement, socioeconomic development has influenced public attitudes. In the 1970s, the US economy was in the grip of severe stagflation that caused economic hardship for ordinary people, “now confronted with shrinking paychecks, higher taxes, and fierce competition for jobs, ...[these economic issues eroded] their support for such policies.”⁷⁵ It is, therefore, essential to see that the effects of the economy are reflected in people’s attitudes towards issues such as equality and, ultimately, feed back into the government policies.

Meanwhile, with the social pressures brought about by the economic downturn, some Americans' attitudes toward social equality issues went beyond mere indifference, translating into actual violence. In 1982, two unemployed white workers murdered Vincent Chen, a Chinese American citizen, after mistaking him for Japanese.⁷⁶ If it were merely a case of drunken rage leading to murder, this case might not seem particularly noteworthy. However, the underlying logic behind the perpetrator's attack on Asian victims points to a racist mindset. In the late 20th century, with the massive shift of the American auto industry to Japan, unemployment among American workers soared. Although the crime itself is never justifiable, one can understand why the perpetrators would attack someone they perceived as Japanese, as he shifted the blame for

⁷⁴ Lee C. Bollinger & Geoffrey R. Stone, *A Legacy of Discrimination: The Essential Constitutionality of Affirmative Action*. 58 (2023).

⁷⁵ Ibid: 59

⁷⁶ Note, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1928 (1993).

potential unfair economic practices by the Japanese government and businesses onto ordinary Japanese citizens. Worse still, this anger spread and harmed everyone with East Asian characteristics, including American citizens. Predictably, this incident did, in effect, create panic within East Asian communities, as all East Asians could potentially become targets.

Furthermore, the fact that criminals mistook American citizens for Japanese immigrants when attacking them also exposes the problem of American society's tendency to perceive Asians as foreigners. The *Harvard Law Review* also acknowledges that Asian Americans are often perceived as immigrants, visitors, or foreigners in the United States.⁷⁷ Such stereotypes are not limited to the social sphere; they are also reflected in the history of the US government. Although the Supreme Court overturned racial segregation in *Brown*, it did not directly address another detail in *Plessy*: the exclusion of Asians, especially Chinese people, from the US nation and society. Justice Harlan claimed in the *Plessy* case that the “[Chinese] is a race so different from our own that we do not permit those belonging to it to become citizens of the United States[; Chinese], with few exceptions, [are] absolutely excluded from [the US].”⁷⁸ This heinous racist exclusion not only reflects prejudice in US history, but also reveals a constitutional system that has long regarded Chinese people, and Asian people in general, as inherently different and presumed to be disloyal.

The assumption of Asian American disloyalty is deeply rooted in the US constitutional history, closely intertwined with international conflicts. Even without evidence of disloyalty among Japanese people within the United States, President Roosevelt issued an executive order to detain Japanese nationals in the US, regardless of their citizenship.⁷⁹ Even considering defense pressures, the U.S. government's executive order to detain all Japanese people without due

⁷⁷ Ibid: 1932

⁷⁸ Note, *The Harvard Plan That Failed Asian Americans*, 131 Harv. L. Rev. 625 (2017).

⁷⁹ Erwin Chemerinsky, *Constitutional Law: Principles and Policies*. 678 (3d ed. 2005).

process clearly violated the Fifth Amendment to the Constitution. However, the Supreme Court's ruling in *Korematsu v. United States* effectively placed military necessity and the so-called strategic need to protect the United States above civil rights.⁸⁰ The constitutional dilemmas revealed in the *Korematsu* case are crucial to understanding the limitations and ineffectiveness of the Fourteenth Amendment in the face of racialized foreign threats. The Supreme Court's upholding of the executive order, regardless of it being a clear violation of the Fifth Amendment, demonstrates that, historically, constitutional protections for Asian Americans have often been vulnerable under the weight of national security. The "China Initiative" targeting Chinese American scientists is a modern recurrence of such political logic.

With China's growing rise, the increasingly tense Sino-US relations have led the US government to adopt similar measures against Chinese American citizens as it did in the past when it persecuted Japanese American citizens. As a recurring phenomenon in American history, the so-called "Blame Game" often occurs during social crises such as economic downturns, serving as a political tool for American politicians under the guise of national security threats, and politicians' rhetoric and government actions frequently reflect hatred towards Asian Americans.⁸¹ The limitations of the Fourteenth Amendment are particularly obvious during a social crisis. When politicians racialize national security rhetoric, the principle of equal protection becomes extremely fragile. This is precisely the root cause of the *Korematsu* case, which allowed the US government to maintain its unconstitutional arrest action based on the assumption of racism, and it has reappeared in the China Initiative policy.

Politicians' rhetoric, which racialized and politicized the public health crisis, played a leading role in the anti-China wave in the United States. Following politicians' pronouncements

⁸⁰ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁸¹ Winni Zhang, *The Witch-Hunt for Spies - A Critique of the China Initiative and National Security's Outsized Influence in Equal Protection Analysis*, 30 Wash. & Lee J. Civ. Rts. & Soc. Just. 583 (2024).

about the Chinese virus, between March 2020 and March 2022, over 11,400 hate incidents targeting Asian Americans were reported nationwide, a staggering 339% increase; 20% of these cases cited issues such as the COVID-19 pandemic, espionage, communist affiliation, and economic instability as reasons for attacking Asian Americans.⁸² Clearly, while social issues like economic instability cannot be directly linked to any particular racial minority, the hate speech by politicians has significantly impacted racial equality among the public. Worse still, in a democracy, even if a politician's political ambitions blind some members of the public to support misguided extremist behavior, it must be noted that the government, as the concentrated embodiment of public opinion, will inevitably respond to the people's thoughts and demands in its actions. From 2009 to 2020, 47% of those prosecuted for espionage were Asian Americans, with 38% of those cases involving Chinese Americans, and one-third of the prosecutions later proved to be wrongful convictions.⁸³ These appalling numbers reveal the weakness of the Fourteenth Amendment: despite its guarantee of equal protection, Asian Americans, especially Chinese Americans, still face a disproportionate risk of state power abuse in the name of national security. However, no actual lawsuit has yet been filed in the Supreme Court challenging the constitutionality of the China Initiative. Even if cases are heard in the future, the probability of a victory for the Chinese community remains slim, as the Supreme Court has not formally overturned the *Korematsu* ruling. In other words, if necessary in the future, the Supreme Court can still apply the principle demonstrated in *Korematsu* that wartime defense needs supersede the civil rights needs of specific racial minorities.

Furthermore, with the Supreme Court dominated by conservative justices, it seems quite willing to defer to the executive branch in judicial review. In *Trump v. Hawaii* (2018), the state of

⁸² Ibid: 584

⁸³ Ibid: 587

Hawaii, three individuals, and the Hawaii Muslim Association have filed a lawsuit in the Supreme Court alleging a violation of the principle of separation of church and state and questioning the president's authority to issue proclamations targeting Muslims; however, the Supreme Court merely employed "rational basis review analysis, which only requires the Court to determine whether the Executive gave a 'facially legitimate and bona fide' reason for its action."⁸⁴ In other words, the Supreme Court proactively relaxed its oversight of the executive branch in *Trump v. Hawaii* (2018). It is no exaggeration to say that this phenomenon not only foreshadows the possibility that Asian Americans may suffer racial persecution in the future when faced with discriminatory legislation or executive orders under the guise of national security, but also because the Supreme Court evades its oversight responsibilities over the other two branches. The Supreme Court's ruling in *Trump v. Hawaii* (2018) even undermined the foundation of the separation of powers system, the system of checks and balances between the executive, legislative, and judicial branches of government. As Zhang argues, the Supreme Court should apply strict scrutiny to the government in cases involving alleged violations of constitutionally protected rights based on race, nationality, or immigration status.⁸⁵ However, as previously stated, the Supreme Court's concessions on scrutiny reflect, to some extent, cooperation between the judiciary and the executive branch rather than checks and balances. This disturbingly suggests once again that Asian Americans, particularly Chinese Americans, may be unable to obtain justice from the Constitution or the Supreme Court when facing inequality.

In conclusion, it should be recognized that constitutional amendments do not guarantee the rights of the American people merely by existing as text; they require effective Supreme Court rulings and cooperation from other government departments. Not only that, but it is an

⁸⁴ Ibid: 606

⁸⁵ Ibid: 608

undeniable reality that the Supreme Court's performance in protecting the rights of Asian Americans, especially Chinese Americans, remains less than ideal. In some cases, it has even raised the possibility of further harming Asian American racial minorities. Therefore, in addition to calling for the Supreme Court to resume its role in upholding racial equality and overseeing other government departments, Asian Americans should also strive for a more prominent position and influence in American politics to better protect their rights.

Bibliography

Korematsu v. United States, 323 U.S. 214 (1944).

Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

Lee C. Bollinger & Geoffrey R. Stone, *A Legacy of Discrimination: The Essential Constitutionality of Affirmative Action*(2023).

Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (3d ed. 2005).

Daniel Golden & Nancy Linari, *The Price of Admission: How America's Ruling Class Buys Its Way into Elite Colleges—and Who Gets Left Outside the Gates* (2019).

Marc P. Johnston-Guerrero & Kai Zhao, *Is Affirmative Action Interfering with the Chinese Dream in America? Exploring WeChat Users' Views on Affirmative Action in the US. College Admissions*, 25 Race Ethnicity & Educ. 939 (2020).

Note, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926 (1993).

Note, *The Harvard Plan That Failed Asian Americans*, 131 Harv. L. Rev. 604 (2017).

Winni Zhang, *The Witch-Hunt for Spies - A Critique of the China Initiative and National Security's Outsized Influence in Equal Protection Analysis*, 30 Wash. & Lee J. Civ. Rts. & Soc. Just. 571-612 (2024).

John Roberts, *Top 25 Quotes by John Roberts: A-Z Quotes*, A-Z Quotes (June 28, 2007), https://www.azquotes.com/author/12443-John_Roberts.

Examining Justiciable Standards of Gerrymandering in Light of *Louisiana v. Callais*

By: Marguerite Schoenfeldt

Abstract

Gerrymandering involves the manipulation of district lines to gain an unfair advantage in elections. The justiciable standard for assessing the constitutionality of racial gerrymanders has been the Gingles test, established in the 1986 *Thornbury v. Gingles* case. This test permitted the creation of a majority-minority district where the minority group is sufficiently large, compact, and politically cohesive, and the majority votes as a bloc to undermine the minority's ability to elect candidates. Whereas this test affirms the justiciability of racial gerrymanders, the Supreme Court held in *Rucho v. Common Cause* (2019) that partisan gerrymanders were non-justiciable. In this decision, the Court distinguished between the justiciability of partisan and racial gerrymandering, as they considered partisan gerrymandering a political question outside of the courts, whereas racial gerrymandering was a constitutional question within the courts. The Gingles test has been updated in the recent *Louisiana v. Callais* (2026) decision, taking into account historical developments, including the non-justiciability of partisan gerrymandering. This decision weakens the "results test" of §2 of the Voting Rights Act and requires plaintiffs making racial gerrymandering claims to prove minority vote dilution independent of partisan motivation. This paper examines case law on gerrymandering to contextualize *Louisiana v. Callais*, and explores the decision's implications.

Introduction

Gerrymandering refers to the practice of manipulating electoral districts for unfair political advantage. These manipulated districts are designed to predict electoral outcomes, and they can be used to entrench a political party in power and to maximize or minimize minority

votes.⁸⁶ While both purposes fall under the same umbrella, the Supreme Court has distinguished between how it treats partisan and racial gerrymandering over decades of case law.

