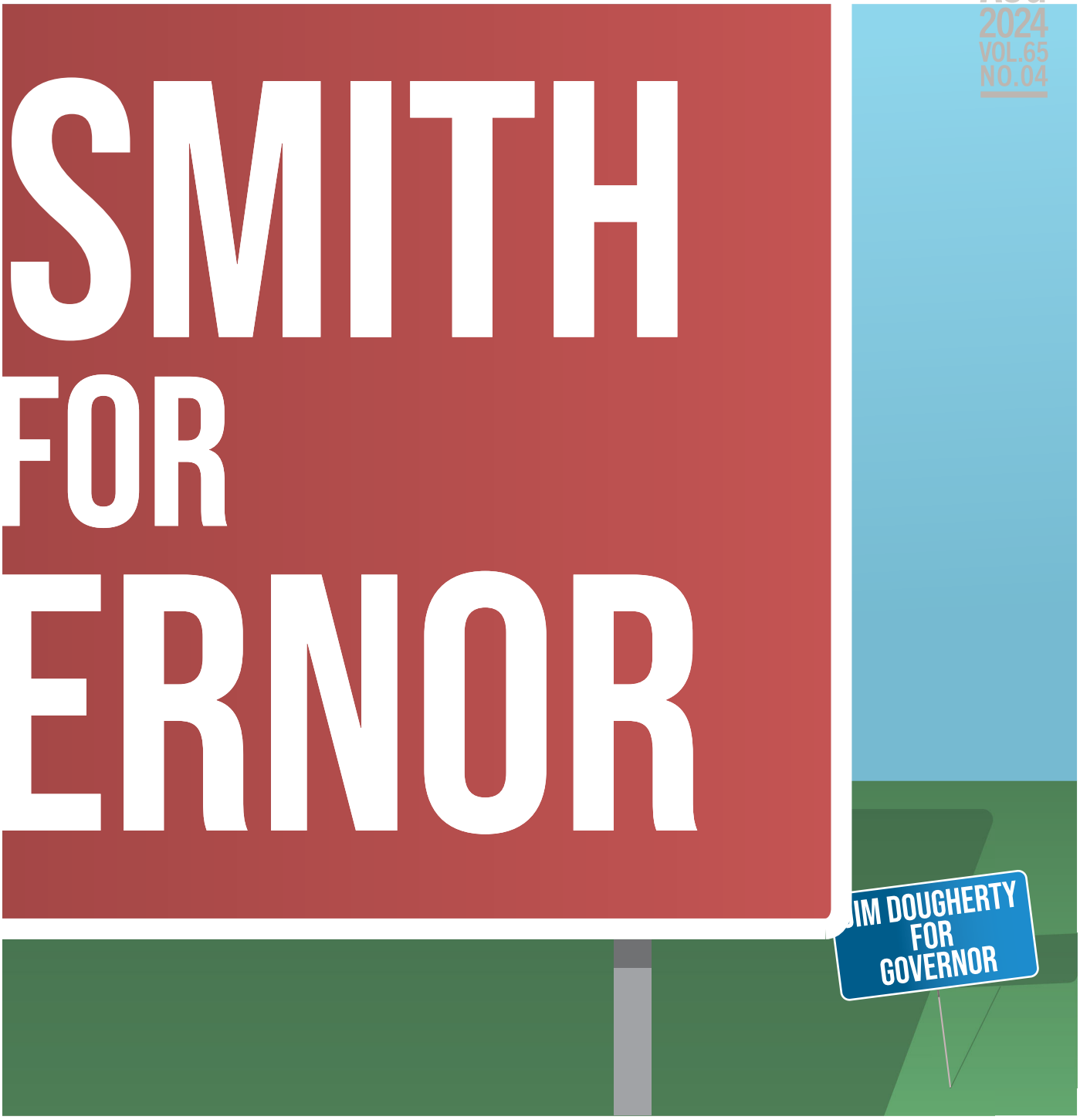
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By: Eric Shytle, General Counsel, Municipal Association of South Carolina, Columbia, South Carolina and Sean Scoopmire, Planning and Law Associate, White & Smith LLC, Greenville, South Carolina

The parameters of First Amendment barriers to content-based sign ordinances continue to evolve in the wake of *Reed*. As our national electoral season approaches, a review of the permissible limits on political signage is in order. Our authors assess the current state of sign law and propose a content-neutral taxonomy.

