Chill

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Although concern for chilling speech is ubiquitous in First Amendment cases, the Supreme Court has never articulated an approach for determining whether claims of chill are justiciable or when they are sufficient for a constitutional violation. This results in inconsistent decisions that often fail to adequately protect speech. Likewise, although concern for the chilling effects of government actions on speech is often raised in the scholarly literature, there surprisingly has been little in-depth analysis of the concept of chill.

Claims of speech being chilled should be a sufficient basis for an injury for purposes of standing and for invalidating laws as violating the First Amendment. The social cost of chilled expression justifies a remedy greater than just what is provided to the parties when a law is declared unconstitutional as applied.

Thus, the Court's great reluctance to provide facial relief in First Amendment cases is misguided. Laws that chill speech should be facially invalidated unless the government can show either that striking down the government action as applied would be sufficient or that the law is justified by a sufficient purpose to meet the requisite level of scrutiny. Moreover, in fashioning First Amendment doctrines, courts should do more to consider the chilling effects of government actions.

This approach would substantially change First Amendment analysis in the many cases where there is a claim of chilled speech. But it is an approach that would do much more to protect freedom of speech and serve the underlying values of the First Amendment.

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Introduction

No concept is more pervasive in the law of freedom of speech than chill.[1] The chilled speech doctrine guards against self-censorship: it permits First Amendment challenges based on the allegation that a law deters the plaintiff or others from engaging in constitutionally protected speech.[2] Challengers, in a wide array of First Amendment cases, contend that their speech has been chilled by government action. Court decisions in almost every area of free speech law invoke the concept of chill. In fact, some First Amendment doctrines, like overbreadth—which allows plaintiffs to challenge a law even where it could constitutionally be applied to them—are based entirely on a concern over how easily speech can be chilled.[3]

Chill is unique to the First Amendment.[4] In other areas of constitutional law, courts have very rarely struck down an otherwise valid law on the

1. As to the pervasiveness of considerations of chill in free speech cases, a Westlaw search reveals 839 Supreme Court cases where the First Amendment and speech appear, and 110 Supreme Court cases where the First Amendment, speech, and the word "chill" appear. WESTLAW, SEARCH RESULTS, https://1.next.westlaw.com/ [https://perma.cc/HHK5-62W4] (filter to show results only from the United States Supreme Court, the search for: "speech" & "First Amendment"); WESTLAW, SEARCH RESULTS, https://1.next.westlaw.com/ [https://perma.cc/FX6T-WXN3] (filter for results only from the United States Supreme Court, then search for: "speech" & "First Amendment" & "chill"). This is a rough measure that about thirteen percent of all Supreme Court cases dealing with freedom of speech under the Constitution explicitly mention the concept of chill. This, of course, is not a perfect measure. It is overinclusive because it includes cases where the Court mentions the First Amendment and speech but does not decide an issue of constitutional protection for expression. And it is underinclusive because it does not measure the cases where the Court discusses the concept without using the word chill. But it is a rough measure that chill matters greatly in free speech analysis. And the proportion of chill cases is particularly noteworthy because "chill" was not mentioned in the context of the First Amendment until 1952. Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 685 (1978) [hereinafter Schauer, *Unraveling*] (quoting Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

2. *See* Schauer, *Unraveling*, *supra* note 1, at 689 ("The very essence of a chilling effect is an act of deterrence."); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1673 (2013) (defining chilled speech as "when, in the course of pursuing legitimate purposes, a law incidentally deters protected expression"); Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1474 (2013) (stating that chill "occurs when a governmental action has the indirect effect of deterring a speaker from exercising her First Amendment rights"); Jonathon W. Penney, *Understanding Chilling Effects*, 106 MINN. L. REV. 1451, 1455 (2021) ("[C]hilling effects predominantly involve not just a deterrent effect, but a shaping effect—people speaking, acting, or doing, in a way that conforms to, or is in compliance with, a perceived social norm, not simply self-censoring to avoid a legal harm.").

3. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 855 (1991) [hereinafter Fallon, Jr., *Making Sense*] ("First Amendment overbreadth is largely a prophylactic doctrine, aimed at preventing a 'chilling effect.'"). The Court explained that it has provided "this expansive remedy [of the overbreadth doctrine] out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." Virginia v. Hicks, 539 U.S. 113, 119 (2003). The overbreadth doctrine is discussed below at *infra* notes 53–58 and accompanying text.

4. Schauer, *Unraveling*, *supra* note 1, at 691 ("[T]he chilling effect is peculiarly a [F]irst [A]mendment doctrine.").

ground that it might chill protected behavior.[5] A claim that the exercise of a non-free speech right has been chilled is typically not even cognizable. Chill is peculiar to free speech and is motivated by, and turns on, concerns that are only applicable to speech issues.[6]

Yet the law of chilled speech is largely undeveloped. The Supreme Court never has articulated a test to determine when allegations that speech has been chilled is sufficient to establish justiciability. Nor has it ever set forth an approach for deciding when chilling of speech is sufficient, or insufficient, to prove a violation of the First Amendment.

As a result, the case law regarding chill is inconsistent. At times, the Court has rejected chill out of hand, going so far as to say: "It is undoubtedly true . . . that '[a] criminal prosecution under a statute regulating expression may inhibit the full exercise of First Amendment freedoms.' But this sort of 'chilling effect' . . . should not by itself justify federal intervention."[7] On many other occasions, though, the Court has struck down laws solely because of concern that they chill speech. It has declared that "a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated."[8]

Not surprisingly, Justices sharply disagree over what must be shown to make a claim of chilling of speech justiciable or sufficient for a First Amendment violation.[9] It can be difficult to gauge in advance whether allegations of chill will pass muster.[10] The Court's inconsistency gives rise to the inescapable conclusion that chill is a concept that Justices invoke when it helps defend the conclusion they desire, but dismiss when they want an opposite result. And because of the vague contours of the chilled speech

5. Indeed, as we discuss below, see *infra* subpart I(A), in other areas of constitutional law, the Court has expressly rejected considering the chilling effects of a law. *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522, 538 (2021) (rejecting consideration of the chilling effect of a Texas law that created civil liability for abortions performed after the sixth week of pregnancy even though at the time the law was clearly unconstitutional).

6. We develop this argument in Part II, explaining that freedom of speech is protected, in part, because of the social benefit of more speech in a way that does not apply to other constitutional rights. *See infra* Part II.

7. Younger v. Harris, 401 U.S. 37, 50 (1971) (citation omitted) (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)).

8. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336 (2010).

9. *Compare* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2382–83 (2021) (plurality opinion) (applying an exacting scrutiny standard when analyzing the chilling effect of compelled disclosure), *with id.* at 2393–94 (Sotomayor, J., dissenting) (arguing for a means-end tailoring). *Compare* Clapper v. Amnesty Int'l, 568 U.S. 398, 417–18 (2013) (rejecting speculative allegations of subjective chill as insufficient), *with id.* at 427–31 (Breyer, J., dissenting) (arguing that government incentives and abilities made the prospective harm more than merely speculative). These cases are discussed in detail in Part I of this Article. *See infra* notes 21–51 and accompanying text.

10. *See* Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORN. L. REV. 936, 947 (1987) (discussing an example of the Court's inconsistency in applying chill).

doctrine, much speech that should be able to be expressed undoubtedly remains chilled. Indeed, the uncertainty surrounding when a claim for chill will be accepted by the courts, in itself, can inhibit speech.

There has been remarkably little systematic examination of the concept of chill in the voluminous First Amendment literature.[11] Scholars, like Justices, frequently make arguments based on concerns over chilling speech, but with little attempt to articulate an approach for determining when a claim of chilling speech should be deemed a basis for allowing a case to go forward and for deeming a law to violate the First Amendment. That is what we seek to do in this Article.

We hope to fill the gap in the Court's analysis by providing a complete analysis—beginning with justiciability and concluding with the choice of remedy—that could be reliably applied to more prophylactically guard against the chilling of speech. In Part I, we examine the Supreme Court's use of the concept of chill, both in justiciability analysis and on the merits in free speech cases. Our goal in this Part is to show that concern for chilling speech is pervasive in First Amendment analysis and that the Court is inconsistent in dealing with claims of chill.

Part II shifts from the descriptive to the normative. It explains why chill is an essential concept in First Amendment law and especially why claims of chilled speech, alone, should be sufficient for a constitutional violation, and why chilled speech presents unique concerns distinct from other constitutional rights. Simply put, justiciability and First Amendment doctrines *should* be concerned with the chilling of speech.

In Part III, we argue that the Court has been unduly reluctant to grant facial relief in chilled speech cases. In many decisions, including in its recent ruling in *Moody v. NetChoice*,[12] the Supreme Court has said that "facial challenges are disfavored" and has created an approach that makes it very difficult for courts to give such relief.[13] We contend that the test the Court has created for facial relief makes little sense: Facial relief should be the norm, not the exception, under the Free Speech Clause.

We also suggest a clearly defined test, consistent with much of the Court's existing caselaw, for determining when allegations of chill are sufficient for standing, as well as what must be proven to show that a

11. *See, e.g.*, Schauer, *Unraveling*, *supra* note 1, at 687–88 (attempting to define the chilling effect and identify its influences on legal doctrines); Kendrick, *supra* note 2, at 1476 (distinguishing governmental chill from private chill); Youn, *supra* note 2, at 1476 (distinguishing governmental chill from private chill); Toni M. Massaro, *Chilling Rights*, 88 U. COLO. L. REV. 34, 35 (2017) (examining the preferential treatment given to free speech in overbreadth cases); Jonathan R. Siegel, Note, *Chilling Injuries as a Basis for Standing*, 98 YALE L.J. 905, 905–06 (1989) [hereinafter Siegel, *Chilling Injuries*] (arguing that chilled speech should be recognized as an injury for standing purposes).

12. 144 S. Ct. 2383 (2024).

13. *Id.* at 2409; *see also infra* notes 190–202 and accompanying text.

government action is unconstitutional due to its chilling effect. Our proposals would, as far as we are aware, go further than others previously made in the chilled speech literature, providing rich protection against chilled speech—but without losing sight of a state's ability to nonetheless justify the challenged law.

Finally, in Part IV, we apply the approach that we set forth to an important issue that has not yet reached the Supreme Court: state laws that prohibit the teaching of Critical Race Theory and President Donald Trump's Executive Orders prohibiting DEI.[14] Challenges to these laws and Executive Orders are pending, and we argue that they should be declared unconstitutional because of their chilling effects on speech.

I. The Supreme Court and Claims of Chill

A review of the Supreme Court's treatment of claims that government actions are unconstitutionally chilling speech leads to two unavoidable conclusions: chilled speech is a pervasive issue throughout First Amendment law, and the Court has been woefully inconsistent in handling it. Remarkably, despite the constant influx of chill issues on the Supreme Court's docket, the Court has never articulated an approach for determining when a claim of chill is justiciable or sufficient for a First Amendment violation.

Chill comes up in many contexts.[15] Sometimes, the question is whether a claim of chill is sufficient for standing. Other times, it is framed as a question of ripeness. Often, the Court simply assumes justiciability and decides the First Amendment issue on the merits. Either way, the Court has been inconsistent. It is rarely clear in advance whether a chilled speech case will be decided based on justiciability or on the merits; the standards often seem to collapse.

A. Justiciability and Chill

It is well established that a plaintiff has standing to sue in federal court only if it shows that it "has suffered, or will suffer, an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged

14. *See, e.g.*, Combating Race and Sex Stereotyping, Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sep. 28, 2020) (setting forth goals to prevent DEI initiatives); *Fact Sheet: President Donald Trump Protects Civil Rights and Merit-Based Opportunity by Ending Illegal DEI*, THE WHITE HOUSE (Jan. 22, 2025), https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-protects-civil-rights-and-merit-based-opportunity-by-ending-illegal-dei/ [https://perma.cc/L7FG-5FF5] (describing the Trump Administration's anti-DEI initiatives).

15. *Cf.* Walker v. City of Birmingham, 388 U.S. 307, 345 (1967) (Brennan, J., dissenting) (recognizing that the Court has "molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise").

action; and redressable by a favorable ruling.'"[16] Closely related, the Supreme Court has said that in order for a federal court to hear a case it must be "ripe" for review.[17] The ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action. The inquiry for standing and ripeness is often the same: has the plaintiff sufficiently suffered an injury, or is the plaintiff sufficiently likely to suffer an injury, to meet the requirements of Article III of the Constitution?[18]

In this context, the question is: When is a claim that speech is likely to be chilled sufficient to meet the justiciability requirements of Article III? Yet in evaluating justiciability based on claims of chill, the Court has not been consistent.

In some important cases, the Court has expressly held that claims of chilled speech are insufficient for standing and ripeness. In *Laird v. Tatum*,[19] the plaintiffs contended that the army's surveillance of domestic groups during the Viet Nam War chilled their freedom of speech.[20] The concern was that the Army's spying on lawful groups and their peaceful protests was likely to chill constitutionally protected expression and association.[21] Nonetheless, the Court dismissed the case on justiciability grounds and said that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."[22] The Court thus appeared to hold that a claim of chilled speech, alone, cannot be a basis for justiciability, even if the affected speech is protected under the First Amendment and is reasonably likely to be inhibited.

The Court came to the same conclusion in *Clapper v. Amnesty International.*[23] *Clapper* involved a challenge to a 2008 law enacted to amend the Foreign Intelligence Surveillance Act to allow the federal government to gather foreign intelligence information by intercepting communications between persons in the United States and those in foreign countries.[24] A lawsuit was brought by lawyers, journalists, and businesspeople who said

16. Murthy v. Missouri, 144 S. Ct. 1972, 1986 (2024) (quoting Clapper v. Amnesty Int'l., 568 U.S. 398, 409 (2013)).

17. Trump v. New York, 141 S. Ct. 530, 535 (2020).

18. As the Supreme Court has stated: "The doctrines of standing and ripeness 'originate' from the same Article III limitation" and sometimes "boil down to the same question." Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 n.5 (2014) (first quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 335 (2006); then quoting MedImmune, Inc. v. Genetech, Inc., 549 U.S. 118, 128 n.8 (2007)).

19. 408 U.S. 1 (1972).

20. *Id.* at 13.

21. *Id.*

22. *Id.* at 13–14.

23. 568 U.S. 398, 417–18 (2013).

24. *Id.* at 401.

that their speech was chilled by the fear that their communications might be intercepted.[25] Here, too, the concern over chill seemed realistic. Lawyers, for example, argued that in light of their duty to protect confidential conversations with clients, they were inhibited from having conversations over telephones or other electronic media because of the danger of government officials listening.[26] The Court found this injury insufficient for standing and again stated: "Because '[a]llegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm,' the plaintiffs in *Laird*—and respondents here—lack standing."[27]

The Court found no standing because no one could show that their conversations actually were intercepted or were likely to be intercepted by the government.[28] The National Security Agency does not tell people this, so no one could ever meet this requirement.[29] But the Court's majority also completely missed the point of the plaintiffs' complaint. The issue wasn't whether the communications were actually being intercepted; it was that the threat of surveillance had caused the plaintiffs to refrain from constitutionally protected conversations. In *Clapper*, as in *Laird*, the Court appeared to rule that self-censorship, no matter how reasonable the claim of speech being inhibited, cannot be a basis for justiciability on its own.

But in other instances, the Court has been explicit that claims of chill *are* sufficient to meet Article III's requirements for standing and ripeness. For example, in *Meese v. Keene*,[30] the Court found a chilling effect on speech to be a sufficient basis for standing.[31] An exhibitor of foreign films challenged the Department of Justice's decision to label three films "political propaganda" under the Foreign Agents Registration Act.[32] As in *Laird* and *Clapper*, the Court said that a claim of chill, standing alone, could not give rise to standing.[33] But unlike in those cases, the Court nevertheless found standing based on the potential consequences that the plaintiff would face if he exhibited the films:

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25. *Id.* at 406.

26. *Id.* at 406–07.

27. *Id.* at 418 (citations omitted).

28. *Id.* at 411.

29. *See* Alan Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99, 156 (2018) ("By requiring plaintiffs to have clear evidence they are being surveilled—a fact that, because of the secret nature of surveillance, is difficult to establish—*Clapper* has made it hard for individuals to challenge broad surveillance programs.").

30. 481 U.S. 465 (1987).

31. *Id.* at 473. On the merits, as discussed below, the Court found no violation of the First Amendment. *See supra* notes 103–10 and accompanying text.

32. *Id.* at 467.

33. *Id.* at 473.

> We find . . . that appellee has alleged and demonstrated more than a "subjective chill"; he establishes that the term "political propaganda" threatens to cause him cognizable injury. He stated that if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired.[34]

It's hard to see why the required label "political propaganda" in *Meese* should be more worthy of judicial review than the threat of surveillance in *Laird* and *Clapper*. Indeed, the chilling effect of surveillance on speech and association is well-recognized in privacy literature.[35]

Subsequently, in *Susan B. Anthony List v. Driehaus*,[36] the Court considered a challenge to an Ohio statute that criminalized making false statements about candidates during political campaigns.[37] The Susan B. Anthony List, a political group that previously had been threatened with prosecution under the law, brought a suit for a declaratory judgment to have the law declared unconstitutional.[38] Although there were no enforcement proceedings pending against them and none planned, the plaintiffs' claim that they would be chilled from advocacy in the future was deemed sufficient for Article III.[39] The Court found that the matter met the "fitness" and "hardship" factors required for review because the plaintiffs "have alleged a credible threat of enforcement."[40] The Court stressed that "the threat of future enforcement of the false statement statute is substantial."[41]

As discussed below, this is consistent with cases where the Supreme Court has found a potential First Amendment violation based on a threat of

34. *Id.* at 473.

35. *See, e.g.*, Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1260 (1998) ("Simply put, surveillance leads to self-censorship."); Margot E. Kaminski & Shane Witnov, *The Conforming Effects: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 RICH. L. REV. 465, 489–91 (2015) (discussing studies demonstrating that behavior changes under the threat of surveillance and noting that the mere "perception that one is being observed is enough to cause a change in behavior"); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1426 (2000) ("[T]he experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behavior."); Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1415 (2001) ("[B]y constantly living under the reality that one could be observed at any time, people assimilate the effects of surveillance into themselves. They obey not because they are monitored but because of their fear that they could be watched. This fear alone is sufficient to achieve control.").

36. 573 U.S. 149 (2014).

37. *Id.* at 151–52.

38. *Id.* at 153–54.

39. *Id.* at 155, 161.

40. *Id.* at 167.

41. *Id.* at 164.

prosecution.[42] It does not, however, answer the question why the abstract possibility of prosecution in *Susan B. Anthony List* or social repercussions in *Meese* is sufficient, but a threat of government surveillance—when it is explicitly alleged that the government is engaged in the practice and that it chills speech—is not enough for a justiciable claim. In either case, the effect is the same: self-censorship.

The Court evidently demands something more than mere allegations of self-censorship to establish standing and ripeness. But it is unclear why this should be the law and what else should be required. Either claims of chilled speech are cognizable or they are not. Also, as we discuss in the next section, this inconsistency is compounded because the Court has often found laws unconstitutional under the First Amendment *entirely* based on chilled speech concerns, without even addressing the justiciability issues that caused the cases to be dismissed in *Laird* and *Clapper*. In these decisions, the Court concludes that the government action unconstitutionally chills speech without any consideration of standing or ripeness.

B. Unconstitutional Chilling Effects on Speech

The lack of clarity as to what is required for a claim of chilling of speech to violate the First Amendment arose in the recent case of *Americans for Prosperity Foundation v. Bonta*.[43] Charities must file a Form 990 with the federal government, which requires organizations to disclose the names and addresses of donors who have contributed more than $5,000 in a particular tax year.[44] This facilitates enforcement of tax laws as the government can be sure that those who claim a tax deduction for a charitable contribution actually gave the money to the organization.[45]

The California Attorney General required that charities, in renewing their registration with the state, file copies of their Internal Revenue Service Form 990, along with any attachments and schedules.[46] In other words, California simply required that charities give to the state the exact form they already were providing to the federal government.[47] The issue before the

42. *See, e.g.*, NRA v. Vullo, 144 S. Ct. 1316, 1328 (2024) (holding that a plausible allegation of "a threat of adverse government action in order to punish or suppress the plaintiff's speech" states a First Amendment claim); Bantam Books v. Sullivan, 372 U.S. 58, 64, 67 (1963) (holding that "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" violated the First Amendment); *see supra* notes 160, 241 and accompanying text.