Beginning with *Davis v. Bandemer* (1986), the Court questioned the justiciability of political gerrymanders. The Court found that political gerrymandering claims could be adjudicated, but they did not yet have a standard to do so.⁸⁷ In *Vieth v. Jubelirer* (2004), the Court split on whether partisan gerrymanders could be adjudicated and what standard could be used.⁸⁸ The 2019 decision *Rucho v. Common Cause* provided the final say on partisan gerrymandering, arguing that, since it is a political question, it cannot be ruled on by the courts.⁸⁹ Because race is not explicitly within the political sphere, the Court has held that gerrymanders on this basis can be placed under judicial consideration. The standard for assessing racial gerrymanders was established in *Thornburg v. Gingles* (1986). The Gingles test was designed to comply with a 1982 Amendment to the Voting Rights Act, which established a “results test” for vote dilution liability.⁹⁰ The Gingles test permitted the creation of districts, under specific conditions, primarily composed of racial minorities, to enfranchise minority voters.

Decided on April 29, 2026, *Louisiana v. Callais* struck down Louisiana’s 2022 district map, ruling it an unconstitutional racial gerrymander. The court majority argued the Gingles test is outdated⁹¹ and created an updated standard that implicates future racial gerrymandering cases and applications of the Voting Rights Act. By tracking Supreme Court decisions on gerrymandering, the specific implications of *Louisiana v. Callais* can be discerned.

⁸⁶Matthew Siciliano, *A History of Gerrymandering: Effects, Issues, and Solutions*, Thesis Committee of Honors College Middle Tennessee State University 1, 1 (2024).

⁸⁷*Davis v. Bandemer*, 478 U.S. 109, 110 (1986).

⁸⁸*Vieth v. Jubelirer*, 541 U.S. 267, 267-270 (2004).

⁸⁹*Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

⁹⁰ Mary J. Kosterlitz, *Thornburg v. Gingles: The Supreme Court’s New Test for Analyzing Minority Vote Dilution*, *Catholic L. Rev.* 531, 532 (1986).

⁹¹ *Louisiana v. Callais*, 608 U.S. (2026).

Constitutional and Statutory Considerations

The Constitution gives substantial leeway to states regarding how they create legislative districts. Article 1, §2 mandates that the apportionment of representatives shall be determined by a decennial census,⁹² and Article 1, §4 mandates that the processes of elections and districting shall be given to the state legislatures.⁹³ Since most states handle districting within the state legislature rather than by delegating it to an independent commission,⁹⁴ districting is generally conducted by the state legislature’s majority party.

Many gerrymandering claims are driven by the Equal Protection Clause of the 14th Amendment, which states that no state shall “deny to any person within its jurisdiction the equal protection of the law.”⁹⁵ When interpreting “equal protection,” the Court has maintained the one-person, one-vote principle:^{96,97} when it comes to electing federal and state congressmen, population and voting power per individual should be roughly equal across congressional districts. This has not necessarily translated into equal representation, as the Constitution was designed to curb proportional representation, evidenced by the institutions of the Senate⁹⁸ and the Electoral College⁹⁹ that give disproportionate representation to smaller states.

The Voting Rights Act of 1965 (VRA) is relevant to racial gerrymandering in particular. The VRA was designed to outlaw discriminatory voting practices that sought to disenfranchise minority voters. It was set to expire five years after passage, but has since been extended and amended five times.¹⁰⁰ The Supreme Court has overruled parts of the VRA, including §4(b), a formula that required states with a history of discrimination to “preclear” any changes to their

⁹² U.S. Const. art. I, § 2.

⁹³ U.S. Const. art. I, § 4.

⁹⁴ Chris Leaverton, *Who Controlled Redistricting in Every State*, Brennan Center for Justice (2022).

⁹⁵ U.S. Const. amend. XIV, § 1.

⁹⁶ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁹⁷ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁹⁸ U.S. Const. art. I, § 3.

⁹⁹ U.S. Const. art. II, § 1.

¹⁰⁰ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C. §§ 10301 et seq.)

voting laws before federal courts.¹⁰¹ The 1982 amendments are notable because of their stipulation surrounding protected classes, or groups legally protected from discrimination.¹⁰² The amendments clarified that protected classes did not have to be proportionally represented but did require an equal ability to elect representatives of their choice,¹⁰³ entailing the creation of majority-minority districts.

The VRA was designed as an enforcement mechanism of the 15th Amendment, which simply states, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,”¹⁰⁴ and that, “Congress shall have power to enforce this article by appropriate legislation.”¹⁰⁵ The VRA, by defining and responding to specific acts of voter suppression and discrimination on account of race, fulfills the enforcement provision in §2 of the 15th Amendment. Additionally, by protecting racial minorities from voting dilution, it ensures they are provided equal protection under the 14th Amendment’s Equal Protection Clause.

Assessing Racial Gerrymanders: *Thornburg v. Gingles* (1986)

The 1982 VRA amendments complicated the permissibility of racial gerrymandering. Whereas gerrymanders that diluted or prevented minority votes were clearly illegal under the 15th Amendment, the idea that gerrymanders could *enfranchise* voters, so long as race was one of several factors guiding districting,¹⁰⁶ obfuscated the case law on this subject. The Supreme Court sought to establish a clear standard delineating the constitutionality of certain racial gerrymanders in the landmark case *Thornburg v. Gingles*.

¹⁰¹ *Shelby County v. Holder*, 570 U.S. 529, 530 (2013).

¹⁰² Cornell Law School, *Protect Class*, last visited 18 May 2026.

¹⁰³ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

¹⁰⁴ U.S. Const. amend. XV, §1.

¹⁰⁵ U.S. Const. amend. XV, §2.

¹⁰⁶ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

Thornburg v. Gingles addressed a 1982 districting plan by the North Carolina General Assembly, a plan black citizens of the state and the District Court believed violated §2(a) of the VRA.¹⁰⁷ In the majority opinion, Justice Brennan affirms that the multimember districts used by the North Carolina districting scheme tend to dilute minority votes by a “numerical superiority,”¹⁰⁸ but that this can only rise to a claim of voting dilution if it “operates to minimize or cancel out their ability to elect their preferred candidates.”¹⁰⁹ This is supported by the concept of “racial polarization,” which correlates the voter’s race to their preferred candidate,¹¹⁰ indicating that the dilution of minority votes corresponds to the dilution of minority representation.

These findings resulted in the formation of the three-pronged Gingles test to determine when districting amounts to minority vote dilution and a majority-minority district can be ordered. Justice Brennan defines the test as follows: “First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district...Second, the minority group must be able to show that it is politically cohesive...Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it...usually to defeat the minority’s preferred candidate.”¹¹¹ These prongs specifically apply to multimember districts, but have been expanded to allow for challenges against vote dilution in single-member districts.¹¹²

Based on this conclusion, if a state is found liable for voter dilution, the remedy is the creation of at least one single-member, majority-minority district to enfranchise minority voters. For 40 years, this was the standard when adjudicating racial gerrymanderings, but this or any specific standard has not been extended to partisan gerrymandering.

¹⁰⁷ *Thornburg v. Gingles*, 478 U.S. 30, 30 (1986).

¹⁰⁸ *Id.* at 48.

¹⁰⁹ *Id.* at 48.

¹¹⁰ *Id.* at 32.

¹¹¹ *Id.* at 51-52.

¹¹² *Grove v. Emison*, 507 U.S. 25 (1993).

An Important Distinction: *Rucho v. Common Cause* (2019)

The Supreme Court remained open to discovering judicial standards for evaluating partisan gerrymanders in *Davis v. Bandemer* (1986),¹¹³ but when it became time to establish those standards in *Vieth v. Jublierer* (2004),¹¹⁴ the Court diverged as to whether they were justiciable. In the absence of a clear judicial standard or consensus, the Court ruled in *Rucho v. Common Cause* (2019) that, regardless of how fair partisan gerrymanders were or were not, they were a political question rather than a judicial one. The Court clarified that these “political questions” include “those that lack ‘judicially discoverable and manageable standards for evaluating them,’” referencing the Court’s inability to find a standard in the aforementioned 1986 and 2004 cases.

This case makes an important distinction between cases of political and racial gerrymandering. In his majority opinion, Chief Justice John Roberts references the United States’s history of voter discrimination, and concludes, “Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power influence...It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.”¹¹⁵ Essentially, partisan gerrymandering claims are predicated on an equality between parties, something that is not requested in racial gerrymandering claims, which simply ask that race not be considered when drawing district lines.

A central part of the Court’s reasoning is that discrimination on the basis of race, unlike discrimination on the basis of partisanship, is unconstitutional. Partisanship, the Court argues, is

¹¹³ *Davis v. Bandemer*, 478 U.S. 109, 110 (1986).

¹¹⁴ *Vieth v. Jubelirer*, 541 U.S. 267, 267-270 (2004).

¹¹⁵ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019).

inherent to creating districting maps,¹¹⁶ meaning a partisan gerrymander cannot be unconstitutional. This difference means that tests like Gingles cannot be applied to partisan gerrymandering. Without a constitutional or statutory provision prohibiting partisan gerrymandering, the Court cannot rule on its legality. This distinction was expanded upon in the recent *Louisiana v. Callais* decision.

Updated Gingles Test: *Louisiana v. Callais* (2026)

In *Louisiana v. Callais*, the Court, while taking into account the link between race and voting patterns, constrained §2 of the VRA. The case considered Louisiana’s 2022 district map, which a federal district court ruled violated §2 of the VRA by not including a second majority-minority black district. The Supreme Court found that the adjusted map was an unconstitutional racial gerrymander because the VRA did *not* require the creation of a second majority-minority district in the first place.¹¹⁷ The Court argued that the second majority-minority district was an overstep of the 15th Amendment as the amendment only provided liability for intentional discrimination,¹¹⁸ thereby weakening the “results test” established by the 1982 VRA amendments, which had a standard of discriminatory effect.¹¹⁹ Now, as long as nonracial factors are applied when districting, a federal court cannot order a new map.

With this decision, the Court states that it “updates the Gingles framework and realigns it with the text of §2 and constitutional principles.”¹²⁰ The majority argues that this update is necessary because, in the 40 years since the Gingles test was established: (1) historically discriminatory states have made strides against racial discrimination, (2) a robust two-party

¹¹⁶ *Id.* at 2497.

¹¹⁷ *Louisiana v. Callais*, 608 U.S. (2026).

¹¹⁸ *Id.* at 3.

¹¹⁹ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

¹²⁰ *Louisiana v. Callais*, 608 U.S. (2026).

system has created a correlation between race and party preference, (3) the *Rucho v. Common Cause* decision found partisan gerrymanders to be non-justiciable, and (4) advances in technology mean mapmakers can create maps that achieve both State goals and racial balance.¹²¹

The new Gingles test the Court lays out updates the three prongs or “preconditions” that prove unconstitutional racial gerrymandering occurred. Firstly, the fact that states *could* have added more majority-minority districts does not mean that they committed a §2 violation; secondly, to prove a violation, the plaintiffs must demonstrate that “voters engage in racial-bloc voting that cannot be explained by partisan affiliation”; and thirdly, plaintiffs must focus on current rather than past instances of discrimination in their suits.¹²²

By saying that partisan rationale can be used to justify a discriminatory effect without intent, the Court expanded upon *Rucho v. Common Cause*, validating the use of partisan consideration when drawing legislative districts. This, in turn, raises the standard to prove unconstitutional racial gerrymandering. Since party preference and race are often linked, a state could theoretically say they used partisan factors to district even if they used racial factors. Further, the fact that states discriminated in the past is not sufficient to necessitate racial enfranchisement through districting in the present. While past instances of discrimination can still be accounted for, they alone are not able to justify a majority-minority district.

Implications

There is likely going to be an increase in partisan gerrymanders because of this decision. Whereas previously, minority plaintiffs could argue that partisan considerations resulted in their votes’ dilution, they now have to argue solely on racial considerations. As voters have become

¹²¹ Id.