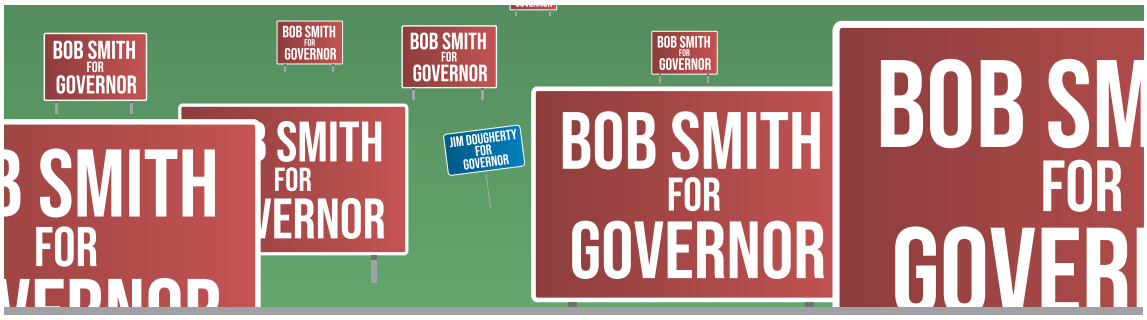
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By: Michelle White, Employment Law Associate Attorney, Lloyd Gosselink, Austin, Texas

The question of when overtime is payable—or is not, due to one or more exemptions in the law—is hugely consequential, including to local governments who are collectively among the largest employers in the nation. Recent Department of Labor pronouncements provide additional clarity on the subject.

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AMICUS

By: ERICH EISELT,
IMLA Deputy General Counsel and Director of Legal Advocacy

A Frenzied Finish to the October 2023 Term

As the last sessions of the Supreme Court's October 2023 Term came to a close on July 1, 2024, the Court raced to issue many of the Term's most pivotal decisions, passing judgment on presidential immunity, agency deference, January 6 obstruction charges, and more. These last-minute, headline-grabbing opinions clearly have national consequences, but their effect at the local level is less discernable. Other of the Court's late-breaking decisions have more obvious significance for local government. They include *Grants Pass v. Johnson* (construing homeless regulations), *United States v. Rahimi* (criminalizing firearm possession), and *Murthy v. Missouri* (analyzing government speech)—all matters in which IMLA chose to file an amicus brief to voice the interests of our membership.

***Grants Pass*:**

In *Grants Pass v. Johnson*, the Court held that the city's enforcement of generally applicable laws regulating camping on public property does not violate the Eighth Amendment's Cruel and Unusual Punishments clause. The factual setting will be familiar to many localities around the country: Grants Pass, an Oregon city comprising 38,000 residents, faced challenges in dealing with as many as 600 homeless persons. It enacted various ordinances directed at "camping" which made it nearly impossible to sleep outside on public property with any bedding or shelter. Single camping violations resulted in fines, but more consequential was a "park exclusion" provision, where persons could be barred from a city park for 30 days if they were cited two or more times in one year for violating the camping ordinances. A subsequent violation of the park exclusion would then constitute criminal trespass.

The legal precursor to *Grants Pass* was *Martin v. Boise*, a 2019 Ninth Circuit decision construing Boise's ordinance that made it a misdemeanor to use "streets, sidewalks, parks, or public places" for "camping." The Ninth Circuit held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." Accordingly, Ninth Circuit local governments could no longer enforce public-camping ordinances against homeless individuals who lacked "access to alternative shelter." Boise, supported by many local government amici, petitioned the Court for cert, but was denied.

Based on the prohibitions against enforcement of anti-camping laws in *Martin v. Boise*, two homeless persons filed a class action against Grants Pass on behalf of the "involuntarily homeless" in the city, arguing that its anti-camping ordinances are unconstitutional under the Cruel and Unusual Punishments Clause. After denying en banc review over the objection of 17 judges writing five separate opinions, the Ninth Circuit upheld the district court's class certification and affirmed the lower court's holding that "the anti-camping ordinances violated the Cruel and Unusual Punishments Clause to the extent they prohibited homeless individuals from 'taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.'"

Grants Pass successfully sought certiorari, supported by numerous governmental amici, bringing *Martin* squarely into focus. Reversing the Ninth Circuit, Justice Gorsuch wrote for the 6-3 majority which squarely disagreed with the Circuit's reading of the Eighth Amendment: "The Cruel and Unusual Punishments Clause focuses on the question what 'method or kind of punishment' a government may impose after a criminal conviction, not on the question whether a government may criminalize particular behavior in the first place or how it may go about securing a conviction for that offense." The majority also challenged the intrusion of the judiciary into the complexities of unhoused persons, explaining that the "Constitution's Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest … [the] rights and responsibilities from the American people" to decide "how best to handle a pressing social question like homelessness" and "in their place dictate this Nation's homelessness policy."