43. 141 S. Ct. 2373 (2021) (plurality opinion).

44. *Id.* at 2380.

45. *Id.* at 2400–01 (Sotomayor, J., dissenting).

46. *Id.* at 2380.

47. *Id.* at 2389.

Supreme Court was whether this violated freedom of association because of the possible chilling effect of this additional disclosure.[48]

The Supreme Court, in a 6–3 plurality opinion split along ideological lines, declared the California law unconstitutional. Chief Justice Roberts wrote an opinion that was joined in full by two Justices (Kavanaugh and Barrett) and in part by three Justices (Thomas, Alito, and Gorsuch).[49] Although all six of these Justices agreed that the law was unconstitutional, they disagreed as to the level of scrutiny to be applied.[50]

Chief Justice Roberts' plurality opinion—and this conclusion was shared by all six Justices in the majority—expressed great concern that freedom of association would be chilled if donors' identities were disclosed. The Court dismissed as irrelevant the fact that California keeps this information secret or that it is the same information that already has to be given to the federal government. Chief Justice Roberts wrote: "Our cases have said that disclosure requirements can chill association '[e]ven if there [is] no disclosure to the general public.'"[51] He thus concluded that the California law was unconstitutional: "We are left to conclude that the Attorney General's disclosure requirement imposes a widespread burden on donors' associational rights."[52]

Justice Sotomayor wrote a strong dissent that was joined by Justices Breyer and Kagan.[53] Justice Sotomayor said that the Court was abandoning its prior decisions, which required some proof that association was actually chilled. She wrote:

> Although this Court is protective of First Amendment rights, it typically requires that plaintiffs demonstrate an actual First Amendment burden before demanding that a law be narrowly tailored to the government's interests, never mind striking the law down in its entirety. Not so today. Today, the Court holds that reporting and disclosure requirements must be narrowly tailored even if a plaintiff demonstrates no burden at all.[54]

Justice Sotomayor expressed great concern that this will put many other disclosure requirements in jeopardy. She concluded her dissent by saying:

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48. *Id.* at 2379, 2382.

49. *Id.* at 2379.

50. Chief Justice Roberts, in a plurality opinion, used exacting scrutiny, which he defined as "substantially related to a sufficiently important [government] interest." *Id.* at 2385, 2391. Justice Thomas used strict scrutiny, while Justices Alito and Gorsuch said that the level of scrutiny did not matter to them for the outcome of this case. *Id.* at 2391. The disagreement over the levels of scrutiny is discussed in Alex W. Chemerinsky, *Tears of Scrutiny*, 57 TULSA L. REV. 341, 342 (2022) [hereinafter Chemerinsky, *Tears of Scrutiny*].

51. *Bonta*, 141 S. Ct. at 2388 (quoting Shelton v. Tucker, 364 U.S. 479, 486 (1960)).

52. *Bonta*, 141 S. Ct. at 2389.

53. *Id.* at 2392 (Sotomayor, J., dissenting).

54. *Id*.

> Today's decision discards decades of First Amendment jurisprudence recognizing that reporting and disclosure requirements do not directly burden associational rights. There is no other explanation for the Court's conclusion that, first, plaintiffs do not need to show they are actually burdened by a disclosure requirement; second, every disclosure requirement demands narrow tailoring; and third, a facial challenge can succeed in the absence of any evidence a state law burdens the associational rights of a substantial proportion of affected individuals.[55]

In other words, the majority and the dissent sharply disagreed over what must be shown in order for a claim of chilling of speech to be deemed to violate the First Amendment. But strikingly, neither offered a test for determining this.[56] It is little more than the majority asserting that it found enough likelihood of chilling of association, while the dissent asserts that it was not sufficiently shown. This is not surprising because, although there are many cases where the Court uses chill as a basis for its decision, it does so without articulating criteria for assessing when a claim of chill is sufficient for a First Amendment violation.[57]

In examining how the Court has dealt with claims of chill in the First Amendment context, it is significant to see that chill is ubiquitous in First Amendment cases and has arisen in a number of different ways.

1. First Amendment doctrines based on a concern over chilling speech but without any requirement for a demonstration of speech likely being chilled.—The First Amendment overbreadth doctrine is based entirely on a concern for preventing the chilling of constitutionally protected speech. Under this doctrine, a law is unconstitutionally overbroad if it regulates substantially more speech than the Constitution allows to be regulated.[58] If a law is found substantially overbroad, it is declared facially unconstitutional. And the overbreadth doctrine allows third-party standing: a person to whom the law constitutionally may be applied may still avoid its application by proving that the law would be unconstitutional as applied to others.[59]

Overbreadth is unique to First Amendment freedom of speech claims. There is nothing like it in any other area of constitutional law. No one can

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55. *Id.* at 2404.

56. Neither did any of the Justices address standing or ripeness nor explain why this chilling claim is different from those in *Laird* and *Clapper*. *Id.* at 2382–83 (majority opinion).

57. *E.g.*, *id.* at 2382 (using chill as a basis for its decision but not articulating criteria for assessing when chill occurs).

58. *See, e.g.*, Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 964 (1984) (defining and applying overbreadth doctrine). For excellent discussions of this doctrine, see Fallon, Jr., *Making Sense*, *supra* note 3, at 858; Henry Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 13 (1981) [hereinafter Monaghan, *Overbreadth*].

59. United States v. Hansen, 143 S. Ct. 1932, 1939 (2023).

challenge a law under due process or equal protection or even free exercise of religion under the First Amendment under an overbreadth doctrine.[60] The doctrine is based entirely on a concern that so long as the overbroad law remains in effect it will chill constitutionally protected speech. As the Court recently explained:

> We have justified this doctrine on the ground that it provides breathing room for free expression. Overbroad laws "may deter or 'chill' constitutionally protected speech," and if would-be speakers remain silent, society will lose their contributions to the "marketplace of ideas." To guard against those harms, the overbreadth doctrine allows a litigant (even an undeserving one) to vindicate the rights of the silenced, as well as society's broader interest in hearing them speak. If the challenger demonstrates that the statute "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep," then society's interest in free expression outweighs its interest in the statute's lawful applications, and a court will hold the law facially invalid.[61]

The Court has explained that the overbreadth doctrine is necessary because the "First Amendment needs breathing space."[62] The concerns are that overbroad laws will chill significant constitutionally protected speech and that individuals to whom the law cannot constitutionally be applied may refrain from expression rather than challenge the statute. As Justice Brennan explained, the overbreadth doctrine is "necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."[63]

Likewise, the vagueness doctrine under the First Amendment is based, in part, on a concern over chilling of speech. Unlike overbreadth, which applies only in the First Amendment speech context, any criminal law can be challenged as violating due process if it is unduly vague.[64] There is the proper concern that it is unfair to punish a person unless the law is clear as to what

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60. *See* Schauer, *Unraveling*, *supra* note 1, at 691 ("[T]he chilling effect is a peculiarly first amendment doctrine."); *id.* at 692 n.36 (noting that "[f]reedom of religion . . . does not appear to occupy a similar position [to other First Amendment rights] in the constitutional order" with regard to the chilling effect doctrine).

61. *Hansen*, 143 S. Ct. at 1939 (citations omitted).

62. Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973).

63. Gooding v. Wilson, 405 U.S. 518, 521 (1972); *see also* Virginia v. Hicks, 539 U.S. 113, 119 (2003) ("We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions").

64. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.").

is prohibited and what is allowed. Also, there is worry that vague laws are especially susceptible to discriminatory enforcement and selective prosecution.[65]

Although vagueness is a generally applicable doctrine, the Court has recognized that these concerns apply with greater force in the free speech context because of concern over how vague laws can chill constitutionally protected speech. The Court explained that "standards of permissible statutory vagueness are strict in the area of free expression . . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[66] Like with overbreadth, an unconstitutionally vague law is declared facially unconstitutional. The Court is concerned that, so long as the law remains on the books, it will chill constitutionally protected expression.[67]

2. Laws held unconstitutional based on a likelihood that constitutionally protected speech or association will be chilled.—The overbreadth and vagueness doctrines do not require that there be a showing that constitutionally protected speech is actually being chilled or even that it is likely to be chilled. Rather, the doctrines exist because overbroad and vague laws inherently risk chilling speech and it thus is important to strike them down. Quite distinctly, the Court has found laws unconstitutional based on a claim that they are *likely* to chill constitutionally protected speech and association.

The most prominent example of this arises from laws requiring disclosure, such as in *Americans for Prosperity Foundation v. Bonta*, discussed above. That case built on many prior instances in which the Court struck down laws requiring disclosure due to concern that speech and association was likely to be chilled. For example, in *NAACP v. Alabama ex rel. Patterson*,[68] in 1958, the Court struck down an Alabama law that required out-of-state corporations to make certain disclosures.[69] Under this law, Alabama required that the NAACP disclose its membership lists.[70] The Court, in an opinion by Justice Harlan, found the law unconstitutional because it chilled expressive association, explaining:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . .

65. *Id.* at 358.

66. NAACP v. Button, 371 U.S. 415, 432, 433 (1963); *see also* Reno v. ACLU, 521 U.S. 844, 871–72 (1997) ("[T]he CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.").

67. *Gooding*, 405 U.S. at 521; *Hicks*, 539 U.S. at 119.

68. 357 U.S. 449 (1958).

69. *Id.* at 466.

70. *Id.* at 451.

> restraint on freedom of association . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations . . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.[71]

Building on that holding, in *Shelton v. Tucker*,[72] the Court declared unconstitutional a state law that required that all teachers disclose their group memberships.[73] The Court again stressed the impact of such disclosures in chilling constitutionally protected association. The Court explained:

> [To] compel a teacher to disclose his every associational tie is to impair that teacher's right of free association . . . . Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy.[74]

Chilled speech and association claims come up frequently in challenges to disclosure requirements in campaign finance laws. In these decisions, the Court has generally upheld disclosure requirements because of the compelling interests served by such statutes in preventing corruption and the appearance of corruption and in providing important information to voters. But the Court has recognized that "[i]n some instances fears of reprisal may deter contributions to the point where the movement cannot survive"—in other words, that disclosure requirements can unconstitutionally chill speech.[75] The Court applied this in *Brown v. Socialist Workers '74 Campaign Committee*,[76] which held unconstitutional a state's attempt to require the Socialist Workers Party to comply with a campaign disclosure law.[77] The Court concluded that because the Socialist Workers Party was a historically unpopular minor party, the disclosure requirements would serve little purpose and would likely chill contributions and associational activity.[78]

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71. *Id.* at 462. The Court has also often recognized that compelling some speech has the potential to chill other speech. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974) (holding that a state law that required newspapers that published an editorial critical of a political candidate to publish a responsive editorial by the candidate chilled speech because "[f]aced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy").

72. 364 U.S. 479 (1960).

73. *Id.* at 480, 490.

74. *Id.* at 485–86.

75. Buckley v. Valeo, 424 U.S. 1, 68 (1976) (upholding disclosure requirements while recognizing the danger that disclosures might chill contributions).

76. 459 U.S. 87 (1982).

77. *Id.* at 88, 102.

78. *Id.* at 101–02.

Relatedly, the Court has held unconstitutional attempts to force speakers to reveal their identities on the ground that it is likely to chill constitutionally protected speech and thus has concluded that there generally is a right to speak anonymously. In *Talley v. California*,[79] the Supreme Court declared unconstitutional a ban on anonymous handbills.[80] Justice Black, writing for the Court, said that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[81] The Court observed that the "obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government."[82]

Subsequently, in *McIntyre v. Ohio Elections Commission*,[83] the Court declared unconstitutional a law that prohibited the distribution of anonymous campaign literature.[84] The Court again stressed how requiring disclosure of identity was likely to chill speech:

> The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible . . . Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.[85]

Similarly, in *Buckley v. American Constitutional Law Foundation*,[86] the Court declared unconstitutional a state law that required that initiative-petition circulators be registered voters, wear an identification badge bearing the circulator's name, and that proponents of an initiative report the names and addresses of all paid circulators and the amount paid to each circulator.[87] Again, the Court stressed the chilling effect of the disclosure requirement: The provision "'limi[ts] the number of voices who will convey the [initiative proponents'] message' and, consequently, [may] cut down 'the size of the [proponents'] audience" to a number insufficient to "qualify for the ballot" and "thus limit[s] proponents' 'ability to make the matter the focus of

79. 362 U.S. 60 (1960).
80. *Id.* at 60–61, 65.
81. *Id.* at 64.
82. *Id.*
83. 514 U.S. 334 (1995).
84. *Id.* at 336, 357.
85. *Id.* at 341–42.
86. 525 U.S. 182 (1999).
87. *Id.* at 186, 191, 205.

statewide discussion' . . . . [T]he requirement 'imposes a burden on political expression that the State has failed to justify.'"[88]

It is notable that in all of these cases, the Court struck down disclosure requirements because of their likelihood of chilling speech based solely on its own judgment about this.[89] There was no requirement of proof that speech was likely to be chilled, nor even an articulation of a standard for determining what is sufficient for purposes of the Article III or First Amendment analysis.[90]

Disclosure requirements are not the only place in First Amendment law where the likelihood of chill has been deemed sufficient for a First Amendment violation. Another quite different example is in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett.*[91] The case involved an Arizona voter-passed initiative law that provided for public funding of elections for state offices.[92] Under the Arizona Citizens Clean Elections Act, no candidate was required to accept public funding for his or her election.[93] A candidate wishing to receive such money could qualify for receiving public funds by obtaining a specified amount of donations.[94]

The concern, though, was if the amount of public funds was fixed, it could be exceeded by an opponent who did not take public funds. The Arizona law said that if a privately funded opponent spent more than a designated sum, a publicly financed candidate would receive roughly one additional dollar for every dollar spent by the opponent.[95] The publicly financed candidate also received roughly one dollar for every dollar spent by independent expenditure groups to support the privately financed opponent or to oppose the publicly financed candidate.[96] There was a cap on these additional funds.[97]

The Supreme Court, in a 5–4 decision, split along ideological lines, declared this law unconstitutional.[98] Chief Justice Roberts wrote for the Court and said that the Arizona law was unconstitutional because it penalized

88. *Id.* at 194–95 (citations omitted) (citing Meyer v. Grant, 486 U.S. 414, 422–23, 428 (1988)).

89. *See, e.g.*, *Buckley*, 525 U.S. at 194–95 (holding that requiring initiative-petition circulators to be registered voters violates the First Amendment in part because such a requirement decreases the number of potential circulators).

90. *See, e.g.*, Talley v. California, 362 U.S. 60, 60–61, 64–65 (1960) (invalidating a ban on anonymous handbills in part because of the historical importance of anonymous speech by persecuted groups).

91. 564 U.S. 721 (2011).

92. *Id.* at 727–28.

93. *Id.* at 728.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 728–29.

98. *Id.* at 753.

candidates who spent their own money in elections.[99] The "penalty" was that their increased spending would be met with greater public funds for an opponent accepting such money.[100] The Court said that the Arizona law violated the First Amendment because it would chill candidates, and their supporters, from spending money in elections.[101] There was no proof that the law actually was likely to have such a chilling effect. But the Court dismissed this concern, observing "'it is never easy to prove a negative'—here, that candidates and groups did not speak or limited their speech because of the Arizona law."[102]

Of course, that is a problem whenever the concern is about chilling speech: it is difficult, and even sometimes impossible, to prove the speech that did not occur because of the government's action that otherwise would have occurred.[103] Claims of chill are inherently about what didn't happen and is not going to happen.

Indeed, this helps to explain the Court's inconsistency. When the Court wishes to reject such a claim, it is easy for it to declare that the allegation of chill is too speculative. That is what occurred in *Laird v. Tatum* and *Clapper v. Amnesty International*, described above.[104] But where the Court likes the speech at issue, it will overlook the speculative nature of the allegations and instead say that chilled speech alone is sufficient for a meritorious claim. Because consideration of chill is not tethered to a fixed analysis or inquiry, the Court has been free to accept or reject chill claims based on a thinly reasoned intuition that varies from case to case.

For example, in *Branzburg v. Hayes*,[105] the Court held that the First Amendment does not protect a right of reporters to keep their sources confidential when subpoenaed before grand juries.[106] The reporters argued

99. *Id.* at 736.

100. *Id.*

101. *Id.*

102. *Id.* at 745 (citing Elkins v. United States, 364 U.S. 206, 218 (1960)). As Professor Daniel Solove has recognized: "It is hard to measure the deterrence caused by a chilling effect because it is impossible to determine with certainty what people would have said or done in the absence of the government activity." Daniel Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 155 (2007).

103. Justice Kagan wrote for the four dissenters. *Bennett*, 564 U.S. at 755 (Kagan, J., dissenting). She stressed that the Arizona law in no way restricted or regulated any speech. *Id.* at 763. The sole effect of the Arizona Citizens Clean Election Act was to increase money for candidates taking public funds. *Id.* at 762–63. Justice Kagan said that the majority opinion repeatedly characterizes the Act as limiting speech, "[b]ut Arizona's matching funds provision does not restrict, but instead subsidizes, speech." *Id.* at 763 (Kagan, J., dissenting). If one accepts that spending money in elections is a form of speech protected by the First Amendment, then the Arizona law actually *increased* speech.

104. *See supra* notes 18–38 and accompanying text.

105. 408 U.S. 665 (1972).

106. *Id.* at 690–92.

that without an enforceable promise of confidentiality, sources would be chilled from speaking to reporters and thus the public would be deprived of important information.[107] The Court, in rejecting a reporters' privilege, said that the effect in chilling speech was too speculative:

> But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury . . . . [T]he evidence fails to demonstrate that there would be a significant construction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative.[108]

Branzburg is difficult to reconcile with *Arizona Free Enterprise Club* or the cases finding an unconstitutional chill based on compelled campaign disclosure. In *Branzburg*, the Court held chill insufficient based on its skepticism that confidential informants would want to remain confidential and that the possibility of disclosure would keep them from speaking.[109] But in many other decisions, as we have shown, the Court assumed that chill was likely to result from disclosure of a speaker's identity, or even from a more nebulous harm like additional funding to publicly financed candidates for political office. The only dividing line between these cases is the Court's guesswork at how nonparties are likely to behave.

In *Meese v. Keene*,[110] too, the Court rejected a claim of chilling speech as insufficient to constitute a violation of the First Amendment.[111] Pursuant to the Foreign Agents Registration Act, the federal government identified some Canadian films as political propaganda.[112] Under the Foreign Agents Registration Act, the exhibitors of such movies were required to place the words "political propaganda" at the beginning of the films.[113] One, titled *If You Love This Planet*, had won the Academy Award for Best Short Documentary in 1982 and depicted an antinuclear weapons speech given by the president of the American group Physicians for Social Responsibility.[114] A second film, titled

107. *Id.* at 682.

108. *Id.* at 693–94. In 2024, the House of Representatives unanimously passed a bill to create a reporters' privilege in federal court. H.R. 4250 (118th Cong.) (2024). It, however, did not pass the Senate.

109. *Id.* at 690–91.

110. 481 U.S. 465 (1987).

111. *Id.* at 479–80.

112. *Id.* at 467.

113. *Id.* at 470–71.

114. *Id.* at 467–68, 468 n.3; Brief for Appellee at 7, Meese v. Keene, 481 U.S. 465 (1987) (No. 85-1180).