¹²² Id. at 4.

more racially polarized, with minority voters leaning Democratic and white voters leaning Republican,¹²³ a districting plan that disadvantages Democratic voters is likely to disadvantage minority voters. Now that the Supreme Court requires race and party to be disentangled in court decisions, plaintiffs will have to find explicit proof of discriminatory intent. This proof will be hard to find as mapmakers, knowing the unconstitutionality of racial considerations when districting, will try not to provide evidence for such intentions in their communications. Without this intention conveyed, an implicit connection will not be sufficient for proving state liability.

Previous Supreme Court VRA limits have immediately led to partisan action. In *Shelby County v. Holder* (2013), the Court struck down §4 of the VRA, which required jurisdictions with a history of voter suppression against minority voters to “preclear” any changes to their voting laws to ensure they did not harm minority voters. The Court believed that, with voter registration and turnout nearly equalizing between majority and minority voters, the section was no longer necessary.¹²⁴ Consequently, several states enacted voting laws that, while neutral on the surface, had the effect of disenfranchising Democratic, and likewise minority, voters. For instance, Texas issued a law requiring government-issued photo identification to vote, an ID type more commonly held by Republican voters; North Carolina issued limitations that included ending same-day voter registration, more frequently used by black voters.¹²⁵

In light of this decision, a somewhat similar floodgate to voter suppression is likely to occur with districting. Texas, California, Virginia, and Florida have all already pushed for mid-decade redistricting ahead of the 2026 midterm elections.¹²⁶ With *Louisiana v. Callais*, gerrymanders are more likely to be upheld by the court, resulting in extremely distorted and

¹²³ *Partisanship by race, ethnicity, and education*, Pew Research Center, (2024).

¹²⁴ *Shelby County v. Holder*, 570 U.S. 529, 531 (2013).

¹²⁵ Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—And the Court*, 134 Harv. L. Rev. 4, 5-6 (2019).

¹²⁶ Benjamin Schneer, *Explainer: What’s Happening with gerrymandering in the United States—and who will “win” the redistricting battle*, Harvard Kennedy School (2024).

anti-majoritarian districts. Many votes will be rendered effectively meaningless as citizens' representation is predicted before campaigning begins. Without a broader safeguard against minority vote dilution, new gerrymanders will disproportionately impact minority voters.

When it comes to future gerrymandering adjudication, plaintiffs will have to look primarily for explicit proof of discriminatory intent. Besides explicit proof, plaintiffs may look at the precision through which maps are drawn, as some districting maps are drawn so that one can infer a discriminatory intent.¹²⁷ Future cases will reject claims, blurring the distinction between political and racial gerrymanders, defaulting to a finding of partisanship. Although the Court has removed itself from hearing political questions, this case will have enormous impacts on the political sphere, affecting representation, polarization, and partisan enmity.

Conclusion

The Supreme Court's April 2026 decision, *Louisiana v. Callais*, limits the ability of plaintiffs to challenge the constitutionality of state districting plans. The Court does this by constraining §2 of the Voting Rights Act of 1965, arguing that, based on the language of the 15th Amendment, discriminatory intent must be found in racial gerrymandering cases. The Court expands its opinion in *Rucho v. Common Cause* by saying districting schemes must be predominantly racial rather than political to prove liability and updates the Gingles test for acts of minority vote dilution, saying racial bloc-voting must be explained independently of partisan affiliation. For these reasons, the decision will likely bolster a pattern of mid-decade redistricting, reducing the meaning of votes and disproportionately harming minority voters.

¹²⁷ Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—And the Court*, 134 Harv. L. Rev. 4, 6 (2019).

Bibliography

Cornell Law School, *Protect Class*, last visited 18 May 2026,

https://www.law.cornell.edu/wex/protected_class

Davis v. Bandemer, 478 U.S. 109 (1986).

Grove v. Emison, 507 U.S. 25 (1993).

Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—And the Court*, 134 Harv. L. Rev. 4 (2019).

Mary J. Kosterlitz, *Thornburg v. Gingles: The Supreme Court's New Test for Analyzing Minority Vote Dilution*, Catholic L. Rev. 531 (1986).

Chris Leaverton, *Who Controlled Redistricting in Every State*, Brennan Center for Justice (2022),
<https://www.brennancenter.org/our-work/research-reports/who-controlled-redistricting-every-state>.

Louisiana v. Callais, 608 U.S. ____ (2026).

Pew Research Center, *2. Partisanship by race, ethnicity, and education*, (2024),
<https://www.pewresearch.org/politics/2024/04/09/partisanship-by-race-ethnicity-and-education/>.

Reynolds v. Sims, 377 U.S. 533 (1964).

Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

Benjamin Schneer, *Explainer: What's Happening with gerrymandering in the United States—and who will “win” the redistricting battle*, Harvard Kennedy School (2024),

<https://www.hks.harvard.edu/faculty-research/policy-topics/democracy-governance/explainer-whats-happening-gerrymandering-united>.

Matthew Siciliano, *A History of Gerrymandering: Effects, Issues, and Solutions*, Thesis Committee of Honors College Middle Tennessee State University 1, 2 (2024).

Shelby County v. Holder, 570 U.S. 529 (2013).

Thornburg v. Gingles, 478 U.S. 30 (1986).

U.S. Const. art. I, § 2; art. II, §1; amend XIV, §1; amend. XV, §1; amend. XV, §2.

Vieth v. Jubelirer, 541 U.S. 267, 267-270 (2004).

Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C. §§ 10301 et seq.)

Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

Wesberry v. Sanders, 376 U.S. 1 (1964).

Obscenity and Overbreadth: Analyzing Idaho's Children's School and Library Protections Act

By: Anika Neumeyer

In the last few years, the United States has seen an increase in book bans nationwide. Idaho's 2024 HB 710, the Children's School and Library Protection Act, seeks to define obscene materials and provide a process for removing them to an adult-only section of the library. This bill has been challenged in Northwest Association of Independent Schools v. Labrador (2024) and Penguin Random House et al v. Labrador (2025), in which the plaintiffs sought injunctive and declaratory relief. After the Idaho District Court denied preliminary injunctive relief, an appeal to the Ninth Circuit Court resulted in a reversal and remand for further consideration of the scope of a limited preliminary injunction due to the overbreadth of the context clause and the resulting civil liability for public libraries. This decision is based on the plaintiffs' claims of violations of the 1st and 14th Amendments. Two new bills were introduced in the 2026 Idaho Legislative Session: HB 795 and HB 819. These bills seek to amend the Children's School and Library Protection Act before the lawsuit proceeds. This Note will evaluate whether HB 795 and HB 819 rectify the constitutional problems associated with HB 710 by examining the bills' structure, the plaintiff's claim and Ninth Circuit's opinion, and relevant statutory and constitutional law. HB 795 and HB 819 do not amend HB 710 due to their selective application of the Miller test's third prong to only adolescent minors in private school and their failure to cure the statutory overbreadth of the context clause.

Introduction

Book bans have seen a rise in the United States over the last few years, with 22,810 book ban cases since 2021.¹²⁸ Books bans, as defined by PEN America¹²⁹, refer to “any action taken against a book based on its content and as a result of parent or community challenges, administrative decisions, or in response to direct or threatened action by governmental officials, that leads to a book being either completely removed or where access to a book is restricted or diminished.”¹³⁰ This trend is reflected in the introduction of House Resolution 7661, a nation-wide bill “that threatens funding promised in the Elementary and Secondary Education Act of 1965 from any school that develops, implements, facilitates, hosts or promotes any program or activity for, or provides or promotes literature or other materials to” minors that include “sexually oriented material” or material that involves “gender dysphoria or transgenderism.”¹³¹¹³² While this bill has drawn national critique, the foundations for HR 7661’s rhetoric have already been enacted in similar state legislation across the country.

The censorship of obscene materials is nothing new to Americans, but it has always walked a fine line between protecting children and regulating First Amendment rights. Proponents of censorship frequently cite the protection of underage children from inappropriate content, parental involvement in their child’s education, and the ability to access the content

¹²⁸ Sabrina Baeta, Tasslyn Magnusson, Madison Markham, Kasey Meehan, Yuliana Tamayo Latore, *The Normalization of Book Banning*, Pen America, (October 1, 2025), <https://pen.org/report/the-normalization-of-book-banning/>.

¹²⁹ PEN America is a non-profit organization whose goal is to raise awareness for the protection of free speech in the United States and worldwide through the advancement of literature and human rights. This work includes research and reports on topical issues; advocacy on free expression challenges; campaigns on policy issues and on behalf of individual writers and journalists under threat; year-round festivals and events; literary awards; fellowships; and more.

¹³⁰ Sabrina Baeta, et al. (2025).

¹³¹ American Library Association. “‘dangerous’ Bill Inviting Government Censorship Passes House Committee.” *ALA*, 5 May 2026, www.ala.org/news/2026/03/HR7661-passes-house-committee.

¹³² Stop the Sexualization of Children Act 2026, H.R. 7661, 119th Cong. §2(3)(C)(ii) (2026).

elsewhere as their rationale. Meanwhile, critics point out that these removal trends often target minority groups, violate the First Amendment, waste the time and money of public libraries, and create a financial gap for those who cannot afford to buy the books independently. Much of this debate, and whether a bill is described as a book ban or a removal of inappropriate material, comes down to the definition of obscenity and the equality of the ban's application to specific groups. This is a central point of conflict surrounding Idaho's HB 710.

Idaho's HB 710, the Children's School and Library Protection Act, was signed into law on April 10, 2024. HB 710 amended Section 18-154 of Idaho Code to define and prohibit obscene materials from being in a school or public library. It also provided a course of action for material to be relocated to an adult-only space, with the possibility of a concerned individual receiving \$250 in statutory damages from the libraries if the material is not moved.¹³³ The impact of this law on libraries, especially rural libraries in Idaho, was immediate. Not only were plastic walls erected to create adult-only spaces, but some libraries, such as the Donnelly Public Library, became "adults-only" to comply as their one-room space did not allow for material relocation.¹³⁴ The CIN, a 14-library consortium that shared materials with patrons across Northern Idaho, voted to dissolve after a member, the Community Library Network "voted to restrict its nearly 9,000 library cards belonging to minors from placing holds on CIN's catalog."¹³⁵

A complaint for injunctive and declaratory relief was filed by parents, students, libraries, authors, and publishers, resulting in two cases: *Northwest Association of Independent Schools v. Labrador* (2024) and *Penguin Random House et al v. Labrador* (2025). Northwest was filed on

¹³³ Children's School and Library Protection Act, Idaho H.B. 710, 67th Legislature, 2nd Reg. Session. (2024).

¹³⁴ James Dawson, *Donnelly Public Library will become adults-only to comply with new 'library porn' law*, Boise State Public Radio News (May 20, 2024 T 12:47 PM MDT), <https://www.boisestatepublicradio.org/politics-government/2024-05-20/donnelly-public-library-idaho-books>

¹³⁵ Hanlon, J. (2025, July 13). *Regional Library Consortium members vote to dissolve Cooperative Information Network*. Spokesman.com. <https://www.spokesman.com/stories/2025/jul/14/regional-library-consortium-members-vote-to-dissol/>

behalf of private schools and libraries, and Penguin on behalf of students, authors, publishers, and the Donnelly Public Library. A preliminary injunction sought by plaintiffs in *Northwest* was denied by the U.S. District Court of Idaho. In their appeal to the Ninth Circuit Court, the *Northwest* plaintiffs “dropped their Fourteenth Amendment claim and doubled down on a ‘First Amendment overbreadth claim,’ arguing that ‘Idaho’s law against distributing obscene materials to minors is unconstitutionally overbroad.’”¹³⁶ but was ultimately reversed by the U.S. Court of Appeals for the Ninth Circuit with instructions to remand the case to a lower court, consider the scope of a limited preliminary injunction, and conduct further proceedings consistent with the Ninth Circuit’s findings.¹³⁷

Since then, Rep. Jaron Crane has introduced two new bills, recommended by the Idaho Attorney General’s office as a response to the recent ruling, that would amend and clarify HB 710.¹³⁸ House Bill 795, would remove the phrase “in the context in which it is used,” language that the Ninth Circuit identified as too vague under the First Amendment.¹³⁹ House Bill 819 would make several changes to the Section 18-1514 of Idaho Code, which HB 710 previously amended. HB 819 would create different standards for public and private school libraries and redefine phrases the Ninth Circuit Court of Appeals flagged, such as splitting minors into two age groups (12 and under, and 13 to 17) instead of one collective.¹⁴⁰

¹³⁶ Beeck, N. op de. (2025, August 26). *PRH presses forward in case against Idaho Book Banning Law HB 710*. PublishersWeekly.com. <https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/98481-prh-presses-forward-in-case-against-idaho-book-banning-law.html>

¹³⁷ *Nw. Ass’n of Indep. Sch. v. Labrador*, No. 25-2491, 2026 WL (9th Cir. Jan. 29, 2026).