In his opinion, Justice Gorsuch included numerous citations from amicus briefs supporting Grants Pass and documenting the scope and complexity of homelessness problems across America. This included the Local Government Legal Center brief, in which IMLA, in collaboration with the National Association of Counties and the National

League of Cities--and joined by numerous other local governments--not only raised federalism and separation of powers issues, but focused on the fact that generally applicable anti-camping ordinances can be a valuable mechanism for bringing homeless persons into programs designed to remedy their situation. As Gorsuch put it, by prohibiting enforcement of anti-camping bans, the *Martin* court "took one of [the] tools [needed to address homelessness] off the table."

A variant of the Eighth Amendment argument proposed by the *Grants Pass* plaintiffs was that the city was criminalizing the *status* of being homeless. In *Robinson v. California,* 370 U. S. 660 (1962) the Court had held that a California law effectively criminalizing the status of narcotics addiction constituted cruel and unusual punishment under the Eighth Amendment. The Court in *Robinson* noted that if the government punishes the "status" of being an addict, "[e]ven one day in prison would be . . . cruel and unusual." But the *Grants Pass* majority declined to extend the *Robinson* analogy; while a person addicted to drugs is unable to act otherwise, those violating a public camping ban--whether a homeless person or a backpacker--may have other options and cannot all be covered under one rubric. As the Court noted, various amicus briefs documented that in some jurisdictions, upwards of 70% of offers for shelter are rejected by homeless persons.

The shelter rejection data also made unworkable the Ninth Circuit's categorization of the "involuntarily homeless" which *Martin* had advanced, revealing the impracticality of a federal judiciary purporting to make decisions better left to local leaders and their constituents:

> Under *Martin*, cities must allow public camping by those who are "involuntarily" homeless. But how are city officials and law enforcement officers to know what it means to be "involuntarily" homeless, or whether any particular person meets that standard? Posing the questions may be easy; answering them is not. Is it enough that a homeless person has turned down an offer of shelter? Or does it matter why? . . . If there are answers to those questions, they cannot be found in the Cruel and Unusual Punishments Clause. Nor do federal judges enjoy any special competence to provide them.

In dissent, Justice Sotomayor was joined by Justices Kagan and Jackson. They argued that because sleep is a biological necessity, it cannot be a crime for people who have no other option but to sleep outside; the ordinances at issue therefore criminalize status under *Robinson* and do violate the Eighth Amendment. The dissent further suggested that, even if held to be valid under the Eighth Amendment analysis by the majority, anti-camping measures such as the Grants Pass ordinances might be susceptible to Due Process and other challenges: "The Court's misstep today is confined to its application of *Robinson*. It is quite possible, indeed likely, that these and similar ordinances will face more days in court."

Rahimi:

In *United States v. Rahimi*, the Court resoundingly rejected the Fifth Circuit's conclusion that a federal law facially violates the Second Amendment in criminalizing continued possession of a firearm by a demonstrably dangerous person who has been prohibited from having a gun under a state domestic violence protective order. The subject of the case was Zackey Rahimi, a Texan who had assaulted his girlfriend, threatened to shoot her, and continued to fire weapons on numerous occasions after being prohibited from further possession. He had been expressly notified by the Texas court imposing the order that continued gun possession would run afoul of federal criminal law. He ignored that advisory and was subsequently found to be keeping firearms.

A federal grand jury indicted Rahimi for violating 18 U.S.C. §922(g)(8), which makes it unlawful for anyone subject to a post-hearing court order that restrains the person from "harassing, stalking, or threatening" an intimate partner or child of such intimate partner and "includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child" to "possess in or affecting commerce, any firearm or ammunition." He was sentenced to six years in prison—a punishment initially upheld by the Fifth Circuit—and sought en banc review.

Enter *New York State Pistol & Rifle Association v. Bruen*, where a 6-3 Supreme Court majority (including four separate concurrences) signed onto Justice Thomas' emphatic pronouncement that, following on *Heller*, any governmental restriction on Second Amendment rights must fit within the Nation's historical tradition of firearm regulation. In light of *Bruen*, the Fifth Circuit panel withdrew its opinion and sought supplemental briefing. The Circuit found that, viewed through *Bruen's* "history and tradition" lens, the Government's proffered historical analogues were not sufficiently close to justify the modern-day federal firearm deprivation law. It reversed the district court holding and vacated Rahimi's conviction.