Acid Rain: Requiem or Recovery?, also produced by the National Film Board of Canada, focused on the harms from acid rain.[115]

The challengers argued that labeling the films "propaganda" would limit their dissemination and potentially subject the exhibitor to criticism. As described above, the Court found this claim to be sufficient for standing.[116] But the Court then found the claim of chill to be insufficient to establish a violation of the First Amendment—one of very few cases in which the Court has found standing based on chill but not struck down the law. The Court said that:

> The statute itself neither prohibits nor censors the dissemination of advocacy materials by agents of foreign principals . . . . The term "political propaganda" does nothing to place regulated expressive material "beyond the pale of legitimate discourse" . . . . To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda.[117]

Again, the Court stressed the lack of evidence of the chilling effect: "there is no evidence that this suspicion—to the degree it exists—has had the effect of Government censorship."[118]

The conclusion is that sometimes the Court finds the likelihood of a chilling effect on speech to be sufficient for a First Amendment violation, but sometimes it doesn't. Sometimes it requires proof of the chilling effect on speech, but sometimes it doesn't. The Court never has explained the difference and never has articulated any criteria for evaluating what is a sufficient likelihood of chilling speech to violate the First Amendment.

3. Concerns over chilling speech as a basis for First Amendment doctrines.—Concern for chilling speech has arisen in First Amendment decisions in another way: as an underlying basis for the doctrines developed by the Court. It is not that the Court finds a government action unconstitutional because it is likely to chill speech, but rather the Court fashions a First Amendment doctrine to avoid the chilling of speech. A clear example of this is the Court's concluding that false speech is often protected by the First

115. *Meese*, 481 U.S. at 478, 480–81; Keene v. Smith, 569 F. Supp. 1513, 1515 (E.D. Cal. 1983).

116. *See supra* notes 27–30 and accompanying text.

117. *Meese*, 481 U.S. at 478, 480–81 (quoting Keene v. Meese, 619 F. Supp. 1111, 1126 (E.D. Cal. 1985), *rev'd*, 481 U.S. 465 (1987)).

118. *Id.* at 484.

Amendment so as to provide "breathing room" and keep speech from being chilled.[119]

In *New York Times v. Sullivan*, the Court considered the First Amendment standard to be used in a defamation suit brought by a public official.[120] The case involved a defamation claim brought by the Montgomery, Alabama, police commissioner against The New York Times and four black clergymen for an advertisement criticizing the handling of demonstrations.[121] There were minor factual errors in the advertisement.[122] A jury awarded the plaintiff $500,000 under Alabama's defamation law.[123]

Justice Brennan, writing for the Court, began by stating that the case was considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[124] The Court explained that criticism of government and government officials was at the core of speech protected by the First Amendment. The fact that some of the statements were false was not sufficient to deny the speech protection; the Court said that false "statement is inevitable in free debate, and [it] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[125]

The Court said that it was not enough that truth was a defense under Alabama's libel law; requiring that defendants prove the truth of their statements will chill speech. The Court thus concluded that the First Amendment prevents a "public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[126] This is a demanding standard. The Court established it because of concern that liability for defamation, based on anything other than the most culpable mental state, would chill important speech critical of public figures.[127]

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119. The idea of free speech needing "breathing room" was articulated in N.Y. Times v. Sullivan, 376 U.S. 254, 271–72 (1964) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). *See infra* Part II.

120. *Sullivan*, 376 U.S. at 256.

121. *Id.*

122. *Id.* at 258–59.

123. *Id.* at 256.

124. *Id.* at 270.

125. *Id.* at 271–72.

126. *Id.* at 279–80.

127. *See* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1637 (2013) (explaining that, under one interpretation, "allowing liability for all [false and defamatory statements] might deter true speech because people might hesitate to speak unless they

Likewise, there is constitutional protection for false speech more generally because of concern that liability will chill speech and valuable expression will be lost. The Court repeated this in *United States v. Alvarez*,[128] where it declared unconstitutional a federal law that made it a crime for a person to falsely claim to have received military honors or decorations.[129] Justice Kennedy, in a plurality opinion, explained that there is no "general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."[130] It is not that false speech has value under the First Amendment. Rather, the concern is that creating liability for false speech will chill constitutionally protected expression.

The Court has also relied on concerns over the chilling of speech as a basis for imposing a *mens rea* requirement for civil liability. *New York Times v. Sullivan*,[131] which created an actual malice standard for defamation liability for public officials, reflects this.[132] So does the more recent case of *Counterman v. Colorado.*[133] The issue was what must be proven in order to show that speech is a "true threat" unprotected by the First Amendment.[134] Justice Kagan's majority opinion was explicit in saying that the Court needed to adopt a legal standard that would minimize the likelihood of speech being chilled. She emphasized the importance of fashioning First Amendment rules that avoid the chilling of speech and wrote:

> Yet, the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. The reason relates to what is often called a chilling effect. Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is "self-censorship" of speech that could not be proscribed—a

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are certain about the truth of their statements. Protected, true speech will thus be 'chilled' by the regulation of unprotected, false speech").

128. 567 U.S. 709 (2012).

129. *Id.* at 715.

130. *Id.* at 718.

131. 376 U.S. 254 (1964).

132. *See id.* at 283 (establishing the "actual malice" standard for libel actions "by public officials against critics of their official conduct").

133. 143 S. Ct. 2106 (2023).

134. *Id.* at 2111. In Watts v. United States, 394 U.S. 705, 707–08 (1969), the Court held that "true threats" are unprotected by the First Amendment, but it did not articulate a standard for determining what is a true threat.

> "cautious and restrictive exercise" of First Amendment freedoms. And an important tool to prevent that outcome—to stop people from steering "wide[] of the unlawful zone"—is to condition liability on the State's showing of a culpable mental state. Such a requirement comes at a cost: It will shield some otherwise proscribable (here, threatening) speech because the State cannot prove what the defendant thought. But the added element reduces the prospect of chilling fully protected expression.[135]

To avoid unduly chilling speech, the Court concluded that proving that speech was a true threat requires demonstrating "recklessness" on the part of the speaker; that the speaker acted with a conscious disregard that the speech would be perceived as a threat of violence.[136]

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These, of course, are only some of the cases where the Court has considered the chilling effect of speech. But they reflect the pervasiveness of the concept in First Amendment analysis. The difficulty with chill as a concept is that there is no way to measure what speech did not happen because of a government action. Judges are thus left to their intuition as to whether a particular government action is likely to chill speech. Not surprisingly, although all agree with the importance of chill as a crucial concept under First Amendment law, they often have different intuitions and come to different conclusions.

II. The Importance of Protecting Against the Risk of Chilled Speech

Part I was largely descriptive, detailing how the Supreme Court has invoked and applied concerns over chilling of speech. But it assumed the normative premise that chilling of speech *should* be a basis for allowing a challenge under Article III and for finding a violation of the First Amendment. In this Part, we explain why chill should be a cognizable harm for justiciability under Article III and for striking down laws as infringing freedom of speech. In Part III, we will set forth the approach that we advocate that courts follow for determining when claims of chill should be sufficient for a constitutional violation.

As the review of cases in Part I demonstrated, many different types of government actions can cause speech to be chilled. Laws that prohibit speech, with criminal or civil penalties, obviously significantly inhibit expression—that is, of course, the whole point of such laws. Even if the likelihood of enforcement is remote, the possibility of sanctions or the potential cost of defending litigation could nevertheless chill speech.

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135. *Counterman*, 143 S. Ct. at 2114–15 (citations omitted).
136. *Id.* at 2111–12.

Uncertainty about a law's application also chills expression. Professor Fred Schauer explained that "[i]t is, broadly speaking, th[e] possibility of error and the consequent uncertainty which create the chilling effect."[137] On this view, chill arises because an individual engaged in lawful activity could nevertheless rationally fear suffering adverse consequences.[138] Individuals could rationally self-censor if they fear that their speech might lead to a prosecution or lawsuit, even one they most likely would win, because of the risk that the court could make an erroneous decision, or out of fear of attorneys' fees and hassle.[139]

Also, as privacy scholars have long recognized, behavior can also be chilled when an individual is watched or fears that they are being watched even in the absence of other threatened consequences.[140] As Justice Sotomayor observed, "[a]wareness that the government may be watching chills associational and expressive freedoms."[141] So even if there is no risk of enforcement at all, a rational individual could still be chilled from engaging in socially desirable conduct just for fear in some contexts of being observed. This is why, as we discussed in Part I, the Court often has struck down disclosure requirements as violating the First Amendment because of their chilling effect on speech and association.

In each of these situations, a plaintiff alleging the chilling of speech or association must convince a court that the government should be disempowered solely because of the psychological effect that the government's action has on the plaintiff and/or others. This makes a defense of the chill doctrine a tough task because prophylactic doctrines, like chill, are a rarity in the law that have occasionally drawn criticism, particularly in the criminal-law context.[142] The critics argue that prophylactic doctrines are undesirable or illegitimate because they grant rights that the Constitution does not directly provide.[143]

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137. Schauer, *Unraveling*, *supra* note 1, at 694.

138. *See id.* at 694–97 (outlining the relationship between legal uncertainty, fear, and chilling of speech).

139. Professor Schauer says: "If the chilling effect is to have any significance as an independent doctrine it must refer only to those examples of deterrence which result from the indirect governmental restriction of protected expression." *Id.* at 693, 695.

140. *See* Kang, *supra* note 31, at 1260 (noting that knowledge of observation has the ability to change an individual's behavior).

141. United States v. Jones, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring).

142. Fallon, Jr., *Making Sense*, *supra* note 3, at 869, n.96 (1991); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 163–64 (1985).

143. Fallon, Jr., *Making Sense*, *supra* note 3, at 869; Grano, *supra* note 142, at, 101–02 (criticizing prophylactic rules); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) (responding to Professor Grano's criticism); Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1034 (2001).

Yet, at least in the speech context, the prophylaxis *is* the protection. Concerns about the chilling of speech are entrenched in First Amendment law in large part because it has been recognized for over a century that free speech rights not only protect the speaker, but also the audience and, indeed, society as a whole. Speech is therefore unusual in that in addition to the importance of freedom of expression to the individual, there is rightly believed to be a collective social benefit to more speech.[144] One can argue over whether more guns in society is inherently a good thing, whether more abortions are desirable, or whether more suppression of evidence overall is beneficial. In all of these instances, the focus of constitutional analysis is solely on the individual's interest in having his or her rights vindicated. Typically, no one refers in constitutional analysis to the overall collective "good" of having there be more guns, or more abortions, or more suppression of evidence. By contrast, courts and scholars often speak of the collective good of there being more speech, and much First Amendment theory is specifically rooted in the notion that encouragement of more speech is necessary for truth-finding or governance.[145] By permitting litigants and courts to prophylactically guard against future or hypothetical self-censorship, chill doctrines like overbreadth encourage a free dialogue.[146] Overbreadth frees not only the parties to the constitutional litigation, but also the voices belonging to others who might be unwilling to express themselves if doing so could leave them mired in litigation.[147]

A key assumption underlying First Amendment law is that more speech benefits not only the individual engaged in expression but also all others who

144. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974) (striking down a right-of-reply law on the ground that "political and elect[oral] coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate'" (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964))); *cf.* Henry Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 268 (1985) [hereinafter Monaghan, *Constitutional Fact Review*] ("The familiar 'chilling effect' rhetoric asserts that first amendment values are very fragile and especially vulnerable to an 'intolerable' level of deterrence.").

145. *See, e.g.*, United States v. Hansen, 143 S. Ct. 1932, 1939 (2023) (describing how overbroad laws mean a loss of speech for the marketplace of ideas); Gooding v. Wilson, 405 U.S. 518, 521 (1972) (explaining the rationale behind the overbreadth doctrine).

146. Professor Neil Richards has argued that free speech doctrines must be used to prevent chill caused by intrusions on privacy so as to protect the societal interest in hearing from a diverse set of perspectives. *See* Neil M. Richards, *Intellectual Privacy*, 87 TEXAS L. REV. 387, 407 (2008) ("If we value what people have to say, we need to ensure they develop something to say that is not skewed or chilled before it can be uttered.").

147. Jonathan R. Siegel, Note, *Overbreadth and Listeners' Rights*, 123 HARV. L. REV. 1749, 1762–63 (2010) [hereinafter Siegel, *Overbreadth*] (justifying the overbreadth doctrine on grounds of marketplace of ideas and protecting listener's rights to receive information).

may want to hear that message.[148] A powerful illustration of this is the Supreme Court's holding that corporations have free speech rights under the First Amendment, not because of their autonomy to engage in expression, but because their speech has the instrumental benefit of providing more views and information to society.[149] The Court has explained that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[150] The Court thus has declared "[o]ur precedents have focused 'not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.'"[151]

Indeed, normatively, the underlying basis for protecting freedom of speech as a fundamental right is only in part based on the autonomy interests of individuals in expressing themselves.[152] Freedom of speech is protected, too, because of the importance of expression for self-government and democracy. It long has been widely accepted that open discussion of candidates is essential for voters to make informed selections in elections. It is through speech that people can influence their government's choice of policies. Public officials are held accountable through criticisms that can pave the way for their replacement.[153] No one contests the importance of speech for the democratic process. It powerfully explains why there is concern for chilling speech because of the social cost for democracy and the political system when expression is lost.

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148. Our assumption, which we believe is the assumption of the First Amendment, is that more speech is a good thing from the perspective of the autonomy of the speaker, the listener, and for society. But we recognize, of course, that there are limits on freedom of speech and argue in Part III that the government always should be able to restrict speech if it meets the requisite level of scrutiny. *See infra* notes 282–85 and accompanying text.

149. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Supreme Court declared unconstitutional a Massachusetts law that prohibited banks or businesses from making contributions or expenditures in connection with ballot initiatives and referenda. *Id.* at 767–68, 795. The Court explained that any restriction on speech, regardless of its source, undermines the First Amendment. *Id.* at 784–85.

150. *Id.* at 777. *See also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 349 (2010) ("Political speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'") (quoting *Bellotti*, 435 U.S. at 777).

151. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982) (quoting *Bellotti*, 435 U.S. at 783).

152. *See, e.g.*, Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 521, 591 (1982) (arguing that self-realization should be regarded as the primary value of the First Amendment).

153. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948) (explaining that critical political speech must be heard by all in a self-governing society); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20, 23, 26 (1971) (explaining the importance of freedom of speech for the democratic process).

It also often is said that freedom of speech is essential for the advancement of knowledge. The alternative to freedom of speech would be for the government to be able to determine truth and to silence what it deems false. Freedom of speech is based on the premise that knowledge is better advanced through expression of ideas than by giving the government the broad power to censor. The public interest in free speech is therefore in part motivated by the interest in democratizing truth-finding, as is perhaps best articulated through the powerful metaphor of the "marketplace of ideas," expressed through Justice Oliver Wendell Holmes's famous quote: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[154]

Even before Holmes, John Stuart Mill expressed this view when he wrote that the "peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it."[155] He said that an opinion may be true and may be wrongly suppressed by those in power, or a view may be false and people are informed by its refutation. Justice Brandeis embraced this view when he said that the "fitting remedy for evil counsels is good ones" and that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[156]

The marketplace of ideas rationale for freedom of speech has been rightly criticized by scholars as a flawed metaphor.[157] But its core insight—that it is better for the advancement of knowledge in society to have freedom of speech—seems unassailable. There thus is a collective benefit to allowing speech, which is why there justifiably should be concern in the law of the First Amendment with the chilling of speech and the expression that is lost when that occurs.

The notion of more speech being a collective benefit also is reflected in the Supreme Court's recognizing a right to receive information. The Court has explained: "we have held that in a variety of contexts 'the Constitution protects the right to receive information and ideas.'"[158] The Court declared: "It is now well established that the Constitution protects the right to receive

154. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

155. JOHN STUART MILLS, ON LIBERTY 33 (2d ed. 1859).

156. Whitney v. California, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring).

157. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 12–14 (1989) (explaining that the marketplace of idea rationale assumes rationality and that people avoid distortion); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 15–17 (criticizing the marketplace of ideas metaphor as a basis for protecting freedom of speech).

158. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

information and ideas . . . . This right to receive information and ideas, regardless of their social worth, is fundamental to our free society."[159]

As Justice Brennan explained, invoking James Madison:

> [T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom. Madison admonished us: 'A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.'[160]

An example of this, where the Court focused on the chilling of speech, is *National Treasury Employees Union v. United States*,[161] which declared unconstitutional a federal law that prevented government employees from receiving monetary honoraria for their off-the-job speeches and writings, even if they were totally unrelated to their work.[162] It is notable that the Court stressed the impact of chilling expression on the ability of people to receive speech:

> The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said. We have no way to measure the true cost of that burden, but we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne.[163]

The ability of people to receive information is obviously constricted when speech is chilled and does not occur. In this way, too, the importance of freedom of speech transcends the individual speaker's interests in expression and there is a social cost when expression is lost when there is the chilling of speech.

Put another way, if chilling of speech were not a concern, challenges to government actions restricting expression could be brought only as a defense to a criminal prosecution or a civil suit. The Court has rejected that approach precisely because of the social harm when speech is chilled. For instance, the Court recently reaffirmed that it has made it easier to bring a facial challenge to a law restricting speech than facial challenges based on any other constitutional right to "provide[] breathing room for free expression."[164] If a

159. *Stanley*, 394 U.S. at 564 (citations omitted).

160. *Pico*, 457 U.S. at 867 (quoting WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910)).

161. 513 U.S. 454 (1995).

162. *Id.* at 480.

163. *Id.* at 471 (citation omitted).

164. Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2397 (2024).

law that is facially unconstitutional remains on the books, speech will be chilled by it and society loses the benefit of that expression.

Similarly, the Court has allowed challenges to government actions threatening prosecution for speech, even with no actual prosecution or sanctions, because the threats chill expression and it is then lost for society. The Court said this explicitly in *Lamont v. Postmaster General*.[165] A federal statute instructed the postal service to identify "communist political propaganda" and deliver only to those who requested, in writing, such materials.[166] The law did not ban any material or impose any punishments for receipt. Nonetheless, the Court found that the law created obvious pressure against receiving material labeled "communist political propaganda" and thus violated the First Amendment.[167] Justice Douglas, writing for the Court, said that:

> This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions . . . . Public officials like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda."[168]

In other cases, too, the Court has recognized that a threat of prosecution is sufficient for a First Amendment violation.[169] This is because a threat of prosecution chills expression and the loser is both the individual who does not speak and the society that is deprived of hearing the expression.[170]

The Court thus often has said that First Amendment freedoms are "delicate and vulnerable, as well as supremely precious in our society . . . [and] the threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."[171] In fact, the Court has said that the overbreadth doctrine does not apply in the context of commercial speech because it believes that the profit motive makes such advertisements less

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165. 381 U.S. 301, 305 (1965).

166. *Id.* at 302.

167. *Id.* at 303.

168. *Id.* at 307.

169. Nat'l Rifle Ass'n v. Vullo, 144 S. Ct. 1316, 1322 (2024) ("Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors."); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963) ("[T]hough the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable.'").

170. *See Bantam Books*, 372 U.S. 67 (explaining that threatening prosecution inhibits the circulation of publications).

171. NAACP v. Button, 371 U.S. 415, 433 (1963).

likely to be chilled.[172] The underlying rationale is that when people are speaking out of ideological interests, such as in criticizing the government, their expression can be easily chilled.[173] The overbreadth doctrine is based on the notion that so long as the unconstitutional law remains on the books people will refrain from constitutionally protected speech.[174] It therefore is important to allow the law to be challenged, even by someone to whom the law constitutionally may be applied. The Court assumes that when there is a profit motive for the speech, there is less reason to fear it will be chilled.

Chill is a doctrine unique to the First Amendment.[175] The Court has consistently rejected considerations of chill outside of the free speech context. Although it is beyond the scope of this Article to address whether chill should be expanded to other constitutional contexts, comparing areas where claims of chill have been rejected to freedom of speech helps to explain why chill *should* be a basis for claims under the First Amendment.[176]

For example, in *Whole Woman's Health v. Jackson*,[177] the Supreme Court considered whether to allow a challenge to a Texas law that created civil liability for doctors who performed abortions after a fetal heartbeat could be detected, which is around the sixth week of pregnancy.[178] At the time the case was decided, *Roe v. Wade*[179] was still the law, and the Texas statute prohibiting abortions before viability was clearly unconstitutional.[180] What made the Texas law different from others that unconstitutionally restricted abortions was that it was not enforced by the government. Rather, the enforcement mechanism was allowing doctors who performed abortions to be sued by private litigants for damages.[181] The issue before the Court was whether state officers could be sued for an injunction under the sovereign-

172. *See, e.g.*, Village of Hoffman Estates v. Flipside, 455 U.S. 489, 496–97 (1982) (explaining that "the overbreadth doctrine does not apply to commercial speech").