¹³⁸ Laura Guido, *Idaho House to consider bills amending 2024 ‘harmful to minors’ library law*, Idaho Capital Sun (Mar. 12, 2026 at 4:04 PM MDT), <https://idahocapitalsun.com/2026/03/12/idaho-house-to-consider-bills-amending-2024-harmful-to-minors-library-law/>

¹³⁹ Idaho HB. 795, 68th Legislature, 2nd Reg. Session. (2026)

¹⁴⁰ Idaho HB. 819, 68th Legislature, 2nd Reg. Session. (2026)

This note will analyze if the amendments by HB 795 and HB 819 would make HB 710 more likely to survive a second round in the Idaho District. After further explanation of the three bills and the current Idaho book removal process in Part I, Part II will then turn to referenced precedent and the Ninth Circuit Court’s remand. Part II will analyze precedent and relevant Constitutional law in order to understand whether HB 795 and HB 819 amend HB 710’s defects. Part III will argue that HB 795 and HB 819 do not cure the constitutional defects identified in HB 710 because they continue to create overbroad restrictions, fail to properly apply the Miller test, and produce a chilling effect on protected speech. This reasoning is based on the 1st Amendment and relevant cases such as *Pope v. Illinois* (1987) and *Miller v. California* (1973), which detail restrictions and regulations for labeling and censoring obscene material.

I

Structures of HB 710, HB 795, and HB 819

This is not the first time a bill attempting to limit obscene materials has been introduced in the Idaho Legislature. In 2023, Idaho Governor Brad Little vetoed HB 314, a bill designed to limit access to obscene materials in schools and public libraries, with the possibility of a concerned individual receiving statutory damages of up to \$2,500 from the library if the material was not removed.¹⁴¹ Little cited concern about the broad blanket assumptions about materials, “the bounty system” created for those seeking damages, and the financial strain on libraries and taxpayers to pay the damages¹⁴² as his rationale for vetoing the bill. One legislative session later, HB 710 was introduced, with tweaks such as lowering statutory damages to \$250 that made the passing of the bill feasible. With HB 710 signed into law but facing an injunction, HB 795 and

¹⁴¹ Kevin Richert, *Little vetoes controversial library bill*, Idaho Ed News (Apr. 5, 2023), <https://www.idahoednews.org/top-news/little-vetoes-controversial-library-bill/>

¹⁴² Ibid.

HB 819 have been introduced to amend legal weaknesses pointed out by the Ninth Circuit Court of Appeals. Part I will expand on the structures and key changes between the three bills. This will lay a basis for evaluating the two newly introduced bills' chance of effectiveness in helping HB 710 survive the injunction.

The purpose of HB 710 is to limit access to obscene materials in schools and public libraries. Key provisions in the bill include defining obscene materials, and creating a course of action allowing an individual to ask the library to relocate the materials to an adults-only space with the chance of receiving \$250 statutory damages from the school or library.¹⁴³ It is important, here, to note that the term minor includes all children under the age of 18, and that the bill does not make any exceptions for what content might be appropriate for children of varying ages.

The bill's definitions of obscene materials cover a wide range of actions. The bill defines "sexual conduct" as "any act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, the breast."¹⁴⁴ The inclusion of "homosexuality" among other terms like "masturbation" and "sexual intercourse" has been flagged by critics of the bill.¹⁴⁵ Critics have argued that since all the other terms in the sexual conduct definition can apply to both heterosexual and homosexual individuals, it is not necessary to include "homosexuality." Critics conclude that its inclusion opens space for actions such as hand-holding and other non-sexual acts between homosexual couples to be censored. Since "heterosexuality" is not specified alongside "homosexuality," critics posit that the latter's inclusion targets the LGBTQ+ community and

¹⁴³ Children's School and Library Protection Act, Idaho H.B. 710, 67th Legislature, 2nd Reg. Session. (2024).

¹⁴⁴ Children's School and Library Protection Act, Idaho H.B. 710, 67th Legislature, 2nd Reg. Session. §1 (3) (2024).

¹⁴⁵ Ibid.

imposes viewpoint-based discrimination.¹⁴⁶ According to the plaintiffs, this inherent viewpoint-based discrimination encourages individuals to “pursue their own personal viewpoints, predilections, or biases,” leading to suppression and chilling of First Amendment liberties.¹⁴⁷

Another point of conflict in the bill is the process through which a minor, parent, or guardian can remove a book. If material harmful to minors is distributed, one can file a written notice asking for the material to be moved to an area with adult access only. If, after thirty days, the material has not been relocated, the prevailing individual who provided notice can recover \$250 in statutory damages, any “actual” damages, as well as any other injunctive relief “to prevent the defendant school or public library from violating the requirements of this section.”¹⁴⁸ This law applies to both private and public schools, as well as public libraries.

HB 710 was challenged in *Northwest Association of Independent Schools v. Labrador* (2024) as well as in *Penguin Random House et al. v. Raúl Labrador et al.* (2025) both of which filed a Complaint for Injunctive and Declaratory Relief. The complaint sought to “preliminarily and permanently enjoin enforcement of, and declare unconstitutional and void, HB 710 as a violation of their rights under the First and Fourteenth Amendments to the United States Constitution.”¹⁴⁹ The shared rationale between the cases is that the law unconstitutionally applies a one-size fits all standard of obscenity that reduces library materials for minors to the content restrictions for the youngest of children. After an Idaho District Court found that the law did allow for meaningful review of books as a whole, taking into account the varying ages of minors,

¹⁴⁶ *Penguin Random House et al. v. Raúl Labrador et al.*, Complaint for Injunctive and Declaratory Relief (D. Idaho. Filed Feb. 4, 2025).

¹⁴⁷ *Ibid.*

¹⁴⁸ Children’s School and Library Protection Act, Idaho H.B. 710, 67th Legislature, 2nd Reg. Session. §2(4)(2024).

¹⁴⁹ *Penguin Random House et al. v. Raúl Labrador et al.*, Complaint for Injunctive and Declaratory Relief §1(5) (D. Idaho. Filed Feb. 4, 2025).

the plaintiffs for *Northwest Association of Independent Schools v. Labrador* (2024) sought an appeal with the US Ninth Circuit Court of Appeals. In order to secure their injunction, plaintiffs must prove irreparable harm will occur without the relief, a likelihood of success on the merits, a favorable balance of hardships, and public interest.¹⁵⁰ The Ninth Circuit Court of Appeals concluded that the plaintiffs of *Northwest Association of Independent Schools v. Labrador* (2024) were successful in their injunction due to “H.B. 710’s context clause is overbroad on its face, threatens to regulate a substantial amount of expressive activity, and is not readily susceptible to a limiting construction.”¹⁵¹ The case was reversed and remanded back to the district court for full consideration of the “scope of a limited preliminary injunction in this case and to conduct further proceedings consistent with our opinion.”¹⁵²

In light of this reversal, the Idaho Attorney General’s Office recommended two new bills in the 2026 Idaho Legislative session: HB 795 and HB 819.¹⁵³ Both of these bills amend or change the 2024 law created by HB 710 in response to a Ninth Circuit Court of Appeals ruling on a challenge. HB 795 presents a slight change to the definitions necessary for defining obscene material and lewd matter, definitions used in determining what material violates HB 710. The original section of both codes reads: “Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.”¹⁵⁴ HB 795 removes the phrase “in

¹⁵⁰ Legal Information Institute, *Injunctive Relief*, Cornell Law School (June 2025), https://www.law.cornell.edu/wex/injunctive_relief#:~:text=Injunctive%20relief%20is%20generally%20only%20available%20when

¹⁵¹ *Nw. Ass’n of Indep. Sch. v. Labrador*, No. 25-2491, 2026 WL (pg. 3) (9th Cir. Jan. 29, 2026).

¹⁵² *Ibid.* (pg. 37).

¹⁵³ Laura Guido, *Idaho House to consider bills amending 2024 ‘harmful to minors’ library law*, Idaho Capital Sun (Mar. 12, 2026 at 4:04 PM MDT), <https://idahocapitalsun.com/2026/03/12/idaho-house-to-consider-bills-amending-2024-harmful-to-minors-library-law/>

¹⁵⁴ Children’s School and Library Protection Act, Idaho H.B. 710, 67th Legislature, 2nd Reg. Session. §1(6)(ii) (2024).

the context in which it is used” from the definition of obscene material and lewd matter in Section 18-4101 and Section 52-103 of Idaho Code.¹⁵⁵ This context clause was an addition to the established third prong of the Miller test. The Ninth Circuit Court of Appeals hinted that the clause would be overbroad, not susceptible to a limiting construction, and would regulate a substantial amount of expressive activity. HB 795 removes that clause from the definitions of obscene material and lewd matter as well as HB 710’s Children’s School and Library Protections Act, where that material can be removed and statutory damages received by the complainant.

The second bill recommended by the Idaho Attorney General’s Office, HB 819, contains far more additions. HB 819 would create a separation between minors older and younger than 13 and would create different standards for harmful material in public and private schools.¹⁵⁶ The application of the phrase “harmful to minors” in determining whether material is appropriate is what draws the line between private and public schools. The third prong of the Miller test requires work to be evaluated based on its literary, artistic, political, and scientific value. This third prong is included in the definition of “harmful to minors” in the bill: “‘Harmful to minors’ shall not include material that, when considered as a whole, possesses serious literary, artistic, political, or scientific value for adolescent minors.”¹⁵⁷ However, “harmful to minors” can only be found in a private school’s limitations: “any material that is sexually explicit and, taken as a whole, is harmful to minors.”¹⁵⁸ Whereas, the public schools are forbidden from providing “any material that is sexually explicit.”¹⁵⁹ This lack of the phrase “harmful to minors” in evaluating public school and library materials leaves out the third prong of the Miller test, concerning the value of the material as a whole.

¹⁵⁵ Idaho HB. 795, 68th Legislature, 2nd Reg. Session. (2026)

¹⁵⁶ Idaho HB. 819, 68th Legislature, 2nd Reg. Session. (2026)

¹⁵⁷ Ibid. §1(7(b))

¹⁵⁸ Ibid. §3(2)

¹⁵⁹ Ibid. §3(3)

HB 819 clarifies that “adolescent minors” are a separate category for children between the ages of 13 and 17.¹⁶⁰ The term “adolescent minors” is also included in the definition of “harmful to minors.” Its inclusion specifies that when evaluating the value of a whole material, it must provide value to adolescent minors, not considering the value to those below the age of 13.