Solicitor General Elizabeth Prelogar rapidly sought certiorari on the following: "Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic violence restraining orders, violates the Second Amendment on its face."

At the High Court, the SG's arguments met a far more receptive audience. Writing for an 8-1 majority which decisively reversed the Fifth Circuit, Chief Justice Roberts con-

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firmed that Second Amendment rights have never been unlimited: "[T]his Court explained in *Heller* that the right to keep and bear arms belongs only to 'law-abiding, responsible citizens.' And in *Bruen*, the Court stated that the Second Amendment protects the right of 'an ordinary, law-abiding citizen' to possess and carry arms for self-defense." Roberts delivered a much more definitive pronouncement for the likes of Mr. Rahimi: "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." The majority found that the Fifth Circuit had been overly restrictive in its rejection of the government's proposed comparators, finding that "like the dissent, it read *Bruen* to require a 'historical twin' rather than a 'historical analogue.'" Here, the government had adequately defined historical antecedents that validated the statute's criminal sanctions for firearm possession: "As applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition."

The sole dissent in *Rahimi* was Justice Thomas, who had authored *Bruen's* history and tradition-based opinion. He objected to relative lack of comparability being accepted by the *Rahimi* majority:

> [T]he Government's "law-abiding, dangerous citizen" test—and indeed any similar, principle-based approach— would hollow out the Second Amendment of any substance. Congress could impose any firearm regulation so long as it targets "unfit" persons. And, of course, Congress would also dictate what "unfit" means and who qualifies. . . .The historical understanding of the Second Amendment right would be irrelevant. In fact, the Government posits that Congress could enact a law that the Founders explicitly rejected.

In rebuttal, Justice Sotomayor challenged the proposition that history must be rigidly construed:

> According to the dissent, the solution cannot be "materially different" even when societal perception of the problem has changed, and even if it is now clear to everyone that the historical means of addressing the problem had been wholly inadequate. Given the fact that the law at the founding was more likely to protect husbands who abused their spouses than offer some measure of accountability, see, e.g., R. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L. J. 2117, 2154–2170 (1996), it is no surprise that that generation did not have an equivalent to §922(g)(8). Under the dissent's approach, the legislatures of today would be limited not by a distant generation's determination that such a law was unconstitutional, but by a distant generation's failure to consider that such a law might be necessary. History has a role to play in Second Amendment analysis, but a rigid adherence to history, (particularly history predating the inclusion of women and people of color as full members of the polity), impoverishes constitutional interpretation and hamstrings our democracy.

Murthy

Murthy v. Missouri was initially brought by a group of five medical professionals against federal government agencies and administrators after the professionals' social media posts criticizing governmental Covid policies and mandates were replaced by federal government Covid messaging. Missouri and Louisiana then joined, alleging that they and their residents were harmed by the social media platforms' censorship of their speech. The suit named the Surgeon General, the CDC, the FBI, White House and dozens of Administration officials. While the Administration contended that it was merely attempting to "mitigate the hazards of online misinformation" by flagging content that violated the social media platforms' own policies, the plaintiffs argued that the government "coerced, threatened, and pressured" the social media platforms into suppressing their views, making the platforms state actors and violating the First Amendment.

In July 2023, the U.S. District Court for the Western District of Louisiana agreed with the plaintiffs, finding that the Administration "apparently engaged in a massive effort to suppress disfavored conservative speech." It granted a broad preliminary injunction prohibiting the White House and numerous federal agencies from "urging, encouraging, pressuring, or inducing in any manner social-media companies to change their guidelines for removing, deleting, suppressing, or reducing content containing protected free speech."

On appeal, the Fifth Circuit limited the order to the White House, the Surgeon General, the FBI, and the CDC, but otherwise largely upheld the sweeping injunction. The Circuit applied a four-factor test to distinguish "attempts to convince" from "attempts to coerce," evaluating "(1) the speaker's 'word choice and tone'; (2) 'whether the speech was perceived as a threat'; (3) 'the existence of regulatory authority'; and, 'perhaps most importantly, (4) whether the speech refers to adverse consequences.' " It found that the White House had coerced: "[T]he officials threatened—both expressly and implicitly—to retaliate against inaction. Officials threw out the prospect of legal reforms and enforcement actions while subtly insinuating it would be in the platforms' best interests to comply."