173. *Button*, 371 U.S. at 435–36.

174. *Id.* at 432–33.

175. Fallon, Jr., *Making Sense*, *supra* note 3, at 867–68.

176. For an argument that the distinction between chilled speech and chilled conduct cannot be justified, see Massaro, *supra* note 11, at 67–71 (2017). *But see* Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1302–03 (1983) [hereinafter Schauer, *Must Speech Be Special?*] ("Thus, we cannot distinguish free speech, or speech itself, from all other activities. That is undoubtedly impossible. It nevertheless remains crucial that we treat freedom of speech as being independent from general liberty.").

177. Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021).

178. *Id.* at 530; *id.* at 543 (Roberts, C.J., concurring in part and dissenting in part).

179. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's, 142 S. Ct. 2228 (2022).

180. *Whole Woman's Health*, 142 S. Ct. at 543 (Roberts, C.J., concurring in part and dissenting in part).

181. *Id.* at 532.

immunity exception created by *Ex parte Young*[182] if the officers play no role in enforcing the law.[183]

The plaintiffs argued that the Texas law creating civil liability would chill doctors from performing abortions, negating the constitutional right to abortion.[184] But the Supreme Court, in a 5–4 decision, rejected this argument and ordered the case dismissed.[185] It concluded that the Eleventh Amendment barred the suit, and the state officers could not be sued under *Ex parte Young* because they do not enforce law.[186]

Chief Justice Roberts—joined by Justices Breyer, Sotomayor, and Kagan—sharply disagreed with the majority and would have allowed the suit against Texas officials to enjoin the law.[187] He stressed: "These provisions, among others, effectively chill the provision of abortions in Texas."[188] Chief Justice Roberts declared: "Given the ongoing chilling effect of the state law, the District Court should resolve this litigation and enter appropriate relief without delay."[189]

But the majority opinion written by Justice Gorsuch addressed and expressly rejected the chilling effect of the law as a reason for allowing it to be challenged. The Court stated:

> [T]he "chilling effect" associated with a potentially unconstitutional law being "on the books" is insufficient to "justify federal intervention" in a pre-enforcement suit. Instead, this Court has always required proof of a more concrete injury and compliance with traditional rules of equitable practice. The Court has consistently applied these requirements whether the challenged law in question is said to chill the free exercise of religion, the freedom of speech, the right to bear arms, or any other right.[190]

But although this is correct as to almost all of the rights listed, the statement is obviously wrong as to freedom of speech. As the cases described in Part I show, in many decisions the Court has invalidated laws precisely because of their chilling effect on speech.[191] As a simple example, in *Americans for Prosperity Foundation v. Bonta*, discussed earlier, the sole

182. 209 U.S. 123 (1908).

183. *Id.* at 531–32.

184. *Id.* at 542 (Thomas, J., concurring in part and dissenting in part).

185. *Id.* at 528, 538–39.

186. *Id.* at 532.

187. 142 S. Ct. 522, 543–44 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

188. *Id.* at 544.

189. *Id.*

190. *Id.* at 538 (majority opinion) (citations omitted) (quoting Younger v. Harris, 401 U.S. 37, 42, 50–51 (1971)).

191. *See supra* Part I.

basis for striking down the California disclosure requirement was concern for its chilling effects on speech and association.[192]

The effect of the Court's decision in *Whole Woman's Health v. Jackson* is that the only way for a doctor to challenge the statute is to wait to be sued and then, as a defense, argue that the law is unconstitutional.[193] As explained below, the reason for allowing suits based on a concern over chill is precisely so that it is not necessary to wait for someone to violate a law and be prosecuted or sued in order to challenge a law as violating freedom of speech.

Or to pick another example, under the Fourth Amendment, a defendant only can argue that his or her constitutional rights have been violated. A criminal defendant cannot challenge a police practice on the ground that it will chill others from exercising their rights, and a defendant cannot raise the Fourth Amendment rights of others. The Supreme Court has declared: "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure."[194]

There is no analogue to the overbreadth doctrine in the Fourth Amendment, nor any other constitutional context.[195] If the government were to engage in electronic eavesdropping that violates the Fourth Amendment, a defendant in a suppression motion could argue that the government violated his or her constitutional rights. The defendant could not argue that the government practice was unconstitutional as applied to others because it would chill their exercise of constitutional rights.

In fact, even when the Court has allowed third-party standing outside the overbreadth context—such as when there is a close relationship between the plaintiff and the injured third party or when the injured third party is likely unable to assert his or her own rights—the plaintiff in the suit still must show a personal injury.[196] Overbreadth is unique in allowing a person to whom the law constitutionally may be applied to argue that it is unconstitutional as applied to others. As the Court has explained, under the overbreadth doctrine, "a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the Court."[197]

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192. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2388–89 (2021); *see supra* notes 39–50 and accompanying text.

193. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 548 (2021) (Sotomayor, J., concurring in part and dissenting in part).

194. Rakas v. Illinois, 439 U.S. 128, 131, n.1 (1978).

195. *See* Note, *supra* note 139, at 1749, 1754 n.35 (comparing First Amendment overbreadth to the Fourth Amendment's exclusionary rule).

196. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 92 (9th ed. 2021) [hereinafter, CHEMERINSKY, FEDERAL JURISDICTION].

197. Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980).

Overbreadth exists as an exception to the justiciability rules applicable to all other constitutional claims because of the unique importance of preventing speech from being chilled. The overbreadth doctrine ameliorates the risk of chill by expanding the universe of plaintiffs who can challenge potentially speech-chilling government actions. Professor Richard Fallon has explained that under the most common account of overbreadth, "the First Amendment enjoys a special status in the constitutional scheme. Any substantial 'chilling' of constitutionally protected expression is intolerable. Third-party rights are too important to go unprotected, and there may often be no better challenger than the one before the court."[198]

One certainly can ask whether free speech is as fragile as the Court assumes or conversely whether other rights are as robust. In *Whole Woman's Health v. Jackson*, there was every reason to believe that the threat of civil liability will chill doctors from performing then-constitutionally protected abortions.[199] Yet, in that instance, the Court refused to allow a suit for an injunction, requiring that doctors wait until they are sued to challenge the constitutionality of (what was then) a blatantly unconstitutional law.

There is every reason to believe that government actions can chill speech from occurring and that when this happens there is a loss to society that should be recognized under the First Amendment. That is why claims of chill should be justiciable and should be a basis for finding a violation of the First Amendment.

III. Taking Chill Seriously: Doctrinal Implications

Although issues concerning the chilling of speech frequently arise in First Amendment cases, the Court has failed to create a workable doctrine to address claims of chill. As we explained in Part I, the Court's decisions often cannot be reconciled, and it is generally hard to predict whether an allegation of chilled speech will be sufficient to establish justiciability or prove unconstitutionality or what relief should be awarded.[200] As a result, the doctrine remains under-protective—a hole in the ordinarily robust protection guaranteed by the First Amendment.

If concern for chilled speech is to be taken seriously, the Court's approach must be retooled to provide a more consistent, more protective curtilage around freedom of speech. We suggest several ways that the Court should do so. First, the Court has been unduly reluctant to order facial relief, including under the overbreadth doctrine. This is undesirable; while piecemeal as-applied relief might be sufficient to safeguard constitutional

198. Fallon, Jr., *Making Sense*, *supra* note 3, at 867–68.

199. *See supra* notes 168–80 and accompanying text; Whole Woman's Health v. Jackson, 142 S. Ct. 522, 538–39 (2021).

200. *See supra* Part I.

rights in other contexts, facial relief should be the norm when chilled speech is involved. Second, the Court should create a clearly defined test for determining when a speech-chilling law is unconstitutional to provide much-needed clarity to the currently inscrutable doctrine. Third, we suggest several contexts in which the Court should be more willing than it has been to rely on chilled speech concerns to influence other First Amendment doctrines.

A. The Supreme Court's Unjustified Reluctance to Engage in Facial Analysis

Facial relief in constitutional cases has typically been thought of as the exception, not the norm.[201] A "recurring theme of the Roberts Court's jurisprudence . . . is its resistance to facial constitutional challenges and preference for as-applied litigation."[202] The Court's reluctance to declare laws facially unconstitutional outside of the First Amendment context makes sense because the focus in these cases is on whether the government's action is unconstitutional as to a specific person, not the social cost of an unconstitutional law remaining on the books. But as explained in Part II, when speech is chilled, there is a significant social cost, which explains why courts should be much more willing to declare laws facially unconstitutional under the First Amendment. Put another way, a law struck down on an as-applied basis is still there to chill the speech of others, to the detriment to society in losing the expression; facial relief leaves no residue of the unconstitutional law.

1. Reluctance to engage in facial invalidation: Moody v. NetChoice *and the failure to adequately protect against the risk of chilled speech.*—The Supreme Court often has said that the bar for facial relief is very high.[203] In non-First Amendment contexts, the Court has held that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[204] The standard is relaxed under the First

201. United States v. Hansen, 143 S. Ct. 1932, 1939 (2023); *accord* Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 TEXAS L. REV. 215, 217 (2020) [hereinafter Fallon, Jr., *Facial Challenges*] ("After decades of denial, the Supreme Court has begun to acknowledge that facial challenges to statutes constitute the norm, not the exception, among constitutional cases on its docket.").

202. Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 773 (2009).

203. Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2397 (2024).

204. United States v. Salerno, 481 U.S. 739, 745 (1987); *see also* Moody, 144 S. Ct. at 2397 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008)) (holding that a challenger may obtain facial relief if "he shows that [a] law lacks 'plainly legitimate sweep'"); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236, 251

Amendment overbreadth doctrine, but not by much.[205] The Supreme Court has said that a law is overbroad "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[206] The Court has cautioned, though, that facial invalidity on overbreadth grounds is to be used "sparingly and only as a last resort."[207] It has explained that this reluctance to apply overbreadth is due to the severity of the overbreadth remedy. If a law is overbroad, that's it; it is unconstitutional. The Court has said, "[b]ecause it destroys some good along with the bad, [i]nvalidation for overbreadth is strong medicine that is not to be "casually employed."[208] So the Court has set up a stringent bar that must be met for that kind of relief. But as we will show, that is the wrong approach for First Amendment analysis, which should be focused on preventing the chilling effects on speech of a government action.

The Court recently elaborated its rigid approach to facial challenges in *Moody v. NetChoice*.[209] In *Moody*, the Court considered facial challenges brought by an internet trade association, NetChoice, to state laws in Texas and Florida that restricted the editorial discretion of social media platforms.[210] The laws prevented large social media companies from engaging in content moderation. The United States Court of Appeals for the Eleventh Circuit declared the Florida law unconstitutional because it impermissibly restricted privately owned social media platforms' right to editorial discretion in content moderation.[211] The Fifth Circuit, by contrast, upheld the Texas law, holding that the platforms were common carriers that can be regulated by the government.[212]

The Supreme Court reversed and remanded both cases on the ground that both lower courts had not engaged in the proper analysis for a facial

(1994) [hereinafter Dorf, *Facial Challenges*] (arguing against the application of the *Salerno* test in the context of the First Amendment and for greater allowance of facial challenges in free speech cases).

205. *Moody*, 144 S. Ct. at 2397.

206. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2387 (2021) (quoting United States v. Stevens, 559 U.S. 460, 473 (2010)).

207. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

208. United States v. Hansen, 143 S. Ct. 1932, 1939 (2023) (internal quotation marks omitted) (quoting United States v. Williams, 553 U.S. 285, 293 (2008)).

209. *Moody*, 144 S. Ct. at 2397–99.

210. *Id.* at 2393. For a more thorough discussion of the underlying *Moody* litigation, see generally Alex W. Chemerinsky & Erwin Chemerinsky, *Misguided Federalism: State Regulation of the Internet and Social Media*, 102 N.C. L. REV. 1 (2023) [hereinafter Chemerinsky & Chemerinsky, *Misguided Federalism*].

211. NetChoice, LLC v. Att'y Gen., Florida, 34 F.4th 1196, 1203 (11th Cir. 2022).

212. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 494 (5th Cir. 2022).

challenge under the First Amendment.[213] Justice Kagan's majority opinion said that NetChoice could get facial relief only if it could show that "the law's unconstitutional applications substantially outweigh its constitutional ones."[214] The Court explained: "To decide the facial challenges here, the courts below must explore the laws' full range of applications—the constitutionally impermissible and permissible both—and compare the two sets."[215] NetChoice had not tried to prove that there were more unconstitutional applications than constitutional applications, so the Court admonished that "[e]ven in the First Amendment context, facial challenges are disfavored" and remanded.[216] It said that the lower courts were to "decide which of the law's applications are constitutionally permissible and which are not, and finally weigh the one against the other" in the first instance.[217]

The Court's facial-challenge standard, as articulated in *Moody* and prior decisions, is wrong several times over. It makes little sense to structure the analysis around balancing all of the constitutional applications of a law against all of its unconstitutional applications. That analysis isn't even possible. No one can feasibly imagine all possible applications of a law, much less sort out which applications are constitutional and unconstitutional. At best, this inquiry requires a judge to dream up a selection of hypothetical fact patterns and then make a gut judgment about the constitutionality of the challenged law in light of the imagined list of its potential applications.

That is hardly a workable or sensible First Amendment doctrine. And it is made all the more unworkable in the chill context because a chilled speech claim necessarily involves speech that has not happened, so the court is further left to imagine who might want to speak and what they may want to say[218]—stacking its reasoning with layer upon layer of conjecture. Professors Evelyn Douek and Genvieve Lakier noted, in discussing the Court's analysis in *Moody*, that the Court "construed the overbreadth doctrine in an extraordinarily stringent manner to mean that a law could not be considered

213. Despite remanding the cases, the Court went on to indicate that the laws are likely unconstitutional because they prevent private companies from deciding what speech to include on their platforms. *Moody*, 144 S. Ct. at 2399, 2407. Justice Kagan's majority opinion was explicit in indicating that the Fifth Circuit was wrong in its analysis and that private media companies have the First Amendment right to decide what speech to include or exclude. *Id.* at 2399, 2407.

214. *Id.* at 2397.

215. *Id.* at 2398.

216. *Id.* at 2409.

217. *Id.*; *see also* United States v. Hansen, 143 S. Ct. 1932, 1948 (2023) (explaining that the overbreadth analysis turns on whether "the ratio of unlawful-to-lawful applications is . . . lopsided enough to justify the 'strong medicine' of facial invalidation for overbreadth") (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

218. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 745 (2011) (recognizing that a chilled speech challenge requires a plaintiff to "prove a negative").

overbroad even if it was shown to be unconstitutional in all of its intended applications if the total range of its potential applications was unknown."[219]

Even if the complete universe of applications of the challenged law somehow could be known, the Court's approach still would be an impossible exercise. Are courts just supposed to make a list of both the constitutional and the unconstitutional applications and see which is longer? That, of course, makes no sense as a way of deciding whether a law violates the First Amendment. Judges inevitably will just come to their conclusion about whether they want to uphold or strike the law down and then in their opinion choose to focus on whichever applications of the law justify their desired outcome. No real weighing of all of the constitutional applications against all of the unconstitutional applications, as *NetChoice* requires, is possible.

But even if that analysis could be done, it would be the wrong inquiry. The test for whether to save a speech-infringing law should not depend on whether the law is constitutional most of the time. A law could be constitutional in most cases (or even almost all cases) and yet conceivably still be unconstitutional enough to warrant facial relief so that each individual affected need not separately sue to establish their right to speak. For example, the law in *Americans for Prosperity Foundation v. Bonta*, which required charities to disclose information to the State of California that the charities are already required to disclose to the Internal Revenue Service, probably would not chill the speech of most charities or charitable donors.[220] Few charitable organizations have a reason to keep secret from a state government information that has already been provided to the federal government. But the law was nevertheless facially unconstitutional because, in the Court's view, it chilled the speech of enough donors to violate the First Amendment.[221] It wasn't about the number of constitutional applications compared to the number of unconstitutional applications. The Court concluded that the law should not stay on the books because of the risk that it would chill *some* speech.[222] Simply put, if a law is likely to chill substantial speech, it should be facially unconstitutional even if somehow it could be determined that there were more conceivable constitutional applications as compared to conceivable unconstitutional applications.

Moody also is wrong because it omits a crucial step in the analysis, as the Court often does in overbreadth cases. Even if a law is overbroad and chills a great deal of speech, there still should be the analysis of whether the law is nevertheless constitutional because it is supported by a sufficient

219. Evelyn Douek & Genvieve Lakier, *Lochner.com?*, 138 HARV. L. REV. 100, 167 (2024).

220. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2388–89 (2021); *see supra* notes 39–51 and accompanying text.

221. *Id.*

222. *Id.*

government interest.[223] In other words, declaring a law facially unconstitutional should require determining *both* that it regulates more speech than the Constitution allows to be regulated *and* that the law fails the appropriate level of scrutiny. If it is a content-based law, it needs to meet strict scrutiny, and as part of that analysis the Court would need to inquire whether there is a less restrictive alternative to the overbroad law.[224] If a law is content-neutral, then it need only meet intermediate scrutiny and be substantially related to an important government purpose.[225] This would entail consideration of whether the government's action is sufficiently narrowly tailored.

A striking number of overbreadth cases, however, fail to engage in this crucial step in constitutional analysis.[226] It helps to explain why the Court regards overbreadth as such strong medicine: A finding of substantial overbreadth automatically invalidates the entire law. But if the Court were to apply the appropriate level of scrutiny, as is required in other areas of constitutional law, some laws that are overbroad and chill substantial speech still might be upheld because the government has met the requisite constitutional test. In *Moody*, the Court should have acknowledged that the Florida and Texas laws had an enormous effect on speech of social media companies—both in what was being regulated and in what was being chilled—and then engaged in scrutiny analysis.

It may seem strange to say that if a law is overbroad or vague that there should be further analysis of whether the law is sufficiently justified because that is not how the Court has approached these doctrines. But under traditional analysis in cases involving constitutional rights, including the First Amendment, there are two distinct questions: Is there an infringement

223. This was the crucial flaw in the Court's analysis in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), which we discuss below. *See infra* notes 252–59 and accompanying text. The Court found that the Colorado law infringed the plaintiffs' speech, but never considered, as it should have, whether the government nonetheless met the requisite level of scrutiny. *303 Creative*, 143 S. Ct. at 2312–18.

224. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); *see also* R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118 (1991) (explaining that content-based laws must meet strict scrutiny).

225. Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994).

226. *See* Zacharias, *supra* note 10, at 947 (observing that, in chill cases, "[c]ourts that have reached the point of assessing the government's accommodation of state interests have also failed to balance fully" since they focus "exclusively on either the degree to which a regulation furthers the governmental interest *or* the degree to which it affects first amendment rights. Rarely have the courts considered the factors in combination").

of the right? And if so, is the government's action sufficiently justified?[227] Showing that a law is overbroad or vague demonstrates that there is an infringement of speech, but then the court should inquire whether nonetheless the law should be upheld.

At bottom, the problem with *Moody* is that it sets up overbreadth and facial challenges in the First Amendment context as an exceedingly rare exception to the ordinary rule against facial relief. That's backwards. Facial relief should be the norm, not the exception, in free speech cases when there is a showing that a government action will have a substantial chilling effect. There is no other effective way to guard against the risk of chilled speech and protect the social interest in expression that we discussed in Part II. Remedying chill on an as-applied basis leaves the unconstitutional law in place where it can continue to inhibit speech. Much chill would go unremedied and much desirable speech would remain unstated. Even for plaintiffs that do sue to establish that a law would be unconstitutional as applied to them, the lawsuit would be a time-consuming and massively expensive tax on their right to speak that would have to be satisfied *in advance* of actually speaking the message that gave rise to the lawsuit, further chilling speech.[228] Or they would have to engage in the speech, be prosecuted or sued, and then bear the costs of litigation on a case-by-case basis to challenge a law restricting speech.