II

Applicable Case Law

In order to analyze whether the passing of these bills will protect Idaho’s Children’s School and Library Protections Act from further legal action, the cases on which defendant and plaintiff arguments are built must be established. The application of key portions of the First Amendment, such as the overbreadth doctrine and the chilling effect, to HB 710 will be examined. The Miller test, established in *Miller v. California* (1973), is a key component that the plaintiffs claim HB 710 and HB 819 incorrectly interpret. It is vital to understand the Miller test’s role as a national standard for evaluating adult obscenity in materials, especially in contrast to *Ginsberg v. New York* (1968), which establishes state control over obscenity restrictions for minors. To explore whether Idaho is impermissibly applying obscenity restrictions to minors, the defendants of *Northwest Association of Independent Schools v. Labrador* (2024) and *Penguin Random House et al v. Labrador* (2025) may build their argument using relevant precedent. *Ginsberg v. New York* (1968) and *Little v. Llano County* (2025) have detailed how states may tighten obscene definitions for minors and label library curation as government speech, respectively. These varying precedents create a maze that HB 819 and HB 795 must navigate if they hope to protect HB 710 from further lawsuits.

¹⁶⁰ Ibid. §1(1)

In their rationale for the injunction, the plaintiffs point to the overbreadth of HB 710 in its inability to properly define terms, to acknowledge the distinction between older and younger minors, and to properly apply all three prongs of *Miller* to materials.¹⁶¹ The overbreadth doctrine is a key part of the First Amendment and holds that if a statute is so broadly written “that it deters free expression, then it can be struck down on its face because of its chilling effect—even if it also prohibits acts that may legitimately be forbidden.”¹⁶² According to *United States v. Stevens* (2010), the statute violates this constitutional overbroad doctrine if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”¹⁶³ In *Ashcroft v. Free Speech Coal* (2002), it was established that the overbreadth doctrine “prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.”¹⁶⁴ In HB 710’s case, the lack of defined terms for complying with the law, broad application to all minors, and inability to fully apply *Miller* results in a blanket application of obscenity to materials whose values are not fully considered.

The overbreadth doctrine directly connects to the First Amendment when a law’s overbreadth results in individuals limiting their expressive actions for fear of violating the vague law. This pre-emptive limiting of expressive action in fear of governmental retaliation is referred to as the chilling effect. This effect “occurs when a governmental action creates a consequence that deters an individual from exercising expressive rights.”¹⁶⁵ When viewed in light of the First Amendment, which states that “Congress shall make no law ... prohibiting the free exercise

¹⁶¹ *Penguin Random House et al. v. Raúl Labrador et al.*, Complaint for Injunctive and Declaratory Relief (D. Idaho. Filed Feb. 4, 2025).

¹⁶² Cong. Research Serv., *The Constitution of the United States of America: Analysis and Interpretation*, art. III, § 2, cl. 1, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-6-6/ALDE_00013008/

¹⁶³ *United States v. Stevens*, 559 U.S. 460, (2010)

¹⁶⁴ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, (2002)

¹⁶⁵ Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 *Vanderbilt Law Review* 1471 (2019) Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol66/iss5/3>

thereof; or abridging the freedom of speech,” the chilling effect becomes a significant constitutional concern because it can deter people from exercising the freedoms of speech and expression that the Constitution protects.¹⁶⁶ Since the source of this chilling effect is the overbreadth of the HB 710’s application, the plaintiffs reason that HB 710 is unconstitutional.

Another key case to consider when evaluating obscenity laws and the plaintiff’s claims of overbreadth is *Miller v. California* (1973). This case established the *Miller* Test, the United States Supreme Court’s standard used to determine obscenity, and thus the extent of the First Amendment’s protection of the material.¹⁶⁷ The test involves evaluating the work by deciding: “(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”¹⁶⁸ The misapplication of this law in HB 710 is one of the core claims in the plaintiffs’ argument in *Northwest Association of Independent Schools v. Labrador* (2024) and *Penguin Random House et al v. Labrador* (2025).

The context clause that HB 710 includes adds the phrase “and in the context in which it is used” to the third prong of the *Miller* test. This phrase implies that while a material may have value in an English classroom, that value is lost when placed in a different context, such as when a student chooses to read for enjoyment rather than homework. This additional phrase overwrites the third prong of the *Miller* test, straying from the national standard, and risks making HB 710 unconstitutional. The misapplication and rewriting of this third prong is what the plaintiffs take issue with and what is regulated by *Pope v. Illinois* (1987). *Pope* requires the proper application

¹⁶⁶ U.S. Const. amend. I.

¹⁶⁷ *Miller v. California*, 413 U.S. 15, (1973)

¹⁶⁸ *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

of the third prong of *Miller* and that “judging whether material is obscene requires the trier of fact to determine ‘whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.’”¹⁶⁹ HB 710’s inclusion of the context phrase altered *Miller*’s third prong, straying from precedent set in *Pope* and constitutional standards. It was this phrase the Ninth Circuit Court of Appeals highlighted as in possible conflict with *Miller*, and it is this context clause that HB 795 seeks to remedy by removing it from Idaho Code.¹⁷⁰

However, the defendants may rely on *Ginsberg v. New York* (1968) to justify the changes made. *Ginsberg v. New York* (1968) upheld that since the state has an interest in the well-being of its children, it may alter obscenity definitions for minors, so long as the minors’ constitutional rights are not invaded.¹⁷¹ This is not a broad acceptance of every alteration, but it does allow states to legally change the obscenity definition for minors, as Idaho did in HB 710. When evaluating bills such as HB 710, the question then becomes: At what point does the alteration of the obscenity definition impede minors’ constitutionally protected rights?

In a recent interview, after the introduction of HB 795 and 819, Idaho Solicitor General Michael Zarian said that courts have recently ruled “that, when it comes to minors, the government can constrain ‘government speech’ in a different way than private speech.”¹⁷² The decision he was referencing arose out of the 2025 Texas case, *Little v. Llano County* (2025). After receiving an appeal, the Fifth Circuit confirmed that government speech includes public library catalog decisions, effectively removing them from First Amendment challenges, which

¹⁶⁹ *Pope v. Illinois*, 481 U.S. 497 (1987)

¹⁷⁰ *Nw. Ass’n of Indep. Sch. v. Labrador*, No. 25-2491, 2026 WL, (9th Cir. Jan. 29, 2026).

¹⁷¹ *Ginsberg v. New York*, 390 U.S. 629 (1968)

¹⁷² Laura Guido, *Idaho House to consider bills amending 2024 ‘harmful to minors’ library law*, Idaho Capital Sun (Mar. 12, 2026 at 4:04 PM MDT), <https://idahocapitalsun.com/2026/03/12/idaho-house-to-consider-bills-amending-2024-harmful-to-minors-library-law/>

are meant to protect government imposition on speech, not dictate government speech.¹⁷³ While not binding to the state of Idaho, the rationale could be used by the defendants. If libraries are considered a form of government speech, then HB 795 and HB 819 could be framed as measures that give the public a greater role in shaping government-managed collections. However, if this rationale is used in the next hearing, the plaintiffs may counter this line of reasoning by examining how the public libraries' curation is being coerced by threats of penalty from private individuals rather than independently selecting materials.

III

Examining if HB 819 and HB 795 Amend HB 710's Defects

Although House Bill 795 and House Bill 819 attempt to address the deficiencies of House Bill 710, they do not resolve its fundamental constitutional issues. Even with revised language, the statutory scheme continues to misapply *Miller*, allows for overbreadth, and risks viewpoint-based discrimination. As a result, educators and librarians remain vulnerable to liability for subjective interpretations of content, creating a chilling effect on protected speech. Given the previous case law and relevant Constitutional doctrines established in Part II, this Note will now evaluate whether HB 795 and HB 819 align HB 710 with Constitutional standards. Due to the inability to properly define terms, to acknowledge the distinction between older and younger minors, and to properly apply all three prongs of the Miller test in review of material, the amending purpose of HB 795 and HB 819 will be ineffective.

¹⁷³ TPR Staff, *The Llano County Ruling and the Future of Texas Library Policy*, Texas Policy Research (December 9, 2025), <https://www.texaspolicyresearch.com/the-llano-county-ruling-and-the-future-of-texas-library-policy/>

Although HB 795 and HB 819 attempt to bring Idaho’s statutory framework into alignment with *Miller v. California* (1973), they do so in an incomplete and internally inconsistent manner. Along with remanding the case back to the district court for full consideration of the preliminary injunction, the Ninth Circuit identified HB 710’s context clause as overbroad. HB 795 removed this problematic “context” clause, appearing to adhere to the Ninth Circuit’s recommendation. However, HB 795’s partner bill, HB 819, creates a new constitutional issue. HB 819 creates a system that fails to fully incorporate the third prong of the Miller test, which requires evaluating whether a work, taken as a whole, possesses serious literary, artistic, political, or scientific value.¹⁷⁴ Instead of applying this constitutionally required standard uniformly, HB 819 creates a fragmented approach by applying the third prong to private schools, but not public schools.

HB 819 accomplishes this by hiding the third prong in the definition of “harmful to minors,” stating that the definition shall not include work that “as a whole, possesses serious literary, artistic, political, or scientific value for adolescent minors.”¹⁷⁵ This hidden inclusion matters when looking at where else in the bill the phrase “harmful to minors,” and thus the third prong of the *Miller* test, is included. Private schools are not allowed to provide “any material that is sexually explicit and, taken as a whole, is harmful to minors.”¹⁷⁶ Meanwhile, public schools are only prohibited from providing “any material that is sexually explicit.”¹⁷⁷ This structure effectively applies the third prong of *Miller* only to private schools and not to public schools, thus failing to rectify HB 710’s violation of *Miller*. As a result, the law effectively bypasses the constitutional safeguards embedded in the Miller test and permits the removing materials

¹⁷⁴ *Miller v. California*, 413 U.S. 15, (1973)

¹⁷⁵ Idaho HB. 819, 68th Legislature, 2nd Reg. Session. §1(7)(b) (2026)

¹⁷⁶ *Ibid.* §3(2)

¹⁷⁷ *Ibid.* §3(3)

regardless of educational, literary, or political significance. This inconsistency not only undermines the constitutional requirement that works be evaluated as a whole, but also creates substantial overbreadth.

HB 819 attempts to compensate for this lack of equal application by rewriting the third prong of the Miller test in the definition of "sexually explicit" applied to public school materials. The bill reads those sexually explicit materials "shall not include diagrams about anatomy for scientific education, religious books such as the Bible and the Torah, or content relating to classical works of art."¹⁷⁸ This phrase addition attempts to replicate the third prong of Miller by rewriting its definition. The definition noticeably leaves out literary and political value and limits the extent of scientific values to anatomy diagrams and artistic values to classical works. Attempts to compensate for this omission of the third prong, as seen above, do not replicate the breadth or function of the Miller framework and risk excluding works that would otherwise be protected under established First Amendment doctrine.

Another point of conflict is that HB 710 referred to all minors as the same without evaluating whether content appropriateness may vary by age. HB 819 attempts to correct this mistake by creating two categories: those below the age of 13, referred to as minors, and those between the ages of 13 and 17, referred to as adolescent minors. This division is only applied under the phrase "harmful to minors," and thus is applied only to private schools. In doing so, the statute only applies the *Miller* test to adolescent minors. This modification is significant because it narrows the third prong of the Miller test so that literary, artistic, scientific, or political value need only be recognized for adolescent minors. As a result, material that holds clear educational or developmental value for children under 13 is excluded from consideration entirely. This restriction, taken with the narrowing of the third prong to only private schools, excludes the

¹⁷⁸ Ibid. §1(12)

application of the Miller test to all public school children and all private school children under the age of 13.