Justice Barrett, writing for a 6-3 majority, reversed. The Court held that the plaintiffs—whether individual or state--lacked standing to sue. To establish standing, the plaintiffs must show they have "suffered or will suffer, an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to

the challenged action; and redressable by a favorable ruling.'"

Here, the plaintiffs could not demonstrate concrete injury, past or future, based on alleged governmental actions. Justice Barrett cited longstanding policies initiated by the social media companies which predated the challenged governmental communications:

> For years, the platforms have targeted speech they judge to be false or misleading. For instance, in 2016, Facebook began fact checking and demoting posts containing misleading claims about elections. Since 2018, Facebook has removed health-related misinformation, including false claims about a measles outbreak in Samoa and the polio vaccine in Pakistan. Likewise, in 2019, YouTube announced that it would "demonetize" channels that promote anti-vaccine messages. In 2020, with the outbreak of COVID–19, the platforms announced that they would enforce their policies against users who post false or misleading content about the pandemic. . . . After the election, the platforms took action against users or posts that questioned the integrity of the election results.

These facts undercut the plaintiffs' required showing of causation. Because the platforms initiated their own content moderation policies, including consultation with outside private experts, merely identifying general communications between government agencies and the platforms was insufficient: "The primary weakness in the record of past restrictions is the lack of specific causation findings with respect to any discrete instance of content moderation. The District Court made none. Nor did the Fifth Circuit, which approached standing at a high level of generality."

A final basis for relief advanced by the individual plaintiffs was the "right to listen" theory – which postulates that they were deprived of a First Amendment right to read and engage with content removed by the platforms. The Court rejected that argument: "This theory is startlingly broad, as it would grant all social-media users the right to sue over someone else's censorship—at least so long as they claim an interest in that person's speech. This Court has 'never accepted such a boundless theory of standing.'"

The state plaintiffs claimed their own version of the "right to listen" theory, asserting a sovereign interest in hearing from their citizens on social media. But both versions of "right to listen" suffered from the same flaw—an inability to identify any specific speakers or topics that the plaintiffs were unable to hear or follow.

IMLA had filed an amicus brief in this case on behalf of neither party, seeking to protect government speech. While the case was reversed on standing grounds, it was regarded in some quarters as a validation of the Administration's assertion that it has the right to communicate its point of view.

The view that *Murthy* involves more than standing is clearly shared by Justice Alito, joined in his dissent by Justices Thomas and Gorsuch. As he sees it:

> If the lower courts' assessment of the voluminous record is correct, this is one of the most important free speech cases to reach this Court in years. . . . [H]ere is what the record plainly shows. For months in 2021 and 2022, a coterie of officials at the highest levels of the Federal Government continuously harried and implicitly threatened Facebook with potentially crippling consequences if it did not comply with their wishes about the suppression of certain COVID–19-related speech. Not surprisingly, Facebook repeatedly yielded.

The implications of *Murthy* are that government, including at the local level, continues to have the right to promote its viewpoint, although that promotional activity must remain in the realm of persuasion and cannot cross the line into coercion. Somewhat ironically, given the states' efforts in Murthy to limit federal government speech, was the Court's last-day decision in *Moody v. Netchoice LLC* and *Netchoice v. Paxton*. These consolidated cases construed statutes where, due to concerns that conservative messaging was being impeded, the legislatures of Florida and Texas had mandated that social media sites not exercise editorial discretion in determining which posts and information they chose to display. While the Court unanimously reversed both the Eleventh Circuit and Fifth Circuit based on their failure to apply the proper analytic construct, an associated message was clear: laws that impose editorial standards are inconsistent with free speech. Writing for a unanimous Court, Justice Kagan was particularly critical of the Texas law:

> Contrary to what the Fifth Circuit thought, the current record indicates that the Texas law does regulate speech when applied in the way the parties focused on be low—when applied, that is, to prevent Facebook (or YouTube) from using its content-moderation standards to remove, alter, organize, prioritize, or disclaim posts in its News Feed (or homepage). The law then prevents exactly the kind of editorial judgments this Court has previously held to receive First Amendment protection. It prevents a platform from compiling the third-party speech it wants in the way it wants, and thus from offering the expressive product that most reflects its own views and priorities. . . . Texas has thus far justified the law as necessary to balance the mix of speech on Facebook's News Feed and similar platforms; and the record reflects that Texas officials passed it because they thought those feeds skewed against politically conservative voices. But this Court has many times held, in many contexts, that it is no job for government to decide what counts as the right balance of private expression—to "un-bias" what it thinks biased, rather than to leave such judgments to speakers and their audiences. That principle works for social-media platforms as it does for others.

ML