These sorts of concerns are exactly why the overbreadth doctrine exists in the first place. The doctrine was created "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech."[229] As the Court observed, "if would-be speakers remain silent, society will lose their contributions to the 'marketplace of ideas.'"[230] But the Court's timid treatment of the remedy afforded by overbreadth—and failure to appreciate why that remedy is peculiarly warranted in the free speech context—has failed in many cases to vindicate the interest against chilled speech or the premises behind the overbreadth doctrine.

2. A presumption in favor of facial relief in chilled speech cases.— Overbreadth and facial invalidity should not be regarded, as the Supreme Court does, as a drastic remedy in First Amendment cases to be used only very sparingly. Facial invalidity of a law is frequently the only adequate remedy to

227. Michael Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1180 (1996) [hereinafter Dorf, *Incidental Burdens*] (explaining the distinction between finding a government action is an infringement of a right and that it is unconstitutional).

228. Of course, if a plaintiff speaks the message that they fear consequences for speaking, then their speech is, by definition, not chilled; but the speech of others still can be (and often will be) chilled by the law remaining on the books.

229. Virginia v. Hicks, 539 U.S. 113, 119 (2003).

230. United States v. Hansen, 143 S. Ct. 1932, 1939 (2023).

prevent chill. First Amendment doctrines should be expanded to reflect this truth.

In light of this, we argue that the Court's focus on "substantial overbreadth" is misguided.[231] The question should not be whether a law is overbroad most of the time, as *Moody* required, nor whether the "ratio of unlawful-to-lawful applications is . . . lopsided enough," as *Hansen* required.[232] Rather, we argue that once a plaintiff has proven that the government has unconstitutionally chilled speech, facial relief should be the default remedy. If the law chills one person's speech, it's likely to chill others' speech too. If chill is to be taken seriously in the manner the Court has often suggested, then it cannot be that most chill cases result in the law remaining in effect to chill the speech of others. Therefore, once a showing of chill has been made, the Court should presume that facial relief is required unless the government meets the requisite level of scrutiny, and not the other way around.

But although we suggest redefining the default remedy, we don't contend that facial invalidation of the law should be the outcome in every case. Rather, the government should have the opportunity to show that the risk of chill could be remedied via as-applied relief. If the risk of chill is minimal, then the law should be declared unconstitutional as applied, but allowed to remain for its constitutional applications.

Moody might be one such case. The Florida and Texas laws applied only to a few social media platforms, all of which were essentially represented by NetChoice, so there was little likelihood of residual chill if the law were struck down as applied.[233]

Many laws, though, apply more broadly than the Florida and Texas laws at issue in *Moody*. And in most cases, such as *Americans for Prosperity Foundation*, the plaintiffs represent just a few of many affected parties. In such contexts, as-applied relief is likely to be insufficient to remedy the chill because the relief would not protect the speech of many whose expression is inhibited. If the government cannot show that there is an adequate interest in maintaining the unconstitutional law, then the law should be struck down on its face. Any other outcome would result in much chilled speech—and a significant compromising of the First Amendment.

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231. *See* Douek & Lakier, *supra* note 206, at 116 (noting that the result of the Court's decision to focus on "substantial" overbreadth "was to make it harder for courts to vindicate the collective right to an unconstrained marketplace of ideas").

232. *Hansen*, 143 S. Ct. at 1937.

233. Another example of this, which we discuss below, is Holder v. Humanitarian Law Project, 561 U.S. 1 (2010), where the most appropriate remedy could have been as-applied relief because of the powerful government interest in preventing knowing aid to terrorist organizations. *See infra* notes 229–33 and accompanying text.

We recognize that this strong position in favor of facial relief is very different from the Court's current approach. In *Moody*, Justice Kagan said that "'[c]laims of facial invalidity often rest on speculation' about the law's coverage and its future enforcement. And 'facial challenges threaten to short circuit the democratic process' by preventing duly enacted laws from being implemented in constitutional ways."[234] She said that this "Court has therefore made facial challenges hard to win."[235] Justice Barrett, in a concurring opinion, embraced Justice Kagan's view and spoke of the "dangers of bringing a facial challenge."[236]

And Justice Thomas, concurring in the judgment, said that he would eliminate altogether the ability of courts to declare laws facially unconstitutional. He wrote:

> Facial challenges are fundamentally at odds with Article III. Because Article III limits federal courts' judicial power to cases or controversies, federal courts 'lac[k] the power to pronounce that [a] statute is unconstitutional' as applied to nonparties. Entertaining facial challenges in spite of that limitation arrogates powers reserved to the political branches and disturbs the relationship between the Federal Government and the States. The practice of adjudicating facial challenges creates practical concerns as well. Facial challenges' dubious historical roots further confirm that the doctrine should have no place in our jurisprudence.[237]

But on careful consideration, these arguments against facial challenges do not justify the Court's restraint when laws have a substantial chilling effect on speech. Justice Kagan is correct that facial challenges "often rest on speculation about the law's coverage and its future enforcement."[238] But, as we have explained and as the Court has recognized, that is inherent to the concept of chill; it inevitably requires trying to estimate the speech that hasn't and won't occur so long as the allegedly unconstitutional law remains. Yet despite this, as the cases discussed in Part I demonstrate, the Court nonetheless often has found laws unconstitutional because of their chilling effect.[239] The fact that evaluating the effect of a law is difficult is not a reason to refrain from that analysis. In light of the social importance of invalidating laws that chill speech, the difficulty Justice Kagan identifies should not be an obstacle to facial analysis. It is important that the analysis we are suggesting,

234. Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2397 (2024) (citations omitted) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450, 451 (2008)).

235. *Id.*

236. *Id.* at 2409 (Barrett, J., concurring).

237. *Id.* at 2413–14 (Thomas, J., concurring in the judgment) (alterations in original) (citations omitted).

238. *Id.* at 2397.

239. *See supra* notes 24–29 and accompanying text.

where courts must assess the chilling effect of speech, is not novel. We are merely suggesting that it be applied consistently and without the presumption against facial invalidity.

The problem with Justice Kagan's argument that facial invalidity "short circuits the democratic process" is that whenever a law is declared unconstitutional, facially or as applied, unelected judges are overturning the decisions of popularly elected officials.[240] The reality is that when judges want to avoid striking down laws, they invoke deference to democracy. When they want to invalidate laws as unconstitutional, that deference vanishes. If it is accepted that freedom of speech should be a fundamental right and that there is great social benefit to expression, as we argued in Part II, then the Constitution limits the choices of the democratic process, and unconstitutional laws should be struck down.

Nor does Justice Thomas' objection have merits. He says that "federal courts 'lac[k] the power to pronounce that [a] statute is unconstitutional' as applied to nonparties."[241] This would be a radical change in the law because then no law ever could be declared facially unconstitutional. If a government adopted the most heinous and odious law, a court still could not strike it down as facially unconstitutional under Justice Thomas' approach. It also would mean that there never could be third-party standing because, by definition, it has a court providing relief to non-parties.[242] It would completely eliminate the overbreadth doctrine.

The central flaw in Justice Thomas' argument is that he is reasoning from a definition that has no foundation. He says that Article III limits federal courts to deciding "cases and controversies" and therefore concludes that federal courts cannot give relief to non-parties. He writes: "Facial challenges conflict with Article III's case-or-controversy requirement because they ask a federal court to decide whether a statute might conflict with the Constitution in cases that are not before the court."[243]

But when a court declares a law unconstitutional, it is deciding the *case* before it, even though there may be a benefit to third parties. If the

240. *Moody*, 144 S. Ct. at 2397. This is what Alexander Bickel famously referred to as the "counter-majoritarian difficulty." ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–18 (2d ed. 1986). There is a vast literature analyzing and debating this. *See* Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 934 (2001) (offering an explanation for the rise of the counter-majoritarian problem in academia); ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 1–2 (1987) (disagreeing with the premises of the counter-majoritarian difficulty) [hereinafter, CHEMERINKSY, INTERPRETING THE CONSTITUTION].

241. Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2414 (2024) (Thomas, J., concurring) (alteration in original).

242. For a summary of the law of third-party standing, and a description of the many cases applying it, see generally CHEMERINSKY, FEDERAL JURISDICTION.

243. *Moody*, 144 S. Ct. at 2415 (Thomas, J., concurring in the judgment).

justiciability doctrines of Article III are met, then there is a "case or controversy" under Article III.[244] In decisions where the Court has found disclosure requirements to be facially unconstitutional—whether *NAACP v. Alabama*[245] or *Americans for Prosperity Foundation v. Bonta*[246]—it is literally deciding *cases* that are properly before it under Article III of the Constitution. There is nothing in the Article III requirement for cases and controversies that says that the relief given in a case only can be granted to, or only benefit, a particular party to the litigation.[247] Quite the contrary, even when a law is declared unconstitutional as applied, that sends a message to the government and to other courts that such uses of the law will be struck down. There are others who benefit from the court's ruling and similar cases, not before the court, are effectively decided. Justice Thomas's argument based on Article III is inconsistent with countless Supreme Court cases that have declared laws facially unconstitutional and would be an undesirable way to define the scope of the judicial power.

This extension of facial invalidation and the overbreadth doctrine that we describe would not have runaway consequences. It would not apply in any other context because it is a doctrine uniquely focused on the social implications of chilling speech. Although facial relief would become more readily available in First Amendment cases, it would not be a foregone conclusion that the government would lose because it would have the opportunity to explain why as-applied relief would be sufficient and to show that it meets the requisite level of scrutiny. But it would save the parties and courts from needing to guess how the law would fare in an infinite number of hypothetical cases. Between the guesswork at a law's conceivable applications and the conjecture at the constitutionality of those applications, the *Moody* standard is unmanageable, satisfying neither the purpose of the overbreadth doctrine nor the public interest in preventing chilled speech.

B. Evaluating Whether Speech Has Been Unconstitutionally Chilled

Even setting aside the Court's failure to appreciate the relationship between facial relief and chill, the Court's approach is problematic because there is no standard articulated or consistently applied in chilled speech cases for determining whether there is a constitutional violation. As we explained in Part I, the Court has never identified a principle that could explain why mere allegations of chill were insufficient to establish standing in cases such

244. Flast v. Cohen, 392 U.S. 83, 95 (1968).

245. NAACP v. Alabama, 357 U.S. 449, 466–67 (1958).

246. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2377 (2021).

247. In *Trump v. CASA*, 145 S. Ct. 2540 (2025), the Supreme Court ruled that federal courts cannot issue universal injunctions. The Court based this conclusion entirely on statutory grounds, holding that Congress in adopting the Judiciary Act of 1789 did not mean to bestow such power because it had not existed in the High Court of Chancery in England. *Id.* at 2551.

as *Laird v. Tatum*[248] or *Clapper v. Amnesty International*[249]yet enough to prove a constitutional violation in *Americans for Prosperity Foundation v. Bonta*[250] or *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.[251] As a result, it is rarely clear when allegations of chill will pass muster, and if they do, why. This lack of clarity is lamentable. Although the Court has recognized the importance of preventing the chilling of speech, the absence of a consistent approach has meant the failure in many instances to adequately protect freedom of expression.

The Court therefore should define a test for chilled speech that makes clear what each party must show to prove that a law does or does not unconstitutionally chill speech. We suggest that this inquiry would be best handled through a three-step test applicable in each chill case:

1. A plaintiff should be required to establish standing by showing that their own speech has been chilled or is likely to be chilled by a particular government action, or that they have standing to assert the rights of others under the overbreadth doctrine.[252]
2. If that showing is made, the plaintiff should be required to prove infringement by showing that a reasonable person's speech would be chilled under similar circumstances.
3. The government should then bear the burden to show either that the law is unlikely to have the chilling effect alleged or that the law is nevertheless constitutional because it is sufficiently tailored to an adequate government interest (i.e., it meets the requisite level of scrutiny).

If the plaintiff carries their burden and the government does not, the law unconstitutionally chills speech.

1. Standing: Has speech been chilled or is likely to be chilled by a particular government action?—As we explained in Part I, the Court has been inconsistent regarding standing based on claims of chilled speech. At times, it has liberally found a justiciable constitutional violation based on nothing more than an allegation of chill. Yet at other times, it has conversely insisted that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of

248. Laird v. Tatum, 408 U.S. 1, 13–14 (1972).

249. Clapper v. Amnesty Int'l, 568 U.S. 398, 402 (2013).

250. *Bonta*, 141 S. Ct. at 2377.

251. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 728 (2011).

252. The procedural posture of the case matters. A criminal defendant or a defendant in a civil suit can challenge the law used against them. A plaintiff seeking a declaratory judgment must meet the ripeness requirements under Article III, which includes showing hardship to not receiving declaratory relief. *See, e.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136, 148–49 (1967) (defining the test for ripeness).

specific present objective harm or a threat of specific future harm."[253] Often the Court has found First Amendment violations without even considering standing.[254]

We argue that the Court should adopt the more lenient approach and hold that a subjective allegation of chill can establish a justiciable injury. This will clarify that the chilling of speech is a substantive claim under the First Amendment that is worthy of remedy on its own. It also will encourage federal courts to focus more on questions of causation and redressability in their standing analysis.

The Court has expressly found a justiciable injury in three chilled speech contexts.[255] First, in cases such as *Hansen*, chill is asserted by someone being punished by a putatively overbroad law.[256] Second, in cases such as *Bantam Books, Susan B. Anthony List*, and *National Rifle Association v. Vullo*, standing has been based on the credible threat of the prosecution that the plaintiff might face if they expressed themselves.[257] Third, in cases such as *Meese v. Keene*, the plaintiff's injury is purely based on the subjective chill they suffer in not being able to speak the message they wanted to express due to some government-imposed consequence.[258]

We agree with the Court's approach in the first context: a plaintiff undoubtedly has standing if they are being prosecuted, and the overbreadth doctrine properly allows them to assert third parties' chilled speech rights. But in the second and third contexts (pre-enforcement challenges), the Court's standard has proven unworkable, with the Court alternating without explanation between a very rigid and a very flexible approach to standing, seemingly depending on the result it wanted to reach.[259]

As we have explained, one thread of the Court's chilled speech caselaw insists that chill, alone, is not enough for standing. In cases such as *Laird*, the Court has insisted that "[a]llegations of a subjective 'chill'" cannot establish standing and that the plaintiff must show an objective likelihood of other harm.[260] Similarly, in *Clapper*, the Court held that there was no standing because the plaintiff could not show an objective likelihood that their

253. Laird v. Tatum, 408 U.S. 1, 13–14 (1972); Meese v. Keene, 481 U.S. 465, 473 (1987).

254. *See, e.g.*, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) (finding the chilling effect sufficient to constitute a violation of the First Amendment, but without any consideration of standing). *See infra* note 250 and accompanying text.

255. As we have said earlier, in many First Amendment cases, the Court has struck down laws as violating the First Amendment based on chill, but without engaging in justiciability analysis. *See supra* notes 17–38 and accompanying text.

256. *See Hansen*, 143 S. Ct. at 1939.

257. *Supra* note 38 and accompanying text; *infra* note 251 and accompanying text.

258. *See supra* notes 27–30 and accompanying text.

259. *See supra* Part I.

260. Laird v. Tatum, 408 U.S. 1, 13–14 (1972); Meese v. Keene, 481 U.S. 465, 473 (1987).

communications had been intercepted by the NSA.[261] *Meese* applied this standard, too, though it found standing: the Court said that the plaintiff adequately showed that they faced a likelihood of social or political consequences if films they wanted to distribute were labeled "political propaganda."[262]

However, in other chilled speech contexts, particularly in recent cases, the Court has been very lenient toward standing based on chill. For example, in *Arizona Free Enterprise Club*, standing was based on the illogical (and unproven) possibility that privately funded candidates might somehow be less likely to spend money on their own campaigns if their opponents had additional funds provided by the state.[263] Likewise, in *Americans for Prosperity Foundation*, the Court based standing on the speculation that donors might be less likely to donate to certain charities if the charities' IRS form 990 were disclosed to California.[264] Each of these harms is about as speculative as it gets. They ought to fail under the *Laird* standard that rejects mere subjective allegations of chill. But the Court either implicitly determined that the plaintiffs in each of these cases adduced something more than mere allegations of chill, unlike *Laird*, *Meese*, or *Clapper*, or more likely, abandoned the rule that subjective allegations of chill alone cannot create standing.

Likewise, although *Susan B. Anthony List* requires a plaintiff to show an objectively "credible threat of prosecution" to establish pre-enforcement standing, the Court has been lenient as to other pre-enforcement chill claims.[265] For example, notably, the Court found standing in *303 Creative v. Elenis* based on the totally hypothetical possibility that a website designer might decide in the future to create wedding websites that might bring in gay clients, whom the designer might reject based on her opposition to same-sex marriage, leading to a potential enforcement action by the state.[266] None of those things had happened yet. As scholars and *amici* recognized, the plaintiff in *303 Creative* appeared to fall below the *Susan B. Anthony List* standard for ripeness and standing.[267] The Court nevertheless determined that the

261. Clapper v. Amnesty Int'l, 568 U.S. 398, 410–18 (2013).

262. *Meese*, 481 U.S. at 472–73; *see also* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2308–10 (2023) (finding standing based entirely on the plaintiff's assertion that she wanted to engage in prohibited expressive conduct arguably prohibited by the state).

263. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 746–47 (2011).

264. *See supra* notes 207–09 and accompanying text.

265. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 160–61 (2014).

266. *303 Creative*, 143 S. Ct. at 2308–10; 303 Creative LLC v. Elenis, 6 F.4th 1160, 1173 (10th Cir. 2021).

267. *See* Richard Re, *Does the Discourse on* 303 Creative *Portend a Standing Realignment?*, 99 NOTRE DAME L. REV. Reflection 67, 73 n.28 (2023) (noting that the Biden Administration and liberal Justices did not dispute standing in *303 Creative* despite the apparent lack thereof); *see also*

allegations were enough for justiciability and reached the merits, ruling in her favor.[268]

Although *303 Creative*'s conjectural reasoning would be out of place in other contexts, it makes sense for standing and ripeness in a chill case.[269] Even if the threat of prosecution was abstract and not particularly likely—there had only ever been one prior enforcement action under the challenged law: In the *Masterpiece Cakeshop* litigation, the plaintiff showed, through sworn statements, that it had chilled her speech.[270] This meant that she had been injured for purposes of Article III.[271] She said that she was unwilling to expand her business to design websites for same-sex weddings, which the Court accepted as expressive activity, until it was clarified that she had a First Amendment exemption from the law. It was thus a classic claim of chill.[272]

At least as to the injury component of standing, *Arizona Free Enterprise Club*, *Americans for Prosperity Foundation*, and *303 Creative* are right.[273] *Laird* and *Clapper* are wrong. The *Laird* standard, in particular, is a failure.[274] The Court has been unable to define what is needed to make an objective showing of harm for purposes of standing when there is a claim of speech being chilled. And it has not applied its non-standard consistently. Sometimes, it hasn't even asked the right question. *Clapper* focused on the

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Katherine Mims Crocker, *Constitutional Rights and Remedial Consistency*, 110 VA. L. REV. 521, 561 (2024) (noting the Court's reliance on past enforcement practices in *Susan B. Anthony List*).

268. *303 Creative*, 143 S. Ct. at 2321–22.

269. *See* Re, *supra* note 253, at 73–76 (defending the finding of standing and ripeness in *303 Creative*).

270. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 584 U.S. 617, 621, 639–40 (2018). After the Supreme Court's decision, it was learned that the affidavits submitted to support the plaintiff's claim were false. Adam Liptak, *What to Know About a Seemingly Fake Document in a Gay Rights Case*, N.Y. TIMES (July 3, 2023), https://www.nytimes.com/2023/07/03/us/politics/same-sex-marriage-document-supreme-court.html [https://perma.cc/WPG8-735R].. But this information was not before the Court when it decided the case and thus is not relevant to assessing whether there was standing and ripeness at that time. *Id.*

271. *303 Creative*, 6 F.4th at 1174.

272. *Id.* at 2308–09.

273. Although we agree with the Court that the plaintiff met the requirements in *303 Creative* to have her case heard, we believe that the crucial question was whether the law was unconstitutional as to her because there was a compelling government interest in stopping business establishments from discriminating based on sexual orientation. *See 303 Creative*, 600 U.S. at 631 (Sotomayor, J., dissenting) (explaining the compelling government interest in stopping businesses from discriminating based on sexual orientation). This reflects the importance of separating analysis as to standing, whether there is a valid claim of chill, and whether the government has met the requisite level of scrutiny.