This selective application of the Miller Test distorts the constitutional inquiry by replacing a holistic evaluation of a work with a segmented and age-restricted analysis not grounded in Supreme Court precedent. *Ginsberg v. New York* (1968)¹⁷⁹ permits some adjustment of obscenity standards for minors, but it does not authorize states to exclude entire groups of minors from *Miller*. By conditioning constitutional protection on whether material benefits only minors between 13 and 17, HB 819 creates a gap in First Amendment safeguards. This increases the likelihood that protected speech in materials for younger audiences will be improperly classified as harmful to minors and removed.

Since it has been established that HB 819 does not rectify the unconstitutional application of *Miller* or the consideration of materials on their value for different ages of minors, it can be concluded that the overbreadth claim brought by the plaintiffs will stand. Possible penalties and facing potential civil liability create strong incentives for schools and libraries to remove materials preemptively. This chilling effect discourages the dissemination of constitutionally protected ideas, undermining the core purpose of the First Amendment.

The presented bills do not counter or amend the constitutional issues brought up by the plaintiffs in *Northwest Association of Independent Schools v. Labrador* (2024) and *Penguin Random House et al v. Labrador* (2025). The inability to properly apply all prongs of the *Miller* test to private and public-school minors of all ages leaves the defendants' overbreadth claim intact. Due to HB 795 and HB 819's inability to rectify key constitutional violations in HB 710,

¹⁷⁹ *Ginsberg v. New York*, 390 U.S. 629 (1968)

and in some cases to create new constitutional violations of the First Amendment, it is unlikely the passage of these bills will increase the defendants' success in upholding HB 710.

Conclusion

As shown above, HB 795 and HB 819 do not fully cure HB 710 because the amended process still fails to apply the serious-value requirement consistently and will continue to chill protected speech. HB 795 has since been signed into law on March 31, 2026. HB 819 has been referred back to the State Affairs Committee and has since been replaced by Senate Bill 1448, which was signed into law on April 10, 2026. Both HB 795 and S1448 will become effective on July 1, 2026. On April 23, 2026, all plaintiffs in *Northwest Association of Independent Schools v. Labrador* (2024) dropped their case because they were satisfied with the changes in S1448. *Penguin Random House et al v. Labrador* (2025) will continue to contest Idaho's Children's School and Library Protections Act, but will have to adjust to account for the definitional and procedural changes S1448 and HB 795 have made.¹⁸⁰

One significant change between S1448 and HB 819 is that S1448 applies the definition of "harmful to minors" to both private and public schools¹⁸¹. This means that the third prong of Miller will now be applied to adolescent minors in both private and public school settings, but will not be applied to materials for private or public students below the age of 13. This revision aligns with the point posed in Part III, that HB 819 only applies the third prong to private schools. In S1448 this mis-step has been revised, but still reinforces the age-restricted application of the Miller Test, which is not grounded in Supreme Court precedent.

¹⁸⁰ Beeck, N. op de. (2026, April 29). *Idaho lawmakers amend state code as book Ban case continues*. PublishersWeekly.com.

<https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/100251-idaho-lawmakers-amend-state-code-as-book-ban-case-continues.html>

¹⁸¹ Idaho S. 1448, 68th Legislature, 2nd Reg. Session. (2026)

As book banning bills continue to rise in the United States, it is expected that new policies will result in collisions with the First Amendment. Supreme Court Cases such as *Miller v. California* (1973), *Ginsberg v. New York* (1968), and *Roth v. United States* (1957) have helped to define how and when censorship may be pursued and ensure that safeguards and structures are in place for evaluating material. It is because of precedents like this that when a new book-banning bill is created, there are Constitutional structures it must follow. Testing and pushing against these norms by trying to create new norms and broadening the reach of censorship is necessary, as it helps us to re-evaluate as well as understand why precedent is still relevant and upholds itself. However, this pushing of new norms, as seen in HB 710 and the related bills, must be done with consideration for precedent and without violation of the First Amendment so that viewpoint discrimination in censorship cannot occur.

Bibliography

- American Library Association. “‘dangerous’ Bill Inviting Government Censorship Passes House Committee.” *ALA*, 5 May 2026,
www.ala.org/news/2026/03/HR7661-passes-house-committee.
- Ashcroft v. Free Speech Coal., 535 U.S. 234, (2002)
- Beeck, N. op de. (2025, August 26). *PRH presses forward in case against Idaho Book Banning Law HB 710*. PublishersWeekly.com.
<https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/98481-prh-presses-forward-in-case-against-idaho-book-banning-law.html>
- Children’s School and Library Protection Act, Idaho H.B. 710, 67th Legislature, 2nd Reg. Session. (2024).
- Ginsberg v. New York, 390 U.S. 629 (1968)
- Hanlon, J. (2025, July 13). *Regional Library Consortium members vote to dissolve Cooperative Information Network*. Spokesman.com.
- Cong. Research Serv., The Constitution of the United States of America: Analysis and Interpretation, art. III, § 2, cl. 1,
https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-6-6/ALDE_00013008/
(last visited Mar. 22, 2026).
<https://www.spokesman.com/stories/2025/jul/14/regional-library-consortium-members-vote-to-dissol/>
- Idaho HB. 795, 68th Legislature, 2nd Reg. Session. (2026)
- Idaho HB. 819, 68th Legislature, 2nd Reg. Session. (2026)
- Idaho S. 1448, 68th Legislature, 2nd Reg. Session. (2026)

James Dawson, *Donnelly Public Library will become adults-only to comply with new 'library porn' law*, Boise State Public Radio News (May 20, 2024 T 12:47 PM MDT), <https://www.boisestatepublicradio.org/politics-government/2024-05-20/donnelly-public-library-idaho-books>

Kevin Richert, *Little vetoes controversial library bill*, Idaho Ed News (Apr. 5, 2023), <https://www.idahoednews.org/top-news/little-vetoes-controversial-library-bill/>

Laura Guido, *Idaho House to consider bills amending 2024 'harmful to minors' library law*, Idaho Capital Sun (Mar. 12, 2026 at 4:04 PM MDT), <https://idahocapitalsun.com/2026/03/12/idaho-house-to-consider-bills-amending-2024-harmful-to-minors-library-law/>

Legal Information Institute, *Injunctive Relief*, Cornell Law School (June 2025), https://www.law.cornell.edu/wex/injunctive_relief#:~:text=Injunctive%20relief%20is%20generally%20only%20available%20when

Miller v. California, 413 U.S. 15, (1973)

Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 Vanderbilt Law Review 1471 (2019) Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol66/iss5/3>

Nw. Ass'n of Indep. Sch. v. Labrador, No. 25-2491, 2026 WL _____ (9th Cir. Jan. 29, 2026).

Penguin Random House et al. v. Raúl Labrador et al., Complaint for Injunctive and Declaratory Relief (D. Idaho. Filed Feb. 4, 2025).

Pope v. Illinois, 481 U.S. 497 (1987)

Sabrina Baeta, Tasslyn Magnusson, Madison Markham, Kasey Meehan, Yuliana Tamayo Latore, *The Normalization of Book Banning*, Pen America, (October 1, 2025), <https://pen.org/report/the-normalization-of-book-banning/>.

Stop the Sexualization of Children Act 2026, H.R. 7661, 119th Cong. §2(3)(C)(ii) (2026).

TPR Staff, *The Llano County Ruling and the Future of Texas Library Policy*, Texas Policy

Research (December 9, 2025),

[https://www.texaspolicyresearch.com/the-llano-county-ruling-and-the-future-of-texas-libr](https://www.texaspolicyresearch.com/the-llano-county-ruling-and-the-future-of-texas-library-p)

[ary-p](https://www.texaspolicyresearch.com/the-llano-county-ruling-and-the-future-of-texas-library-p) U.S. Const. amend. I.

United States v. Stevens, 559 U.S. 460, (2010)

Professional Regulation or Freedom of Speech?: The Implications of *Chiles v. Salazar*

By: Savannah Shuman

Conversion therapy is a practice that aims to change an individual's sexual orientation or gender identity. The practice has taken many forms, but most recently, in psychotherapy, it has been primarily employed using speech only. In recent years, several states have passed laws in regard to conversion therapy. Twenty-four states and dozens of local governments have restricted the practice, including Colorado.¹⁸² *Chiles v. Salazar*, a recent Supreme Court case, arose from Colorado's law regarding restrictions on conversion therapy. A 2019 Colorado law prevents "conversion therapy" with minors.¹⁸³ Colorado's law encompasses both physical interventions and what is considered "talk therapy."¹⁸⁴ Talk conversion therapy aims to change an individual's sexual orientation or gender identity using words alone.¹⁸⁵ Under the Colorado law, a mental health professional practicing conversion therapy can be referred to a regulatory board for such practice.¹⁸⁶ Such a complaint could result in disciplinary actions against the therapist, including fines, probation, or loss of license.¹⁸⁷ The law does not allow state-licensed therapists to practice conversion therapy on minors.¹⁸⁸

Kaley Chiles, the petitioner in the case, holds a master's degree in clinical mental health and is licensed by the state of Colorado.¹⁸⁹ Chiles claims she provides services to a variety of clients, some who "are content with their sexual orientation" and others who "hope to reduce or

¹⁸² Amy Harmon, "More Than 20 States Have Banned Conversion Therapy for L.G.B.T.Q. Minors, N.Y. TIMES," Oct. 7 2025, <https://www.nytimes.com/2025/10/07/us/politics/conversion-therapy-state-bans.html>

¹⁸³ *Chiles v. Salazar*, No. 24-539, slip op. at 2 (U.S. March 31, 2026)

¹⁸⁴ *Id.* at 3

¹⁸⁵ *Id.*

¹⁸⁶ See Colo. Rev. Stat. § 12-245-226 (2025)

¹⁸⁷ See Colo. Rev. Stat. § 12-245-225 (2025)

¹⁸⁸ See Colo. Rev. Stat. § 12-245-224 (2025)

¹⁸⁹ *Chiles*, No. 24-539, at 2

eliminate unwanted sexual attraction.”¹⁹⁰ With these clients who are experiencing unwanted sexual attraction, Chiles will attempt to reduce these feelings in her practice.¹⁹¹ Chiles employs only talk therapy; however, under the Colorado law, her practice is illegal.¹⁹² Chiles filed a preliminary injunction on the basis of the First Amendment, and both the District Court and the 10th Circuit Court rejected her claims.¹⁹³ The lower Courts held that Colorado’s law is valid as it “regulat[es] professional conduct and that it regulates speech only incidentally”, asserting the law is not a First Amendment violation.¹⁹⁴ However, Chiles then appealed again, bringing the case before the Supreme Court. In an 8-1 decision, the Supreme Court sided with Chiles, remanding the case back to the lower court to be reviewed under a stricter standard, and holding that Colorado’s law violates the First Amendment as it “regulates speech based on viewpoint” and “regulates the content of her speech.”¹⁹⁵ The decision effectively overturned the Colorado law.

The full implications of the Supreme Court decision are yet to be seen. This article will analyze how the Supreme Court did not consider how conversion therapy laws can survive stricter standards and advance compelling state interest while deciding *Chiles*. While Colorado’s law is not viewpoint-neutral and warrants revision, the Court’s rationale goes too far, ignoring the fact that talk therapy is healthcare and can therefore be regulated, goes against the advice of the relevant professional community surrounding the harms of conversion therapy, and creates troubling uncertainty for future regulatory efforts surrounding speech-based professional treatment.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 3

¹⁹³ *Id.* at 6

¹⁹⁴ *Id.* at 2 (syllabus)

¹⁹⁵ *Id.*

Conversion Therapy Bans and Strict Scrutiny

The First Amendment protects the freedom of speech in the United States.¹⁹⁶ However, the First Amendment is very broad. Despite the Constitution placing no limits on the freedom of speech, in some instances, the Court has found it necessary to do so. Over time, the Supreme Court has interpreted the First Amendment to include certain exceptions.¹⁹⁷ These exceptions have included limits on speech intended to create lawless action, limits on “true threats”, limits on speech in schools, and even restrictions on when and where speech can occur.¹⁹⁸ A theme within these accepted limitations has been that the proposed limitation must be content-neutral.¹⁹⁹

When a law is not content neutral, it is subject to a higher standard of review. The Court has defined content-based laws as “law [that] applies to particular speech because of the topic discussed or the idea or message expressed.”²⁰⁰ A law can go further to engage in what the court calls viewpoint discrimination. Viewpoint discrimination is defined by the court as “discrimination because of the speaker’s specific motivating ideology, opinion, or perspective”.²⁰¹ The Court considers viewpoint discrimination to be “an egregious form of content discrimination” calling violations of the First Amendment “all the more blatant” when viewpoint discrimination occurs.²⁰² Therefore, the Court suggests that in some instances, content-based laws are permissible, but viewpoint-based laws are rarely permissible under the First Amendment.²⁰³

¹⁹⁶ U.S. CONST. amend. I.