274. The Court at least has managed to apply the *Susan B. Anthony List* standard deferentially in cases like *303 Creative*. *303 Creative*, 143 S. Ct. at 2308. The Court has had to entirely ignore the *Laird* standard in almost every case where it did not want to dismiss for lack of standing, including *Arizona Free Enterprise Club* and *Americans for Prosperity Foundation*. *See generally* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011); Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021).

plaintiffs' failure to prove that their speech was actually intercepted[275] rather than even asking the proper question under the Court's own inquiry: whether the plaintiffs showed more than a subjective chill.[276] The plaintiffs' primary allegation was that fear of their calls being unconstitutionally intercepted was chilling their communications.[277]

Significantly, our proposed test would finally make it clear that mere allegations of chill are justiciable. Some cases, like *Arizona Free Enterprise Club*, seem to indicate that chill can constitute a justiciable injury in its own right.[278] But many others, including *Laird* and *Clapper*, insist that a plaintiff prove some harm *other* than chill to get through the courthouse doors.[279] This lack of clarity regarding whether chill is sufficient for a claim under the First Amendment should be corrected. Chill is not an abstract problem that falls below the margin of constitutional inquiry. As we have explained, it is rightly a crucial and pervasive First Amendment doctrine and a core part of the American free speech tradition. If that important value is to be protected, it must be actionable.

Thus, in all chilled speech cases, standing can be established in one of two ways. First, if the plaintiff is subject to an actual or threatened enforcement action, the plaintiff has standing to raise their own rights and also to assert the chilled speech rights of others pursuant to the overbreadth doctrine and to challenge the law on vagueness grounds. Second, the plaintiff can establish that they have been injured for standing purposes by showing that there is some protected message they would express but for a particular law or government action.

We recognize that this would lead to an increase in litigation asserting chilled speech claims. This is as it should be. But we doubt the overall shift would be dramatic. Although courts would no longer conduct an inquiry beyond allegations of subjective chill at the pleading stage in assessing standing, they would have other tools to nix cases that assert chill based merely on paranoia or misunderstanding of law. For example, courts would still be able to dismiss, for failure to state a claim, any chilled speech challenge that was implausible in light of judicial common sense. Also,

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275. *Clapper*, 568 U.S. at 413.

276. *See* Rozenshtein, *supra* note 26, at 156 ("The Court rejected the argument that the chilling effect of possibly having one's communications collected created a sufficient First Amendment injury to establish standing.").

277. *Clapper*, 568 U.S. at 415.

278. *Arizona Free Enterprise Club* assumes standing, but there was no other injury presented aside from the public-financing provision. *See Ariz. Free Enter. Club's Freedom Club PAC*, 564 U.S. at 721 (refraining from discussion regarding standing or any injury apart from the public-financing provision).

279. Laird v. Tatum, 408 U.S. 1, 11 (1972); Clapper v. Amnesty Int'l, 568 U.S. 398, 418 (2013).

claims of chill sometimes would fail under the weightier merits analysis we set out in the next two sections.[280]

Moreover, we only suggest that the Court hold that chilled speech can constitute a justiciable injury; courts still would need to apply the causation and redressability prongs of the standing inquiry in full force. This means, for example, that the Court's recent decision in *Murthy v. Missouri*[281] would remain unchanged. In *Murthy*, a group of plaintiffs sued the federal government arguing that their speech was chilled due to government actors pressuring social media companies to moderate potential misinformation related to the COVID-19 pandemic.[282] The Court held the plaintiffs lacked standing because they could not show that the government *caused* the injury they suffered.[283] The content-moderation decisions were made by the internet platforms; the government "issued no directives and threatened no consequences."[284] The plaintiffs could not show that it was government pressure that caused their harm and thus they lacked standing.

Under our approach, the plaintiffs in *Murthy* would have alleged a justiciable injury—that their speech was chilled—but, as the Court held, would have failed to satisfy the causation or redressability requirements for standing. A chilled speech plaintiff needs to show not only that there is a message they would speak but also that the chill was caused by the government in a way that likely would be addressed by a favorable federal court decision.[285]

2. Infringement: Would a reasonable person's speech be chilled?—In addition to showing standing, a plaintiff must prove that the chill constitutes an infringement of their rights under the First Amendment. It's not clear under the current doctrine when chill rises to the level of infringement. As we have shown, the Court has never articulated a clear standard, and the cases have been inconsistent on this.

A standard is important for the lower courts that must decide whether there is a First Amendment violation, as well as for the parties litigating such claims. In the last section, we argued that subjective allegations of chill (or threat of punishment) should be sufficient to establish standing; here, we argue that a plaintiff must meet an objective standard to prove an

280. *See* Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (articulating plausibility as the standard for evaluating a motion to dismiss for failure to state a claim under Federal Rules of Civil Procedure Rule 12(b)(6)).

281. 144 S. Ct. 1972 (2024).

282. *Id.* at 1981.

283. *Id.* at 1993.

284. *Id.* at 1994.

285. We, of course, assume, as the Court has, that government actions frequently are likely to chill speech. For a critical inquiry into whether that assumption is true, see generally Suneal Bedi, *The Myth of the Chilling Effect*, 35 HARV. J.L. & TECH. 267 (2021).

infringement of the First Amendment based on a claim of chill.[286] In other words, the plaintiff should be required to prove that a reasonable person's speech would be chilled by the challenged law.

If a plaintiff makes this showing, then it is likely that the law burdens speech—not only the plaintiff's, but also the expression of any similarly affected third party. That burden, like any burden on protected speech, warrants constitutional scrutiny. This approach is particularly warranted in the chilled speech context because a plaintiff has standing to assert third parties' rights under the overbreadth doctrine. The standard that we propose would follow directly from the premise of the overbreadth doctrine and apply it more generally in free speech cases: if a reasonable person's speech would be chilled by a law, that should be sufficient for a claim under the First Amendment and the court should apply the appropriate level of scrutiny.[287]

Imposing an explicit objective standard as the initial showing of the merits inquiry in a chilled speech case will help ensure that such challenges are cabined once the standing inquiry is made more reliably relaxed. If a plaintiff alleges a subjective chill sufficient to establish all of the requirements of standing, but which is not reasonable under the circumstances, then the law is constitutional and the government need not even provide a sufficient interest to support the law's constitutionality.[288] Indeed, the government can prevail by convincing the court that the claim of chill is not reasonable.

The Court has occasionally imposed such an objective standard in chilled speech cases, but it has usually done so as a component of standing. The Court's decisions in *Laird*, *Clapper*, *Meese*, and *Susan B. Anthony List* all were directed toward requiring a plaintiff to prove an objective harm in order for the case to be deemed justiciable.[289] *Laird* and *Clapper* demand that a plaintiff show a "specific present objective harm or a threat of specific

286. It is familiar in constitutional law to have a test that includes both objective and subjective components. This, for example, is the approach to determining whether there is a privacy interest under the Fourth Amendment under *Katz v. United States*, 389 U.S. 347, 352 (1967).

287. As we explained in subpart I(A), the Court has often inquired into both subjective and objective chill. However, it has not clearly defined what the objective standard means, which has caused the Court to frequently misapply the standard. *See* Siegel, *Chilling Injuries*, *supra* note 11, at 916 ("*Laird v. Tatum* did not clarify the difference between objective and subjective chills, and the lower courts have not reached agreement on the meanings of these terms."). Our standard makes clear—contrary to cases like *Laird* and *Clapper*—that the objective prong asks whether a reasonable person would be chilled, and *not* whether the speaker faces some other threat of "objective" harm. *Laird* and *Clapper* do not ask the correct question and therefore are wrongly decided.

288. An objective standard benefits the analysis because although "merely accepting such assertions [of chill] at face value would allow anyone claiming a chilling effect to establish one." Daniel Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 155 (2007).

289. Laird v. Tatum, 408 U.S. 1, 13–14 (1972); Clapper v. Amnesty Int'l, 568 U.S. 398, 418 (2013); Meese v. Keene, 481 U.S. 465, 472 (1987); Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157–58 (2014).

future harm," and not merely that they subjectively felt their speech was chilled.[290] In *Meese*, the plaintiff proved the reasonableness of their chill—and thus "demonstrated more than a 'subjective chill'"—by submitting sworn statements that the plaintiff would suffer reputational harm as a result of the challenged law.[291] And in the threat-of-enforcement chill cases, like *Susan B. Anthony List*, the Court has imposed a reasonableness requirement by insisting that the plaintiff's fear of prosecution be "credible."[292]

We are suggesting that the Court import the objective standard it appeared to apply in justiciability analysis in these cases to the merits analysis of the First Amendment claim. But the Court must do so properly. The appropriate question is whether a reasonable person would be likely not to speak the chosen message under the same circumstances. The focus must remain on the chilling of *speech*, rather than being directed toward whether the plaintiffs will suffer some other harm, as in *Clapper*, where the Court instead focused on whether the plaintiffs' communications had actually been intercepted.[293]

Finally, the reasonable-person standard is potentially advantageous because it presents a familiar, relatively easily-tried factual question. Doctrines based on the reasonable-person standard are abundant, and courts have much experience trying reasonable-person questions.[294] At the pleading stage, the question is whether the plaintiff has plausibly alleged a reasonable likelihood of speech being chilled. At summary judgment, the question is whether there is a material dispute of fact as to the chilling effect of the government's action. And if the case goes to trial, it would be for the trier of fact to determine whether the plaintiff had proven that a reasonable person would be chilled from speaking. Although the reasonable-person standard, by definition, is indefinite and would leave much to the factfinder's discretion, it would still provide greater clarity than under the existing ad hoc approach to claims of chilled speech. The assumption must be that clearer legal rules will matter for individuals and entities in society, for those litigating, and for courts deciding First Amendment issues.

290. *Laird*, 408 U.S. at 14; *Clapper*, 568 U.S. at 418.

291. *Meese*, 481 U.S. at 473–74.

292. *Susan B. Anthony List*, 573 U.S. at 159; *see also* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2308 (2023) (requiring the plaintiff to show that a "credible threat" of state-compelled speech existed).

293. *Clapper*, 568 U.S. at 410.

294. *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (summary judgment); Ramirez v. Plough, Inc., 863 P.2d 167, 171–72 (Cal. 1993) (general standard for tort liability); Radtke v. Everett, 501 N.W.2d 155, 164 (Mich. 1993) (hostile work environment claim).

3. Constitutionality: Is the law nevertheless constitutional?—Once a plaintiff has shown that they suffer a subjective chill due to a government action that is objectively reasonable, an infringement is established. But that should not mean that the law is automatically unconstitutional. Rather, as we explained above, the government must have the opportunity to prove that, despite the infringement, the challenged law is nevertheless adequately tailored to a sufficient government interest.[295]

This already important part of the chilled speech inquiry takes on an added importance under our test. Because our standard focuses more directly on chill than the Court's current mismatched doctrine, more chilled speech claims will be justiciable and more will make it to the scrutiny step of the analysis. For example, in *Branzburg v. Hayes*, the Court, with little analysis, rejected the claim that reporters' First Amendment rights would be chilled by being compelled to reveal confidential information about their sources to a grand jury.[296] It should have engaged in this analysis. Under our test, the reporters would certainly have been able to demonstrate both standing and infringement based on chill. The government might have been able to justify the law under constitutional scrutiny, but the Court's analysis never got that far. And that's what the case should have turned on: did the government's interest in requiring that reporters disclose their sources justify the loss of speech due to chill induced from the compelled disclosure of sources?

Likewise, in *Meese*, the Court upheld a law that required some films to be labeled "political propaganda" without asking whether the law met constitutional scrutiny.[297] But the Court should have made that inquiry because the plaintiff had shown that the law burdened his speech because his "personal, political, and professional reputation would suffer" if his speech were labeled propaganda by the government.[298] If the Court had conducted the full analysis, it may well have struck down the law as impermissible compelled speech, as it did decades later in *NIFLA v. Becerra*,[299] in which the Court applied strict scrutiny to strike down a government-imposed disclosure that the Court thought chilled too much speech.[300]

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295. A court need not necessarily apply one of the recognized tiers of constitutional scrutiny. But the court should at least require an established test of constitutionality if a tier of scrutiny is inapplicable. *See, e.g.*, Pernell v. Fla. Bd. of Gov. of State Univ. Sys., 641 F. Supp. 3d 1218, 1268 (N.D. Fla. 2022) (applying the Eleventh Circuit's speech test under *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), in determining that a speech-restrictive law was overbroad and unconstitutionally vague). For more discussion of *Pernell*, see *infra* subpart IV(B).

296. Branzburg v. Hayes, 408 U.S. 665, 679–82, 695 (1972). *But see id.* at 741 n.29 (Stewart, J., dissenting) (arguing that the law did chill speech).

297. Meese v. Keene, 481 U.S. 465, 485 (1987).

298. *Meese*, 481 U.S. at 473.

299. 138 S. Ct. 2361 (2018).

300. *Id.* at 2371, 2378.

Although our three-part test would substantially change the law of chilled speech, most of our proposals are actually based on approaches taken by the Supreme Court in some cases. Many of the Court's decisions are entirely consistent with our approach, including *Americans for Prosperity Foundation*, which found standing and a constitutional violation based on an arguably reasonable chill, applied constitutional scrutiny, and granted facial relief. Many of the Court's election finance and disclosure cases are similar. Likewise, although the Court appeared to assume standing in *Arizona Free Enterprise Club* in declaring the Arizona campaign finance law unconstitutional and in *303 Creative* in finding it violated the First Amendment to apply a state anti-discrimination law to expressive activity, the conclusions in those cases about justiciability were consistent with our approach. The Court permitted a challenge based on the plaintiff's allegation that they subjectively felt chilled, which the Court evidently felt was reasonable enough to trigger First Amendment scrutiny.

In other contexts, however, the Court has asked the wrong question at some stage of the case. In *Laird* and *Clapper*, the Court failed to properly consider the plaintiffs' allegations of chill, even though the plaintiffs alleged subjective chill that should have been sufficient for standing (and which, in our view, was objectively reasonable). In *Meese*, the Court was right on standing—the disclosure law chilled speech, but wrong on the merits because the Court upheld the law without giving due weight to the burden on speech or the potentially limited government interest supporting it.

Overall, though, the central difference between our approach and the Supreme Court's is a desire to make facial challenges based on chill a much more accepted part of free speech analysis. No longer should successful facial claims be rare.

C. Using Chill to Influence First Amendment Doctrines

Finally, we argue that the Court has been correct to enhance First Amendment protections based on chilled speech concerns. As we explained in Part I, the Court has justified many aspects of free speech law—including protections against liability for defamation, true threats, and false political speech—by noting the need to prevent chilled speech.[301] Although we think the Court's invocation of chill in these contexts is commendable, we do not think it goes far enough. There are many contexts in which the Court should have taken chilled speech concerns far more seriously—even if the Court's consideration of chill would not have led to a different result. The risk of chill is simply too important to be overlooked or disregarded in the manner that the Court sometimes has. Consider a few examples.

301. *See supra* section I(B)(3).

1. Younger v. Harris.—It often is forgotten that *Younger v. Harris*[302]—a case more known for establishing a major abstention doctrine—involved a chilled speech claim.[303] The plaintiff was a member of the Progressive Labor Party who was indicted in state court for distributing leaflets alleged to violate the California Criminal Syndicalism Act.[304] The Act, which prohibited advocating the overthrow of the government or industrial organization by force or violence, was unquestionably unconstitutional. The Court had struck down a nearly identical law in *Brandenburg v. Ohio*[305] just two years prior.[306] In *Younger*, the plaintiff sought a federal court injunction against the state prosecution on the grounds that the California Act violated the First and Fourteenth Amendments. Subsequently, three other individuals intervened as plaintiffs claiming that the prosecution of David Harris inhibited their teaching and their political activities as members of the Progressive Labor Party. A three-judge federal court enjoined the Act on vagueness and overbreadth grounds.[307]

The Court reversed, holding that chilled speech could not be the basis for the relief ordered by the lower court. "It is undoubtedly true . . . that '[a] criminal prosecution under a statute regulating expression may inhibit the full exercise of First Amendment freedoms.' But this sort of 'chilling effect' . . . should not by itself justify federal intervention."[308] Justice Hugo Black, writing for the Court, declared:

> Moreover, the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action . . . . Just as the incidental "chilling effect" of such statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the important and necessary task of enforcing these laws against socially harmful

302. 401 U.S. 37 (1971).

303. *Id.* at 38–40. The Court articulated the abstention doctrine that federal courts cannot enjoin pending state court prosecutions. *Id.* at 40–41.

304. Transcript of Oral Argument at 13, Younger v. Harris, 401 U.S. 37 (1969) (No. 163). The plaintiff was protesting in the wake of the Watts riots. The leaflets said, in part: "Wanted for the murder of Leonard Deadwiler, Bobo the cop." *Id.* at 15. The state argued that the leaflets "advocat[ed] extermination of the police." *Id.* at 15–16.

305. 395 U.S. 444 (1969).

306. *Id.* at 449.

307. Harris v. Younger, 281 F. Supp. 507, 517 (1968).

308. *Younger*, 401 U.S. at 50 (citations omitted) (quoting Dombrowski v. Pfister, 380 U.S. 479, 486–87 (1965)).

> conduct that the State believes in good faith to be punishable under its laws and the Constitution.[309]

In a companion case, *Samuels v. Mackell*, the Court further expanded on *Younger* by holding that federal courts cannot declare state law unconstitutional when it is the basis for an ongoing prosecution in state court.[310]

Younger and *Samuels* are wrong in two respects. First, the Court should not have been so dismissive of the plaintiffs' reasonable chilled speech concerns. Although the Court might still have concluded that federal courts cannot enjoin pending state prosecutions, it should have at least recognized the importance of chill claims, rather than dismissing them as largely irrelevant.[311] Justice Black's majority opinion analogized to circumstances in which laws could be constitutional despite an "*incidental* 'chilling effect.'"[312] But the risk of chill in *Younger* was far more than incidental: The intervenors, who were not being prosecuted yet, reasonably claimed that their speech had been chilled based on the active prosecution against the plaintiff, a member of the same organization, who was engaged in similar speech in the same jurisdiction as the intervenors. At the very least, the Supreme Court should have heard the intervenors' claims of chilled speech because there was no pending state court prosecution against them.

But Justice Black waved away those very real chilled speech concerns by deriding the speech as "socially harmful conduct" and entirely disregarding the risk of chill.[313] There was no reason to give those substantial First Amendment concerns such short shrift.

Second, even if there is a sufficient interest in comity to justify federal court abstention from *enjoining* state prosecutions, that limitation should not

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309. *Id.* at 51–52. It is stunning that the Court could say that a California law that was all about preventing speech has only an "incidental chilling effect." The law undoubtedly chilled the future speech of the criminal defendant—who had actually been indicted for his speech—as well as the three intervenors, who also faced prosecution based on their similar speech.

310. Samuels v. Mackell, 401 U.S. 66, 73 (1971). The plaintiffs in that case were indicted in New York on charges of criminal anarchy and sought a declaratory judgment that the prosecutions were unconstitutional. *Id.* at 67.

311. Justice Black stated: "This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is a proper respect for state functions." *Younger*, 401 U.S. at 44–45. Justice Black explained that this idea could best be captured in the phrase "Our Federalism"—a belief that "the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." *Id.*

312. *Id.* at 51–52 (emphasis added).

313. *Id.* at 51–52. The *Younger* intervenors' speech had been chilled at least as much as the plaintiff in *303 Creative*. There, the Tenth Circuit found that the plaintiff has established a credible threat that the state may "force her to create speech she does not believe or endorse," pointing out that the state has a history of enforcing administrative complaints against "nearly identical conduct." 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (citing 303 Creative LLC v. Elenis, 6 F.4th 1160, 1172–75 (10th Cir. 2021)).

prevent courts from declaring speech-chilling laws unconstitutional on their face—at least when brought by a plaintiff not currently under prosecution.[314] In other words, we argue that the intervenors in *Younger* should have been able to bring their own challenge asserting that the Criminal Syndicalism Act was overbroad. Whatever the value of federal-state comity, a state's interest in its laws should not overcome non-defendants' interests in not having their speech unconstitutionally chilled because, as to nonparties to the prosecution, the state has no active interest in enforcement.[315] Declaratory relief can free nonparties to the prosecution from fear of chill without sacrificing the state's interest in enforcing its own laws.[316] Accordingly, *Younger* was wrongly decided because the courts should have bifurcated the litigation, at most staying Harris's lawsuit but declaring the law unconstitutional in adjudicating the intervenors' claim.

2. Garcetti v. Ceballos*.*—In *Garcetti v. Ceballos*,[317] the Court held that there is no First Amendment protection for the speech of government employees on the job in the scope of their duties.[318] Although the Supreme Court previously held that there is constitutional protection for the speech of

314. We acknowledge that this suggestion runs directly contrary to the view that state courts must be the ones to define the scope of state statutes. Fallon, Jr., *Making Sense*, *supra* note 3, at 861 (explaining that a fundamental premise of "constitutional federalism holds that state law is what the state courts say it is. Thus, whether a state statute actually is overbroad, whether it means what it seems to say or something less than that, is a state law question on which state courts have the last word."). However, it must be noted that in chill cases, the state court would not be tasked with interpreting the statute's actual meaning. Rather, the question is often whether the plaintiff's self-censorship is reasonable in light of the statute's *possible* meaning. *See* Schauer, *Unraveling*, *supra* note 1, at 692–93 (explaining that a chilling effect occurs not when the government directly proscribes conduct, but rather when conduct is deterred by regulation not specifically directed at the protected activity); *supra* Part II. A federal court interpreting that question would not intrude on the state's right to dictate its own laws.

315. In *Steffel v. Thompson*, 415 U.S. 452, 475 (1974), the Court expressly held that a plaintiff who is not being prosecuted in federal court may seek a declaratory judgment that a law is unconstitutional. This is consistent in some respects with Professor Henry Monaghan's persuasive argument that overbreadth is justified based on the premise that "a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law." Monaghan, *Overbreadth*, *supra* note 53, at 3; *see also* Fallon, Jr., *Making Sense*, *supra* note 3 at 871–75 (discussing Monaghan's theory).

316. Indeed, as we explained in the prior footnote, *Steffel v. Thompson* held that a person not being prosecuted in state court already can seek a declaratory judgment in federal court that a law is unconstitutional. 415 U.S. at 475. The law is thus clear, at the least, when there are no pending state court proceedings against a person, that individual should be able to obtain relief from the federal court.

317. 547 U.S. 410 (2006).

318. *Id.* at 421.

government employees,[319] it ruled against the plaintiff, Ceballos.[320] The Court found that Ceballos spoke as a "public employee" rather than as a "citizen" and that public-employee speech is categorically unprotected by the First Amendment.[321] Justice Kennedy wrote: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[322]

The Court's holding in *Garcetti* is certain to chill speech of government employees. As the dissent pointed out, under the Court's holding, a whistleblower who exposes wrongdoing in the workplace would have no protection at all from reprisals by their employer, even though whistleblowers' speech may greatly benefit the public.[323] Despite this argument in the dissent, the majority, strikingly, never even acknowledged the obvious risk of its holding chilling the speech of government employees.[324] The complete denial of First Amendment protection for speech on the job undoubtedly will chill whistleblowers from coming forward and other government employees from speaking.

Garcetti is at the least a failure of analysis, if not also a failure of result. It was a mistake for the Court to establish such a broad government-speech doctrine without giving any weight to the risk of chill. We recognized that the Court might have come to the same conclusion if it had addressed chill, perhaps due to the interest in preventing federal courts from becoming enmeshed in the workplace.[325] But the Court only should have come to this conclusion after recognizing the chilling effect of its ruling on important speech exposing government wrongdoing. And, if the Court had properly considered chill, it may have refrained from crafting such a bold, hardline rule that risks chilling so much societally valuable speech.

319. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 572–74 (1968) (government employee's speech is protected by the First Amendment if it involves a matter of public concern and does not unduly interfere with the functioning of the workplace).

320. *Garcetti*, 547 U.S. at 421.

321. *Id.* at 421–22.

322. *Id.* at 421.

323. *Id.* at 428, 439–41 (Souter, J., dissenting).

324. *Id.* at 424–25.

325. Justice Kennedy wrote that allowing such claims "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents." *Id.* at 423.

3. Holder v. Humanitarian Law Project.—In *Holder v. Humanitarian Law Project*,[326] the Court upheld a law without considering the very real chilled speech implications presented.[327] The plaintiffs, a mix of citizens and public interest organizations, challenged on vagueness and speech grounds the constitutionality of the federal law that prohibits providing support to designated terrorist organizations.[328] "Material assistance" is defined in the statute to include such activities as "training," "personnel," and "expert advice or assistance."[329]

Two groups of Americans brought a lawsuit seeking to establish First Amendment protection for their assistance for groups that had been designated by the Department of State as foreign terrorist organizations.[330] One group of Americans sought to help a Kurdish group, which sought to form a separate country, use international law and the United Nations to peacefully resolve disputes.[331] The other group of Americans sought to help a group in Sri Lanka, which also sought to form a separate nation, apply for humanitarian assistance.[332]

The Court, in a 6–3 decision, ruled that this speech could be constitutionally punished.[333] The plaintiffs argued that the law chilled their speech because it arguably applied to their activities providing "'training,' 'expert advice or assistance,' 'service,' and 'personnel'" to Kurdish and Tamil organizations that had been designated terrorist organizations by the Secretary of State.[334] But the Court in upholding the law appeared to consider only the substantive question whether the plaintiffs' speech was unconstitutionally restricted without giving any weight to the chilling effect that the law undeniably had as applied to the plaintiffs and others.[335] Although it might not have ultimately made a difference in its holding, the Court erred in failing to consider the very real risk of chill created by the statute.

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326. 561 U.S. 1 (2010).

327. *Id.* at 39 ("We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups, § 239B does not violate the freedom of speech.").

328. *Id.* at 8, 10.

329. *Id.* at 8–9 (quoting 18 U.S.C. § 239A(b)(1)).

330. *Id.* at 10–11.

331. *Id.* at 14–15.

332. *Id.* at 9–10.

333. *Id.* at 8, 40.

334. *Id.* at 14.

335. *See* Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 625 (2004) ("Many citizens and lawful residents are reluctant to engage in First Amendment conduct if that activity will result in an FBI file branding them as extremists or terrorists.").

These are just a few examples where the Court should have included consideration of chill in formulating legal doctrines. Simply put, as we argued in Part II, chill should be a crucial underlying concern when the government regulates speech and should be integral when fashioning First Amendment doctrines.

IV. Taking Chill Seriously: An Application

As we have argued, our approach would change current law by allowing chill to be a basis for standing in federal court, favoring facial challenges when there are First Amendment claims, prescribing a three-step approach when there are claims of chill, and having concern for chill influence the content of First Amendment doctrines. We conclude by applying this to matters that have not yet reached the Supreme Court—recent attempts by conservatives at the state and federal level to chill pro-diversity speech. In particular, state laws prohibiting the teaching of Critical Race Theory and Executive Orders by President Trump prohibiting DEI efforts.

A. Anti-Critical Race Theory Laws and Trump Executive Orders

Critical Race Theory began in law schools in the 1970s and then became part of other social science disciplines.[336] It focuses on the way white supremacy and racial power are maintained over time, especially by the legal system, and how race and racial oppression shape law and society. It seeks to end anti-Blackness and racism in society.

Critical Race Theory became a hot-button issue during President Donald Trump's first term. In September 2020, Trump ordered Russell Vought, the director of the White House Office of Management and Budget, to ban any training within the federal government related to Critical Race Theory.[337] Vought issued a memorandum saying that Critical Race Theory is "un-American propaganda" and "contrary to all we stand for as Americans and should have no place in the federal government."[338] He instructed the heads of federal agencies to dramatically alter racial sensitivity training programs for employees.[339]

Two days later, Trump issued an Executive Order on "Combating Race and Sex Stereotyping," which attacked what he called a "destructive ideology" that is "rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account

336. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 4, 7 (3d ed. 2017).

337. Memorandum from Russell Vought, Dir., Off. of Mgmt. & Budget, for Heads of Exec. Dep'ts & Agencies (Sep. 4, 2020).

338. *Id.*

339. *Id.*

of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans."[340] The executive order claimed that "[t]his malign ideology is now migrating from the fringes of American society and threatens to infect core institutions of our country."[341] Every federal agency was directed to implement the order, which prohibited federal government contractors from engaging in training programs that convey, among other things, that the United States is fundamentally racist or sexist.[342] Non-compliance would mean that the "contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts."[343]

The Executive Order immediately chilled speech. Universities, which depend on federal funds, quickly began changing their policies. For example, the University of Iowa, fearing a loss of federal research grants, ended training programs for university employees about race or sex discrimination.[344] Although it was possible that the executive order only applied to employees that receive money from the federal government, the university cut the training programs for all employees out of caution because

340. Exec. Order No. 13,950, Combating Race and Sex Stereotyping, 85 Fed. Reg. 60683 (Sep. 28, 2020).

341. *Id.* The executive order originated with Christopher Rufo, a fellow at the Manhattan Institute, a conservative think tank, who claimed that "profiteering race theorists" were teaching white federal employees that they contributed to racism. KEITH WHITTINGTON, YOU CAN'T TEACH THAT! THE BATTLE OVER UNIVERSITY CLASSROOMS 11 (2024). Rufo called on conservatives to "brace for a long war against the diversity-industrial complex and its enablers." *Id.* He attributed their ideas to critical race theory, which he described as "the academic discourse centered on the concepts of 'whiteness,' 'white fragility,' and 'white privilege,'" which had as its goal "a new, racial political consciousness." *Id.* at 12.

342. Exec. Order No. 13,950, Combating Race and Sex Stereotyping, 85 Fed. Reg. 60683, 60685 (Sep. 28, 2020). The full list of objectionable topics included: concepts that: (1) "one race or sex is inherently superior to another race or sex"; (2) "the United States is fundamentally racist or sexist"; (3) "an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously"; (4) "an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex"; (5) "members of one race or sex cannot and should not attempt to treat others without respect to race or sex"; (6) "an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex"; (8) "any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex"; or (9) "meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race." *Id.*

343. *Id.* at 60686.

344. Hailey Fuchs, *Trump Attack on Diversity Training Has a Quick and Chilling Effect*, N.-Y. TIMES (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/us/politics/trump-diversity-training-race.html [https://perma.cc/UG57-SQ4V].

the scope of the executive order was unclear.[345] Stanford University and other universities also prohibited some diversity trainings to avoid the possibility that the diversity trainings might contain speech that triggered financial consequences under the executive order.[346]

President Joe Biden rescinded Trump's executive order on his first day in office,[347] but twenty conservative states nevertheless quickly adopted state laws that are almost identical in content to Trump's executive order (which we refer to as "anti-CRT" laws).[348] Indeed, most simply copy the executive order's language.[349] For example, the Florida State Board of Education prohibited teachers from instruction as to critical race theory or content from the *New York Times*'s *1619 Project*.[350] Florida also subsequently enacted the "Stop W.O.K.E. Act," which prohibited training or teaching that people are

345. *See id.* ("In a statement, a spokeswoman said the university's general counsel suspected that the executive order may apply to all employees, not simply those who receive money from the federal government.").

346. Khari Johnson, *Stanford rushes to comply with Trump executive order limiting diversity training*, VENTUREBEAT (Nov. 17, 2020), https://venturebeat.com/ai/stanford-rushes-to-comply-with-trump-executive-order-limiting-diversity-training [https://perma.cc/Z6T3-KR8M] (explaining that Stanford "is facing backlash . . . for recently taking action to follow a Trump executive order that limits acknowledging the history of structural racism . . . despite the fact that the order is likely to be rescinded").

347. Exec. Order No. 13,985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009, 7012 (Jan. 25, 2021).

348. Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK (July 22, 2025), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06 [https://perma.cc/B274-7HRW]; *see, e.g.*, TENN. CODE ANN. § 49-7-1902 (West 2022) (explaining that Tennessee prohibits teachers to instruct that "an individual, by virtue of the individual's race or sex, is inherently privileged, racist, sexist, or oppressive, whether consciously or subconsciously"); N.D. CENT. CODE ANN § 15.1-21-05.1 (West 2025) (prohibiting instruction of "critical race theory," which is defined in the legislation as "the theory that racism is not merely the product of learned individual bias or prejudice, but that racism is systemically embedded in American society and the American legal system to facilitate racial inequality"); Protect Students First Act, 2022 Ga. Laws 719 (codified at O.C.G.A. § 20-1-11 (2022)) (prohibiting schools from teaching "divisive concepts," including that "[o]ne race is inherently superior to another race" and that "[t]he United States of America is fundamentally racist"). For a discussion of additional anti-CRT laws not mentioned here, see Dylan Salzman, Comment, *The Constitutionality of Orthodoxy: First Amendment Implications of Laws Restricting Critical Race Theory in Public Schools*, 89 U. CHI. L. REV. 1069, 1071–73 (2022).

349. Salzman, *supra* note 348, at 1071 ("Many of these regulations parrot the language from President Trump's executive order.").

350. Schwartz, *supra* note 348. The 1619 Project is a collection of materials prepared by journalist Nikole Hannah-Jones that reframes American history around the date when the first slave ship arrived on America's shores—August 1619. Nikole Hannah-Jones, *The 1619 Project: A New Origin Story*, N.Y. TIMES MAG., August 2019. Its powerful presentation of the role of slavery and race in American history earned it a Pulitzer Prize—though several prominent American historians have objected to factual errors that they considered to be inconsistent with honest scholarship and journalism. Jeff Barrus, *Nikole Hannah-Jones Wins Pulitzer Prize for 1619 Project*, PULITZER CENTER (May 4, 2020); *see* Jake Silverstein, *We Respond to the Historians Who Critiqued The 1619 Project*, N.Y. Times Mag. (Dec. 20, 2019); Leslie M. Harris, *I Helped Fact-Check the 1619 Project. The Times Ignored Me.*, POLITICO (Mar. 6. 2020).

privileged or oppressed on account of race or sex,[351] and HB 1557 (commonly known as the "Don't Say Gay" bill), which has the express purpose of "prohibiting classroom discussion about sexual orientation or gender identity in certain grade levels or in a specified manner."[352] Anti-CRT laws all apply to elementary and high schools, and about 40% apply to colleges and universities as well.[353]

President Trump has redoubled his attacks on diversity in his second term. Immediately after his inauguration in 2025, President Trump issued a series of Executive Orders to prohibit diversity, equity, and inclusion ("DEI") efforts. For example, on his first day back in office, President Trump issued Executive Order 14151—entitled, "Ending Radical and Wasteful Government DEI Programs and Preferencing"—which mandates the termination of "discriminatory programs," including all DEI initiatives (mandates, policies, programs, preferences, etc.) adopted by the federal government.[354] The next day he issued Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," which mandates that "[t]he Director of the Office of Management and Budget . . . shall: . . . (iii) Terminate all 'diversity,' 'equity,' 'equitable decision-making,' 'equitable deployment of financial and technical assistance,' 'advancing equity,' and like mandates, requirements, programs, or activities, as appropriate."[355] Several other Trump Executive Orders also seek to eliminate DEI initiatives.[356]

These Executive Orders, to a large extent, are directed at speech. They are explicit in seeking to eliminate trainings and advocacy that focus on advancing diversity, equity, and inclusion. Also, the Trump administration directed federal agencies, including the National Science Foundation (NSF) and the National Institutes of Health (NIH), to review and potentially

351. Stop W.O.K.E. Act, 2022 Fla. Laws 72 (amending Fla. Stat. §§ 760.10, 1000.05, 1003.42, 1006.31, 1012.98, 1002.20, 1006.40).

352. Parental Rights in Education Act, 2022 Fla. Laws 22 (amending Fla. Stat § 1001.42).

353. *See, e.g.*, 2021 Idaho Sess. Laws 293 (codified at Idaho Code § 1-33-138).

354. Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 20, 2025).

355. Exec. Order No. 14,173, 90 Fed. Reg. 8633, 8634 (Jan. 21, 2025).

356. *See, e.g.*, Exec. Order No. 14,148, 90 Fed. Reg. 8237 (Jan. 20, 2025) (facilitating the termination of DEI policies and practices in the federal government by revoking many executive orders from the Biden Administration); Memorandum on Keeping Americans Safe in Aviation, 90 Fed. Reg. 8651 (Jan. 21, 2025) (ordering the Secretary of Transportation and the FAA to "immediately return to non-discriminatory, merit-based hiring" and to rescind all "DEI initiatives"). After his election, Donald Trump said that he would cut funding for schools that teach Critical Race Theory. Alyson Klein, *Can Trump Force Schools to Change Their Curricula?*, EDUC. WEEK (Nov. 14, 2024), https://www.edweek.org/policy-politics/can-trump-force-schools-to-change-their-curricula/2024/11 [https://perma.cc/RTT3-2P5M].

terminate research grants based on certain keywords.[357] Targeted words included "diversity," "equity," "inclusion," "minority," "marginalized," "underserved," "sense of belonging," "gender," "transgender," "trans," "cisgender," "nonbinary," "assigned male at birth," "assigned female at birth," "biologically male," and "biologically female."[358] In other words, grants were explicitly targeted based on the language used by the grant-writer, almost certainly chilling that speech (and research) going forward.

B. Applying the Proposed Three-Part Test

The anti-CRT state laws and Trump anti-DEI Executive Orders—which we think raise fundamentally the same chilled-speech issues—should be declared facially unconstitutional under the three-part test we proposed in Part III.

1. Standing: Do anti-CRT laws and Executive Orders chill speech?— Under our test, the plaintiff must establish standing by plausibly alleging that they would engage in certain speech but for a particular government action. Indeed, many teachers have alleged that their speech was chilled by anti-CRT laws,[359] although the Stop W.O.K.E. Act permits classroom discussion of divisive concepts so long as "instruction is given in an objective manner without endorsement of the concepts."[360] The difficulty of maintaining whatever the state believes to be an "objective" tone in discussions regarding race and gender encourages teachers to self-censor.[361] Under these laws, it is even possible that

357. Zach Montague, *Trump's Cuts to N.I.H. Grants Focused on Minority Groups Are Illegal, Judge Rules*, N.Y. TIMES (June 16, 2025), https://www.nytimes.com/2025/06/16/us/politics/trump-nih-grants-cut.html [https://perma.cc/RKT7-V3C4].

358. Karen Yourish, Annie Daniel, Saurabh Data, Isaac White and Lazaro Gamio, *These Words Are Disappearing in the New Trump Administration*, N.Y. Times (March 7, 2025), https://www.nytimes.com/interactive/2025/03/07/us/trump-federal-agencies-websites-words-dei.html [https://perma.cc/7ZSZ-YGA7].

359. *See* Salzman, *supra* note 348, at 1072 ("Teachers and administrators struggle to discern what exactly the laws restrict, forcing them to alter teaching strategies. School authorities have banned books such as A Raisin in the Sun, Their Eyes Were Watching God, and Narrative of the Life of Frederick Douglass from core curricula."). Following passage of Florida's Stop W.O.K.E. Act, a group of students and educators filed a lawsuit arguing that the act violated both the First Amendment and the Equal Protection Clause. Pernell v. Lamb, No. 4:22CV304-MW/MAF, 2023 WL 2347487, at *1 (N.D. Fla. Feb. 22, 2023), *rev'd and remanded sub nom*., Pernell v. Fla. Bd. of Governors of State Univ., 84 F.4th 1339 (11th Cir. 2023); *see also, e.g.*, Christine Hauser, *Texas Principal in Spotlight over Race Issues Agrees to Resign with Paid Leave*, N.Y. TIMES (Nov. 10, 2021).

360. Stop W.O.K.E. Act, 2022 Fla. Laws 72 (amending Fla. Stat. §§ 760.10, 1000.05, 1003.42, 1006.31, 1012.98, 1002.20, 1006.40).