¹⁹⁷ *E.g.* Schenck v. United States, 249 U.S. 47 (1919)

¹⁹⁸ *See* Brandenburg v. Ohio, 395 U.S. 444 (1969), Virginia v. Black, 538 U.S. 343 (2003), Bethel School District v. Fraser, 478 U.S. 675 (1986), Ward v. Rock Against Racism, 491 U.S. 781 (1989)

¹⁹⁹ *Ward*, 491 U.S. at 782

²⁰⁰ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)

²⁰¹ *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 820 (1995)

²⁰² *Rosenberger*, 515 U.S. at 829

²⁰³ *See Id.*

In order for content-based restrictions on speech to be permissible, they must pass strict scrutiny. To pass strict scrutiny, the “government [must] prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”²⁰⁴ A ban on conversion therapy speech would be considered a content-based law, as it pertains to the topic discussed. When considering bans on conversion therapy, we must consider what the government’s compelling interest is. The government has a compelling interest in protecting minors, but in order for a ban on conversion therapy to be permissible, the State must prove the law is “narrowly tailored to serve compelling state interests.”²⁰⁵ In *Chiles*, the Court argued that the law had not been subject to strict scrutiny by the lower courts.²⁰⁶ However, when reviewed by the lower court, there is the potential that Colorado’s law will survive strict scrutiny. Conversion therapy bans in other states describe the harms of the practice from the relevant professional community.²⁰⁷ These bans then go on to depict that the state has a “compelling interest in protecting the physical and psychological well-being of minors.”²⁰⁸ The combination of these two factors makes the laws restricting conversion therapy in other states appear to be much more narrowly tailored than Colorado’s law. If Colorado’s law were to be amended to be more narrowly tailored, it would be easier to defend and thus more likely to pass strict scrutiny.

Additionally, in this process of narrowly tailoring the law, the Colorado legislature could make its law more viewpoint-neutral. In passing strict scrutiny, states must demonstrate that their law is the “least restrictive means for addressing a real problem”.²⁰⁹ The Colorado law is written in such a way that it bans conversion therapy and allows therapists to provide acceptance,

²⁰⁴ *Reed*, 135 S. Ct. at 2231

²⁰⁵ *Reed*, 135 S. Ct. at 2226

²⁰⁶ *Chiles*, No. 24-539, at 11

²⁰⁷ 2012 Cal. Stat. ch. 835, § 1 (b-m)

²⁰⁸ *E.g.* 2012 Cal. Stat. ch. 835, § 1(n)

²⁰⁹ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 827 (2000)

support, and assistance to their LGBTQ+ clients.²¹⁰ Thus, it is undeniable that Colorado’s law specifically is neither content nor viewpoint-neutral.²¹¹ The Court argues that “the Colorado law does not just regulate the content of Ms. Chiles’ speech, it goes a step further, prescribing what views she may and may not express.”²¹² Other states have nearly identical language regarding conversion therapy, distinguishing “acceptance, support, and understanding” from the practice of conversion therapy.²¹³ A ban on conversion therapy without allowing for affirmation would be considered viewpoint-neutral. It would also be considered to be more narrowly tailored, as it would be less restrictive in its nature. As posited in Justice Sotomayor and Kagan’s concurrence, this change alone may render the Colorado law more permissible under the First Amendment.²¹⁴ The two argue that “because the State has suppressed one side of a debate, while aiding the other, the constitutional issue is straightforward.”²¹⁵ However, they acknowledge that “if Colorado had instead enacted a content-based but viewpoint-neutral law, it would raise a different and more difficult question.”²¹⁶ The primary difference between the concurrence and the majority opinion was that the majority opinion did not address the issue of whether a viewpoint-neutral law would be permissible.

Restrictions on Professional Speech

With practices that cause substantive harms, the state has long regulated healthcare. A 2018 Supreme Court case, *National Institute of Family and Life Advocates v. Becerra* (commonly referred to as *NIFLA*), defines the exceptions for restrictions on professional speech.

²¹⁰ Colo. Rev. Stat. §12–245–202(3.5)(b)(I)

²¹¹ *See Id.*

²¹² *Chiles*, No. 24-539, at 13

²¹³ E.g. 1046, 2019–2020 Leg., Reg. Sess. (N.Y. 2019)

²¹⁴ *See Chiles* No. 24-539, at 3 (Kagan & Sotomayor, J.J. concurring)

²¹⁵ *Id.*

²¹⁶ *Id.* at 1

Under *NIFLA*, only two exceptions to strict scrutiny are mentioned. First, “laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech’” under *Zauderer v. Office of Disciplinary Counsel* and laws regulating professional conduct that “incidentally involves speech” under *Planned Parenthood of Southeast PA v. Casey*.²¹⁷ It is clear that these exceptions are very narrow, and cases that involve them will be few and far between.

The Court argued that Chiles’ speech was not conduct or related to conduct. Therefore, her speech cannot be regulated under *NIFLA*’s *Casey* exception, because it is not conduct nor connected to any procedure.²¹⁸ The Court asserted that “nor does her speech become conduct just because it can also be described as a ‘treatment’.”²¹⁹ However, when speech reaches into a treatment, it is no longer just speech; it is professional conduct. Justice Jackson corroborates this viewpoint, arguing “bedrock First Amendment principles have far less salience when the speakers are medical professionals.”²²⁰ The State is not regulating what can and can not be said by an ordinary person, but is restricting a medical professional’s “treatment-related speech.”²²¹ Some of the most important moments in healthcare come from only speech. Communication between a patient and doctor, for example, can have aims of changing patient behavior and be unrelated to any procedure.²²² Well child visits involving wait-and-see approaches are primarily conducted with speech alone.²²³ The majority of physicians’ practice is unrelated to any type of conduct, either.²²⁴

²¹⁷ *National Institute of Family & Life Advocates v. Becerra*, 132 HARV. L. REV. 347, 349 (2018)

²¹⁸ *See Chiles* No. 24-539, at 11-12

²¹⁹ *Id.*

²²⁰ *Chiles* No. 24-539, at 2 (Jackson, J., dissenting)

²²¹ *Id.*

²²² Brief for Experts in Health Care Practice, et. al as Amici Curiae Supporting Respondents at 9, *Chiles v. Salazar*, 607 U.S. ____ (2026)

²²³ *Id.* at 10

²²⁴ *Id.*

The government has long regulated speech in healthcare, even if said speech is unrelated to a procedure.²²⁵ Especially in a historical context, much of medical speech and medical advice was unrelated to a procedure. Consequently, incorrect advice, even if unrelated to a procedure, has established malpractice liability.²²⁶ Amongst professionals, “bad advice—that is advice falling out of the acceptable range—is subject to professional malpractice liability.”²²⁷ Physicians can commit medical malpractice due to a substandard level of care substantiated by speech alone. Therefore, it is clear that some professional speech, in certain instances, can be regulated.

Among mental health therapists, conversion therapy is considered to be bad professional advice, inconsistent with research, and widely condemned within the field. In 2021, the American Psychological Association (APA) “passed two resolutions addressing sexual orientation and gender identity,” which “both oppos[ed] such change efforts given evidence of harm and lack of evidence of efficacy.”²²⁸ The APA additionally asserts that conversion therapies “do not meet the criteria of a legitimate therapeutic treatment.”²²⁹ Evidently, this practice is not widely accepted within the larger knowledge community and is, therefore, subject to restriction. The Supreme Court asserts that Colorado’s argument of malpractice is invalid because “malpractice actions require exacting proof of injury caused by breach of duty.”²³⁰ Thus, the court implies that conversion therapy does not result in injury and is not a breach of therapeutic duty.

Professional literature provides substantial evidence that conversion therapy causes harm to youth, therefore constituting “exacting proof of injury”. The APA has concluded that “studies

²²⁵ *Id.* at 14

²²⁶ *Id.*

²²⁷ Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. 671, (2017)

²²⁸ “*The Evidence Against “Conversion Therapy”*”, AMERICAN PSYCHOLOGICAL ASSOCIATION, April 1, 2026, <https://www.apa.org/topics/lgbtq/evidence-against-conversion-therapy>

²²⁹ *Id.*

²³⁰ *Chiles* No. 24-539, at 4 (Syllabus)

using a wide range of designs have found harms associated with SOCE [sexual orientation change efforts].”²³¹ The APA cites a plethora of harms associated with the practice, including, but not limited to, exacerbation of existing mental health problems, depression and anxiety, substance abuse, a distrust in mental health professionals, and higher suicide rates.²³² These findings come from a wide variety of professional studies. Most notably, it is in the states’ best interest to decrease suicide and substance abuse rates amongst youth. It is difficult to argue that a therapist partaking in a practice that has been proven to result in significant harm is not malpractice under the law. This is not a new or revolutionary practice; it is a practice that has been proven to not only be harmful but also highly ineffective. There is no support that conversion therapy can achieve its stated aim of changing sexual orientation.²³³ Additionally, the APA asserts that psychologists “use an assortment of evidence-based treatments to help people improve their lives”, and help individuals “cope more effectively with life issues and mental health problems.”²³⁴ Conversion therapy does not meet such criteria. Thus, according to the APA standards and the consensus of the larger therapy industry²³⁵, practicing conversion therapy is “exacting proof of injury caused by breach of duty.”

However, while it is clear that conversion therapy could be subject to malpractice liability, malpractice liability alone is not enough. Thus, a ban on conversion therapy is necessary. Malpractice suits provide compensation to individuals once harm has already been

²³¹ “APA Resolution on Sexual Orientation Change Efforts”, AMERICAN PSYCHOLOGICAL ASSOCIATION, February 2021, <https://www.apa.org/about/policy/resolution-sexual-orientation-change-efforts.pdf>

²³² *Id.*

²³³ “An assessment of the evidence on conversion therapy for sexual orientation and gender identity”, UK GOVERNMENT, October 29, 2021, <https://www.gov.uk/government/publications/an-assessment-of-the-evidence-on-conversion-therapy-for-sexual-orientation-and-gender-identity/an-assessment-of-the-evidence-on-conversion-therapy-for-sexual-orientation-and-gender-identity>

²³⁴ “What do practicing psychologists do?”, AMERICAN PSYCHOLOGICAL ASSOCIATION, December 11, 2019, <https://www.apa.org/topics/psychotherapy/about-psychologists>

²³⁵ E.g. Whitney Meyerhoeffer, “AMHCA Statement on Reparative or Conversion Therapy”, AMERICAN MENTAL HEALTH COUNSELORS ASSOCIATION, <https://www.amhca.org/viewdocument/amhca-statement-on-reparative-or-co>

done, this harm cannot be undone with a payout. While the potential financial burden placed onto the provider may provide an incentive to not engage in said harmful action, malpractice liability is not as preventative as a blanket ban. Additionally, a minor involved in a malpractice suit, a lengthy and expensive process, would likely require the support of their parents, which may be unlikely if their parents were the one choosing to send them to conversion therapy. And, most malpractice suits are unsuccessful, being decided in favor of the defendant, because there can be reasonable doubt about the source of the problems.²³⁶ When prevention is possible, it is preferred opposed to later remedying an issue civilly in court.

The Court has also commented on psychological harms when deciding on speech restrictions. In order to prove psychological harm, there must be a clear link between the banned action and harm.²³⁷ *Brown v. Entertainment Merchants Association* posed the question whether California was able to restrict violent video games for minors under 18.²³⁸ The Supreme Court held that video games were protected speech, so the court could not do so.²³⁹ The Court held that California could not meet strict scrutiny.²⁴⁰ The Court argued that California could not meet this standard because psychological studies do not show a correlation between violent video games and increased aggressive behavior.²⁴¹ But psychological studies do, in fact, show a correlation between conversion therapy and increased depression, anxiety, and suicidal thoughts, which provides support that conversion therapy could qualify as an action to be banned.²⁴²

²³⁶ Inst. of Med. (U.S.) Comm. to Study Med. Pro. Liab. & the Delivery of Obstetrical Care, Medical Professional Liability and the Delivery of Obstetrical Care: Volume II: An Interdisciplinary Review ch. 6 (Virginia P. Rostow & Robert J. Bulger eds., Nat'l Acad. Press 1989) <https://www.ncbi.nlm.nih.gov/books/NBK218649/>

²³⁷ See *Brown, et al. v. Entertainment Merchants Assn. et al.*, 564 U.S. 786, 799 (2011)

²³⁸ *Id.* at 786

²³⁹ *Id.*

²⁴⁰ *Id.* at 786-787

²⁴¹ *Id.* at 787

²⁴² See American Psychological Association, *Supra* note 44, at 4

Freedom of Speech Restrictions Involving Minors

The California law in *Brown* banned violent video games for minors. The Colorado law, as in *Chiles*, banned conversion therapy for minors. In the *Brown* ruling, the Court gave repeated consideration to the fact that the law applied to minors.²⁴³ In *Chiles*, however, the Court did not consider that this law applies to minors, a vulnerable and impressionable population, even though this fact is incredibly important in the case. The APA mentions specifically that they are “particularly concerned about the significant risk of harm to minors from SOCE [sexual orientation change efforts].”²⁴⁴ Chiles argued that minors were coming to her voluntarily. Minors have the right in Colorado to seek their own treatment at age 12, but with certain conditions. First, “The minor is knowingly and voluntarily seeking such services,” and second, “provision of psychotherapy services is clinically indicated and necessary to the minor's well-being.”²⁴⁵ So while minors may have been voluntarily seeking out Chiles’ service, it is difficult to argue, under Colorado law, that conversion therapy is necessary to the minor’s well-being.

Not only does the law state that minors can seek out therapy voluntarily, but it also states that parents can subject their children to therapy without their consent. Colorado law is as follows: “minors may not refuse psychotherapy services when a mental health professional and the minor's parent or legal guardian agree that psychotherapy services are in the best interest of the minor.”²⁴⁶ If mental health professionals who are practicing conversion therapy and parents who want to subject their children to the practice are in agreement, then non-consenting minors can be subjected to conversion talk therapy if it is not banned. The solution to protect minors from the wishes of their parents, which are not always in the child's best interest, is to ban the

²⁴³ E.g. *Brown*, 564 U.S. at 793-794

²⁴⁴ AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 45, at 2.

²⁴⁵ Colo. Rev. Stat. § 12-245-203.5 (2024)

²⁴⁶ *Id.*

practice altogether. Chiles mentions that her clients are voluntarily seeking treatment. But this is not the case for all Colorado therapists. How voluntary is treatment if the child is being subjected against their will? In *Brown*, the Supreme Court stated, “No doubt a State possesses legitimate power to protect children from harm.”²⁴⁷ The State's interest in protecting minors may help the statute withstand strict scrutiny. Therefore, the fact the law applies only to minors is essential in applying a strict scrutiny standard to the issue. The state has a compelling interest to protect minors, and banning the harmful practice of conversion therapy does so.

Future Implications of the Chiles Decision

The decision of the majority, the binding decision, mentions primarily how the Colorado law restricts Chiles’ freedom of speech. The Court argues the Colorado law “regulates the content of her speech” and is therefore invalid under the First Amendment.²⁴⁸ The Court also mentions that “The fact that the State’s viewpoint regulation falls only on licensed health care professionals does not change the equation.”²⁴⁹ The combination of the decision and the court’s reflection on professional speech alone creates a dangerous future precedent. The speech of healthcare professionals, including physicians, is often restricted by laws and professional regulations. The court argues that because the speech is not related to any conduct, such as informed consent, then Chiles’ speech can not be regulated.

In her dissent, Justice Jackson warns that the decision in *Chiles* may create dangerous future precedent.²⁵⁰ She argues that the decision “will eventually prove untenable for those who rely upon the long-recognized responsibility of States to regulate the medical profession for the

²⁴⁷ *Brown*, 564 U.S. at 794

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *See Chiles* No. 24-539, at 23-24, 32 (Jackson, J., dissenting)

protection of public health.”²⁵¹ Jackson describes previous cases where “the First Amendment inquiry requires consideration of whether the regulated speech was made during the provision of medical care.”²⁵² It is certainly important that *Chiles* is about mental health/medical care, it becomes a vastly different situation than if a state were creating a law as to what can and can not be said in public. The Court must consider whether regulation on medical treatment collapses when it consists only of words. *Chiles* contends that regulation disappears if the treatment is speech only. But recognized historical pedigree displays that this has not always been the case. The effects of restrictions imposed on physicians and therapists alike by professional organizations and states are now in jeopardy.

The Supreme Court’s rhetoric in the decision to remand the case back to the lower court will likely result in Colorado’s law being overturned. The Court’s decision not to uphold the decisions of the lower courts will have dangerous effects on the safety of minors who may be subjected to conversion therapy. Especially considering that, in many states, minors can be subjected to therapy without their consent,²⁵³ ruling that conversion therapy is speech and thus cannot be regulated puts these youth at risk. In making their decision, the court failed to consider the harms of the practice, leaning only into the freedom of speech aspect of the Colorado law. When typically dealing with freedom of speech laws, the court does the opposite, considering the context of the law, the affected populations, and who is speaking, much more than they did in *Chiles*.²⁵⁴ In erring to make these considerations, the Supreme Court took a position that will

²⁵¹ *Id.* at 2

²⁵² *Id.* at 10

²⁵³ MaryLouise E. Kerwin, Kimberly C. Kirby, Dominic Speziali, Morgan Duggan, Cynthia Mellitz, Brian Versek & Ashley McNamara, What Can Parents Do? A Review of State Laws Regarding Decision Making for Adolescent Drug Abuse and Mental Health Treatment, 24 J. Child & Adolescent Substance Abuse 166, 170 (2015)

²⁵⁴ *E.g. Brown*, 564 U.S. at 793-794; *FCC v. Pacifica Foundation*, 438 U.S. 726, 727-728 (1978); *NIFLA*, 138 S. Ct. 2361 (2018)

effectively reverberate across the nation, allowing a harmful and dangerous practice to occur under the guise of freedom of speech.

The Supreme Court's current decision is not applicable to other states. However, the nature of the court's response to the case and the subsequent reasoning certainly opens the door to conversion therapy laws in other states being challenged on the basis of freedom of speech violation.²⁵⁵ Many states have laws very similar to Colorado's that allow for acceptance and support of LGBTQ+ youth.²⁵⁶ Under *Chiles*, any laws that simultaneously ban conversion therapy whilst allowing for acceptance and support are in jeopardy. The Supreme Court argued that "the spoken word is perhaps the quintessential form of protected speech" to justify that the practice was permissible because it was only verbal.²⁵⁷ This justification alone threatens conversion therapy bans nationwide.

The Court's decision in *Chiles* has effectively struck down the Colorado law, putting LGBTQ+ minors in Colorado at risk. In deciding *Chiles*, the Court did not consider that the law applies only to minors, who, under Colorado law, can be subject to psychotherapeutic treatments without their consent. It is abundantly clear that conversion therapy causes harm and it is therefore in the states' best interest to protect its minors. Additionally, *Chiles* suggests that medical speech, granted it is speech only, cannot be regulated, which sets a dangerous future precedent. The government has a long history of regulating speech in healthcare through malpractice liability. The decision of the majority and subsequent concurrence raise the question whether a viewpoint-neutral law, banning conversion therapy but not including a clause for affirmation or support, would be permissible under the First Amendment.

²⁵⁵ Alexandra Citrin, Conversion is Not Care: A Response to the Supreme Court's Decision in *Chiles v. Salazar*, CENTER FOR THE STUDY OF SOCIAL POLICY, (April 3, 2026)

<https://cssp.org/conversion-is-not-care-a-response-to-the-supreme-courts-decision-in-chiles-v-salazar/>

²⁵⁶ E.g. 2012 Cal. Stat. ch. 835, § 1, H.B. 0217, 99th Gen. Assemb., Reg. Sess. (Ill. 2015); Pub. Act 99-0411

²⁵⁷ *Chiles* No. 24-539, at 11

Bibliography

- “An assessment of the evidence on conversion therapy for sexual orientation and gender identity.” *UK Government*, October 29, 2021, <https://www.gov.uk/government/publications/an-assessment-of-the-evidence-on-conversion-therapy-for-sexual-orientation-and-gender-identity/an-assessment-of-the-evidence-on-conversion-therapy-for-sexual-orientation-and-gender-identity>
- “APA Resolution on Sexual Orientation Change Efforts.” *American Psychological Association*, (February 2021), <https://www.apa.org/about/policy/resolution-sexual-orientation-change-efforts.pdf>
- Citrin, Alexandra. “Conversion is Not Care: A Response to the Supreme Court’s Decision in *Chiles v. Salazar*.” *Center for the Study of Social Policy*, April 3, 2026, <https://cssp.org/conversion-is-not-care-a-response-to-the-supreme-courts-decision-in-chiles-v-salazar/>
- Harmon, Amy. “More Than 20 States Have Banned Conversion Therapy for L.G.B.T.Q. Minors.” *N.Y. Times*, October 7, 2025, <https://www.nytimes.com/2025/10/07/us/politics/conversion-therapy-state-bans.html>
- Institute of Medicine (U.S.) Committee to Study Medical Professional Liability and the Delivery of Obstetrical Care. *Medical Professional Liability and the Delivery of Obstetrical Care: Volume II: An Interdisciplinary Review*. Edited by Virginia P. Rostow and Robert J. Bulger. Washington, DC: National Academies Press, 1989. Chapter 6, “Medical Professional Liability and the Relations Between Doctors and Their Patients.” <https://www.ncbi.nlm.nih.gov/books/NBK218649/>
- Kerwin, MaryLouise E., Kimberly C. Kirby, Dominic Speziali, Morgan Duggan, Cynthia Mellitz, Brian Versek, and Ashley McNamara. “What Can Parents Do? A Review of State Laws Regarding Decision Making for Adolescent Drug Abuse and Mental Health Treatment.” *Journal of Child & Adolescent Substance Abuse* 24, no. 3 (2015): 166–176. <https://doi.org/10.1080/1067828X.2013.777377>
- Meyerhoeffer, Whitney. “AMHCA Statement on Reparative or Conversion Therapy.” *American Mental Health Counselors Association*, <https://www.amhca.org/viewdocument/amhca-statement-on-reparative-or-co>
- “The Evidence Against ‘Conversion Therapy’”, *American Psychological Association*, April 1, 2026, <https://www.apa.org/topics/lgbtq/evidence-against-conversion-therapy>
- “What do practicing psychologists do?.” *American Psychological Association*, December 11, 2019, <https://www.apa.org/topics/psychotherapy/about-psychologists>