361. If teachers fear that their speech could be seen as an "endorsement" of a divisive view, faculty members facing punishment would reasonably avoid such topics. Much of what is routinely explored in history, philosophy, sociology, political science, classics, psychology, art or many other

students could hear arguments against affirmative action or reparations for slavery, but not arguments on the other side, because of the possibility that such arguments might veer into discussing structural prejudices. Much of the history of political thought, or of civil rights, or of the position of women in many societies throughout history could not be fully taught, criticized, or fairly debated.

Teachers therefore should have standing to challenge these laws based on the allegation that their speech has been chilled. For example, teachers and schools can show that books that previously would have been assigned in school curricula, such as *A Raisin in the Sun* and *Narrative of the Life of Frederick Douglass*, have been removed for fear of running afoul of an anti-CRT law.[362] This satisfies our inquiry for chilled-speech standing because it shows particular expression (the books) that the teachers and schools would communicate but for a particular government action (the anti-CRT laws). And students should have standing based on the allegation that their right to receive information is being restricted.[363]

The same analysis as to the anti-CRT legislation applies with regard to the Trump Executive Orders. None of the Executive Orders attempt to define the diversity-related language they hope to chill.[364] Rather, President Trump

areas (not to mention ethnic studies and gender studies) would be altered or even omitted for fear of liability. *Cf.* Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 835 (1995) (noting that the danger of chilling free expression "is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition").

362. Salzman, *supra* note 348, at 1072. Although the Supreme Court has held that there is no First Amendment protection for the speech of government employees on the job in the scope of their employment, Garcetti v. Ceballos, 547 U.S. 410, 426 (2006), the fact that teachers face firing for violating these laws should be a basis for an injury sufficient to meet Article III. Even under *Garcetti*, individuals who face punishment should be able to challenge a law on vagueness grounds. Moreover, as the Ninth Circuit held in Demers v. Austin, 746 F.3d 402 (9th Cir. 2014), *Garcetti* should not apply when there is the exercise of academic freedom. Whether the First Amendment applies to the teachers' speech in light of *Garcetti* is discussed below. *See infra* note 369 and accompanying text.

363. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (the Court recognized a right to receive information for students in schools); *see* Pernell v. Fla. Bd. of Governors of the State Univ. Sys., 641 F. Supp. 3d 1218, 1230, 1244 (N.D. Fla. 2022) (finding that student plaintiffs challenging the Stop W.O.K.E. Act had a right to receive information that was coextensive with professors' right to teach that information); Salzman, *supra* note 348, at 1079 (discussing students' rights to receive information in school); Dylan Saul, Note, *School Curricula and Silenced Speech: A Constitutional Challenge to Critical Race Theory Bans*, 107 MINN. L. REV. 1311, 1316, 1342 (2023) (discussing the right to receive information being violated by state anti-CRT laws).

364. *See generally* Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 29, 2025); Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 31, 2025).

fired a broad shot at as much DEI speech as he could reach.[365] Indeed, as described above, it was the very use of these words that was deemed objectionable.[366] There is nothing intrinsically objectionable of desiring diversity, treating people equitably, and wanting all to be included. The goal of pursuing diversity, equity, and inclusion violates no law and is unassailable; it is the means used that might violate the law. But the Trump Executive Orders do not delineate what actions are permissible and which are impermissible.

The lack of clarity as to what is prohibited and what is allowed has clearly chilled speech. Many colleges and universities have eliminated programs rather than face uncertain consequences.[367] Many companies have done so as well.[368]

Quite correctly, a number of federal courts have found standing to challenge the Trump Executive Orders based on their chilling effect on speech.[369] In *Chicago Women in Trade v. Trump*,[370] the plaintiffs alleged "that it faces pressure to self-censor in response to the Orders, which supports the proposition that there is a chilling effect on grantees."[371] The federal district court, like many others, properly found that this was sufficient for standing to challenge the Trump anti-DEI Executive Orders.

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365. *See* Exec. Order No. 14,151 at 8339 (terminating DEI positions, all equity initiatives, and all DEI performance requirements); Exec. Order No. 14,173 at 8633–35 (terminating DEI in the federal government, educational agencies receiving federal funds, and in the private sector through litigation).

366. Exec. Order No. 14,173 at 8634 ("[E]xcise references to DEI and DEIA principles, under whatever name they may appear.").

367. *See generally* Erin Gretzinger, Maggie Hicks, Christa Dutton, Jasper Smith, Sonel Cutler, and Aisha Baiocchi, *Tracking Higher Ed's Dismantling of DEI*, THE CHRONICLE OF HIGHER EDUCATION (June 20, 2025), https://www.chronicle.com/article/tracking-higher-eds-dismantling-of-dei [https://perma.cc/LV95-QQYP] (detailing programs that have been eliminated).

368. *See generally* Connor Murray & Molly Bohannon, *IBM Reportedly Walks Back Diversity Policies, Citing 'Inherent Tensions': Here Are All the Companies Rolling Back DEI Programs*, FORBES (Apr. 11, 2025, 11:27 AM EDT), https://www.forbes.com/sites/conormurray/2025/04/11/ibm-reportedly-walks-back-diversity-policies-citing-inherent-tensions-here-are-all-the-companies-rolling-back-dei-programs/ [https://perma.cc/VE3R-MPCN] (detailing programs that have been eliminated).

369. *See, e.g.*, Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243, 258, 269 (D. Md. 2025) ("These are all concrete actual injuries suffered by Plaintiffs and their members. Moreover, the injuries are directly traceable to the Orders. It is also likely that Plaintiffs' injuries will be redressed by a favorable decision. Therefore, all four Plaintiffs have standing to challenge the Termination Clause."); San Francisco Unified Sch. Dist. v. AmeriCorps, No. 25-cv-02425-EMC, 2025 WL 1713360, at *10 (N.D. Cal. 2025) (finding Plaintiffs had made an adequate showing that they would likely suffer irreparable harm absent preliminary relief.); Chi. Women in Trades v. Trump, 778 F. Supp. 3d 959, 972, 984, 994 (N.D. Ill. 2025) (finding standing to challenge recission of DEI programs).

370. 778 F. Supp. 3d 959 (N.D. Ill. 2025).

371. *Id.* at 978.

2. Infringement: Would a reasonable person's speech be chilled by anti-CRT laws and the Trump Executive Orders?—To establish a constitutional violation, the teachers or students would next need to prove that a reasonable person's speech would be chilled by the anti-CRT laws. Under the circumstances, we think courts should have little difficulty in finding that a reasonable teacher's speech would be chilled by these laws and that therefore students' right to receive information would be compromised as well.

The anti-CRT laws have provisions that are vague.[372] All of these laws, starting with the Trump Executive Order in 2020, prohibit teaching that "the United States is fundamentally racist or sexist."[373] No teacher can know what instruction about the history of racism and sexism in the United States would run afoul of this provision. A federal district court accordingly found that President Trump's anti-DEI Executive Order was "so vague that it is impossible for Plaintiffs to determine what conduct is prohibited" and that "the line between teaching or implying (prohibited) and informing (not prohibited) 'is so murky, enforcement of the ordinance poses a danger of arbitrary and discriminatory application.'"[374]

Indiana enacted a law that requires faculty to teach "intellectual diversity" as a condition of employment, tenure, or promotion.[375] But it is not clear what "intellectual diversity" entails. The text of the statute—which merely states that "'[i]ntellectual diversity' means multiple, divergent, and varied scholarly perspectives on a range of public policy issues"—leaves more questions than answers.[376] Would a professor teaching about civil rights have to offer a defense of Jim Crow laws and slavery?[377] What about conspiracy theories? Would a professor teaching about the Holocaust have to teach a Holocaust-denial viewpoint? On the extreme end, it's not even clear that facts are safe: Does Indiana's law mean that a math teacher has to teach diverse viewpoints about the value of π? The law provides no guidance, leaving it up to teachers to guess—with their livelihoods on the line—what

372. *See* Salzman, *supra* note 348, at 1072 (stating teachers struggle to interpret anti-CRT laws).

373. Exec. Order No. 13,950, 85 Fed. Reg. 60683, 60685 (Sep. 28, 2020).

374. Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 543–44 (N.D. Cal. 2020) (quoting Hunt v. City of Los Angeles, 638 F.3d 703, 712 (9th Cir. 2011)).

375. Ind. Sen. Enrolled Act No. 202 § 11 (2024) (codified at IND. CODE 21-39.5-2).

376. *Id.*

377. Ironically, instruction under Indiana's law would be illegal under many other states' anti-CRT laws and Trump's executive order. While the Indiana law requires professors to teach many viewpoints (though offers little guidance as to what viewpoints that may be), other states, like Arizona and North Dakota, as well as the executive order, explicitly *prohibit* instruction of certain viewpoints, including ones recognizing structural racism. Salzman, *supra* note 348 at 1072. Even as to those state laws, though, it is unclear what teachers must do: How does one know when a purely factual discussion of slavery or Jim Crow in Southern states—undeniably forms of structural racism in America—reaches the point of unlawfully recognizing structural racism in America?

the legislature meant.[378] Under the Indiana law, instructors, even tenured professors, could be fired for violations.

Teachers are likely to be chilled precisely because they face very serious consequences for violating these state laws. Matthew Hawn, a high school teacher in Tennessee, was fired for teaching about "white privilege" in violation of that state's law.[379] A hearing officer upheld Hawn's firing, saying that he failed to provide students "varying viewpoints" on the existence of white privilege during a lesson on police brutality against Black men.[380]

Faced with the prospect of losing their jobs, many faculty will self-censor. It would certainly be reasonable to do so. As the Supreme Court has recognized, when an individual faces a vague law with severe consequences, self-censorship naturally results.[381] Anti-CRT laws put faculty in the unenviable position of needing to guess which viewpoints are acceptable to the state and which are not. The safest choice for faculty to make in this context is to err far on the side of caution, even at the expense of accuracy, pedagogy, and free speech. A court would therefore be on strong ground to conclude that anti-CRT laws would chill a reasonable teacher's speech. Indeed, some courts have done exactly this.[382]

The same vagueness problems exist with regard to the Trump DEI Executive Orders. As explained above, they do not define DEI and reasonable individuals thus are being chilled in their speech, eliminating programs that are protected by the First Amendment. As the federal district court concluded in *San Francisco A.I.D.S. Foundation v. Trump*:[383]

> [T]he Court finds that the Equity Termination Provision *is* likely to compel speakers to "steer too far clear of [a] 'forbidden area'" of protected speech and activity . . . . "[T]his lack of clarity may operate

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378. Ryan Quinn, *Indiana Governor Signs Bill Tying Tenure to 'Intellectual Diversity*,*'* INSIDE HIGHER EDUC. (Mar. 14, 2024), https://www.insidehighered.com/news/quick-takes/2024/03/14/gov-signs-bill-tying-tenure-intellectual-diversity [https://perma.cc/MZY8-9JZ5]. Little guidance is also provided because the Indiana law leaves it to the university's trustees, many of whom are appointed by the governor, to determine what intellectual diversity actually means for faculty members and to determine whether it has been provided. *Id.*

379. Hannah Natanson, *A White Teacher Taught White Students About White Privilege. It Cost Him His Job*, WASH. POST (Dec. 6, 2021), https://www.washingtonpost.com/education/2021/12/06/tennessee-teacher-fired-critical-race-theory/ [https://perma.cc/2FN4-T2LK].

380. Eesha Pendharkar, *Teacher Fired for Lesson on White Privilege Loses Appeal*, EDUC. WEEK (Oct. 26, 2021), https://www.edweek.org/teaching-learning/teacher-fired-for-lesson-on-white-privilege-loses-appeal/2021/10 [https://perma.cc/97WK-XRYR].

381. In *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952)—one of the first Supreme Court cases to ever expressly discuss the concept of chill—the Court struck down a requirement for loyalty oaths for teachers. Justice Frankfurter observed their "unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." *Id.* at 195 (Frankfurter, J., concurring).

382. *See, e.g.*, Pernell v. Fla. Bd. of Gov. of State Univ. Sys., 641 F. Supp. 3d 1218, 1281–86 (N.D. Fla. 2022) (holding the Stop W.O.K.E. Act unconstitutionally vague).

383. 2025 WL 1621636 (N.D. Cal. 2025) (1998).

> to inhibit the exercise of freedom of expression because individuals will not know whether the ordinance allows their conduct, and may choose not to exercise their rights for fear of being . . . punished."[384]

3. Constitutionality: Can the government prove that prohibitions of critical race theory and the Trump executive orders nevertheless survive constitutional scrutiny?—As we have explained, many courts' analysis would end with the finding that the vague anti-CRT laws and the executive orders chill speech.[385] Under our test, though, the government should have the opportunity to show that the laws are constitutional despite the infringement of academic speech.[386]

Unlike for many categories of speech, it is not clear what First Amendment inquiry governs the anti-CRT analysis in the university-speech context. Most simply, the test likely would be strict scrutiny because anti-CRT laws are content-based restrictions on speech.[387] Under strict scrutiny, the laws would almost certainly fail because the state would find it impossible to show that the speech-chilling effects of the law, vague and overbroad as they are, are tailored as narrowly as possible.

It is possible that instead courts might analyze these laws based on forum analysis, perhaps using the test for limited public forums that sometimes has appeared in cases about schools.[388] But this requires that the government's restriction on speech be viewpoint neutral, and laws prohibiting the teaching of CRT are very clearly viewpoint based.[389]

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384. *Id.* at *21–22 (citation omitted) (first quoting Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998); then quoting Hunt v. City of Los Angeles, 638 F.3d 703, 713 (9th Cir. 2011)).

385. Zacharias, *supra* note 10, at 947 ("Courts that have reached the point of assessing the government's accommodation of state interests have also failed to balance fully[, focusing] . . . on either the degree to which a regulation furthers the governmental interest or . . . to which it affects first amendment rights. [Courts rarely consider] the factors in combination.").

386. In the challenge to Florida's Stop W.O.K.E. Act, the district court appropriately chose to apply the Eleventh Circuit's balancing test for evaluating university speech restrictions under Bishop v. Aronov. *Pernell*, 641 F. Supp. 3d at 1268–69 (citing *Bishop*, 926 F.2d 1066, 1074 (11th Cir. 1991)). The court, however, appeared to only apply that framework to the direct-infringement challenge. *Pernell*, 641 F. Supp. 3d at 1277–78. In our view, the court should also have been required to inquire whether the government had an adequate interest in the vague and overbroad anti-CRT law.

387. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (describing how content-based restrictions fail).

388. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993) (citing Cornelius v. NAACP Legal Def. and Educ. Fund, 473 U.S. 788, 806 (1985)) (detailing the test for limited public forums).

389. As discussed above, see *supra* note 304 and accompanying text, the state likely will argue that under Garcetti v. Ceballos, there is no First Amendment protection for teachers' speech on the job. But the Court in *Garcetti* explicitly declined to extend its decision "to a case involving speech related to scholarship or teaching." Garcetti v. Ceballos, 547 U.S. 410, 425 (2006). The Ninth

Thus, most anti-CRT laws would have little hope of survival under any of these tests. Although the state may have a significant interest in regulating curricula, it rarely (if ever) has a strong interest in imposing substantial penalties tied to vague, plainly speech-restrictive, content-based laws that chill expression.

So, under our analysis, the anti-CRT laws should be struck down on their face.

The state is unlikely to show an overriding reason to overcome the presumption in favor of facial relief that we suggest should be applied to speech-chilling laws. The anti-CRT laws affect a huge universe of school personnel and students at many educational levels. They infringe not only the individual rights of the professors, but also the students' right to hear certain perspectives and, consequently, the overall culture of academic freedom on campus.[390] As-applied relief, carving away at such speech-chilling statutes, would be insufficient to solve the problem because it would leave the laws in place and much speech still likely to be chilled.

The same is true as to the Trump executive orders prohibiting DEI initiatives. The orders directly infringe some speech. But they also will chill much diversity speech and they are not at all narrowly tailored. For the most part, it's far from clear what is prohibited and what is allowed. Indeed, many federal district courts thus have found that the chilling effects of the executive orders violate the First Amendment, including on chilled-speech grounds.[391] For example, in *National Association of Diversity Officers in Higher*

Circuit has recognized that the *Pickering* balancing test, not *Garcetti*, applies to university employee speech. *See* Demers v. Austin, 746 F.3d 402, 406 (9th Cir. 2014). Under Pickering v. Board of Education, a court weighs a plaintiff's interest in speaking to a matter of public concern against an employer's interest in restricting that speech. 391 U.S. 563, 568 (1968). Under *Pickering*, many anti-CRT restrictions would likely fail because the teachers and students are often speaking to matters of public concern—discussions of race, gender, history, and politics in the United States—and the teachers' and students' interest in pedagogy outweighs the state's interest in chilling speech through vague viewpoint- and content-restrictive speech limitations enforced with severe penalties. At the very least, even if the teachers' First Amendment rights are not cognizable because of Garcetti v. Ceballos, the students have a First Amendment claim based on their right to receive information.

390. Pernell v. Fla. Bd. of Gov. of State Univ. Sys., 641 F. Supp. 3d 1218, 1290-91 (N.D. Fla. 2022).

391. Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243, 285–86 (D. Md. 2025); Doe v. Officer of the Dir. of Nat'l Intel., 2025 WL 637444 (E.D. Va. 2025); Nat'l Urb. League v. Trump, 2025 WL 1275613 (D.D.C. 2025); S.F. AIDS Found. v. Trump, 2025 WL 1621636, *22, 27 (N.D. Cal. 2025) (granting a preliminary injunction against an executive order on the potential for irreparable harm under the first amendment); Am. Ass'n of Colls. for Tchr. Educ. v. Carter, 2025 WL 1110834 (D. Md. 2025); State of California v. U.S. Dep't of Educ., No. 10548 (D. Mass. filed Mar. 6, 2025); Am. Pub. Health Ass'n v. Nat'l Insts. of Health, 2025 WL 1548611 (D. Mass. 2025); Erie County, New York. v. Corp. and Nat'l Cmty. Serv., No. 00783 (D.D.C. 2025); New York v. Trump, 2025 WL 715621 (D.R.I. 2025); Chi. Women in Trades v. Trump, 778 F. Supp. 3d 959, 985 (2025).

Education v. Trump,[392] the federal district court issued a preliminary injunction and held that the Trump Executive Orders with regard to DEI as applied to colleges and universities were facially unconstitutional on the grounds that they were vague and would chill speech, as well as being viewpoint discrimination in violation of the First Amendment.[393]

Conclusion

There is perhaps no area of First Amendment law more ubiquitous, or more confusing, than the law of chilled speech. Lawyers frequently invoke it and courts at all levels base decisions on it. Yet, although chill is a very familiar concept, it is one that has not received the careful analysis that it deserves. Doing so has profound implications for the First Amendment. That is what we have tried to show in this Article.

In sum, we have suggested a complete overhaul of the law of chilled speech, rebuilding from the ground up—but mostly using parts that already appear in the Supreme Court's caselaw. First, we propose that because of the uniquely important communal interest in preventing chilled speech, facial relief should be the presumptive remedy once chilled speech has been proven. Second, the Court should establish a clear test for chilled speech, under which a plaintiff establishes standing by alleging a subjective chill, and infringement by showing that a reasonable person would be chilled, which gives the government an opportunity to nevertheless demonstrate constitutionality. Third, there are several contexts in which the Court has at times been too dismissive of chilled speech concerns; it should be taken more into account in fashioning First Amendment doctrines. Taken together, these changes in the law would expand the protection for expression and better fulfill the fundamental purposes of the First Amendment.

However, as we have explained, there are guardrails all along the way to enable courts to ensure that chilled speech claims are not won based merely on suspicion. For example, our proposal regarding standing is limited to the standard for an injury-in-fact, leaving the law unchanged related to redressability, causation, and motions to dismiss for failure to state a claim. As to constitutionality, although we argue that a court should presume that facial relief is appropriate if a law would chill a reasonable person's speech, the government should still have the opportunity to demonstrate some overriding reason why facial relief should not be ordered.

Ultimately, we urge courts to take claims of chilled speech seriously and offer a way for them to do so.

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392. 767 F. Supp. 3d 243 (D. Md. 2025).

393. *Id.* at 284–86.