A SMART Approach to First Amendment Line Drawing?
Free Speech Restrictions in Nonpublic Forums

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I. INTRODUCTION

Despite the deceptively absolutist language of the First Amendment, the Court has struggled with inevitable line-drawing problems. The Free Speech Clause primarily restricts the government from regulating speech in public places—traditionally spaces open to public debate[1]—but grants it more leeway in nonpublic forums.[2] In *American Freedom Defense Initiative v. Suburban Mobility Authority* (hereinafter "*SMART 2020*"), the Sixth Circuit ruled that Michigan's Suburban Mobility Authority for Regional Transportation (SMART) violated the First Amendment by adhering to guidelines restricting buses from allowing ads that were "political" or promoted "scorn or ridicule."[3] *SMART 2020* underlines the disjointedness of First Amendment jurisprudence and compels us to develop a more unified theory of the First Amendment.

The *SMART 2020* decision involves two First Amendment questions: whether public transit bus advertising space qualifies as a public or nonpublic forum; and whether SMART's ban on ads that are "political" or hold a certain group up to "scorn or ridicule" is permissible. Earlier in the *SMART* case (hereinafter "*SMART 2012*"), the Sixth Circuit found the advertising space on SMART's buses constituted a nonpublic forum and the restrictions on advertising were likely reasonable and viewpoint neutral.[4] Two recent Supreme Court cases have provided additional guidance on free speech restrictions in nonpublic forums. In *Minn. Voters All. v. Mansky* (2018), the Court ruled that speech restrictions in nonpublic forums must be reasonable and viewpoint

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[1] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939); Schneider v. State of New Jersey, 308 U.S. 147, 162.

[2] Adderley v. Florida, 385 U.S. 39 (1966); Greer v. Spock, 424 U.S. 828 (1976); Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

[3] American Freedom Def. Initiative v. Suburban Mobility Auth., No. 19-311, slip op. at 11–19 (6th Cir. Oct. 23, 2020).

[4] American Freedom Def. Initiative v. Suburban Mobility Auth., 698 F.3d 885, 890–96 (6th Cir. 2012), *rev'd*, No. 19-311 (6th Cir. Oct. 23, 2020).

neutral.[5] In *Matal v. Tam* (2017), it held that a standard is not viewpoint neutral if it allows positive depictions of a topic but bans negative depictions.[6] The *Mansky* and *Matal* decisions compelled the Sixth Circuit to reverse its earlier ruling rejecting the First Amendment challenge to the SMART restrictions.[7]

SMART 2020 provides broader protection for free speech in nonpublic forums by clarifying the requirements for reasonableness and viewpoint neutrality. But it also raises the question of how to distinguish protected and unprotected speech. Because judicial doctrine does not offer a satisfactory answer, we must devise a unified First Amendment theory that reflects constitutional ideals and outlines an analytical framework for line-drawing problems. A strong approach to defining First Amendment theory involves balancing individual rights with social benefits.[8] The First Amendment will not draw a line in the sand for us; ultimately we must develop a theory of free speech that does not subordinate social benefits to absolutist individual rights.

II. *SMART 2012* DECISION AND REVERSAL

The American Freedom Defense Initiative (AFDI) brought suit against SMART in 2010, claiming SMART had violated the First Amendment by refusing to display an ad in violation of its advertising guidelines.[9] The ad read: "Fatwa on your head? Is your family or community threatening you? Leaving Islam? Got questions? Get answers!"[10] It also included a link to RefugeFromIslam.com.[11] SMART claimed the ad was political because the word "fatwa" evoked sharia law and the linked website contained anti-Islamic commentary.[12] It also worried that the ad would hold people of the Islamic faith up to "scorn and ridicule" by implying they might threaten family members who tried to leave the religion.[13]

The Court first questioned whether advertising space on public buses is a public or a nonpublic forum, which determines what level of scrutiny to apply. The government may not regulate the content of speech in designated public forums unless it can satisfy strict scrutiny.[14] In nonpublic forums, it must only show that any restrictions are reasonable[15] and viewpoint neutral.[16] In *SMART 2012*, the Sixth Circuit found the advertising space on SMART's city buses was

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[5] Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018).

[6] Matal v. Tam, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment).

[7] *Suburban Mobility 2020*, *supra* note 3, at 2–3.

[8] Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. Ill. L. Rev. 1015, 1018.

[9] *Suburban Mobility 2012*, *supra* note 4, at 888.

[10] *Id.* at 888.

[11] *Id.*

[12] *Id.* at 894.

[13] *Id.* at 889.

[14] *Mansky*, *supra* note 5, at 1885.

[15] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 807–08 (1985).

[16] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–30 (1995).

a nonpublic forum because its policy and practice demonstrated intent to create such a forum and its restrictions were intended to raise revenue.[17] In 2020, the Sixth Circuit "lean[ed] toward viewing SMART's advertising space as a nonpublic forum," notably because "SMART's formal policies bar political and political-campaign ads, a limit incompatible with an intent to create a public forum."[18] The Court discussed factors indicating whether the advertising space was a public or a nonpublic forum, but it ultimately declined to resolve the question[19] because SMART's advertising guidelines failed even the more forgiving nonpublic forum review.[20]

The 2020 Court changed course on the reasonableness and viewpoint-neutrality standards.[21] In 2012, the Sixth Circuit found SMART's advertising guidelines reasonable because SMART needed to restrict political ads to increase ad revenue and avoid offending a captive audience.[22] Moreover, it held that the determination of what constitutes "political" content was a "reasonably objective exercise."[23] The 2020 Court disagreed on both counts. Relying on *Mansky* and *Matal*, the Sixth Circuit reversed, concluding that SMART's ban on "political" ads is not reasonable and its ban on ads engaging in "scorn or ridicule" is not viewpoint neutral.

A free speech restriction in a nonpublic forum is reasonable if "the proposed conduct would 'actually interfere' with the forum's stated purpose,"[24] and a forum may ban political advertisements if the restriction aims to limit controversial content to increase revenue.[25] A rule must be clear enough that "a person of ordinary intelligence [could] readily identify the applicable standard for inclusion and exclusion."[26] Although a restriction cannot leave the line-drawing exercise to the unchecked discretion of a government official, it may involve some exercise of discretion. [27] In *SMART 2012*, the Sixth Circuit held the restriction on political ads in SMART's advertising guidelines was

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[17] *Suburban Mobility 2012*, *supra* note 4, at 890–92.

[18] *Suburban Mobility 2020*, *supra* note 3, at 12.

[19] Because SMART's guidelines failed even the most forgiving standard, the Sixth Circuit declined to specify what type of forum SMART created with its advertising space. The Supreme Court, however, offered guidance on the issue when it noted that the advertising space on a bus, unlike the license plate of a car, is a context "traditionally available for private speech." Walker v. Tex. Div., Sons of Confederate Veterans, 576 U.S. 200, 218 (2015) (citing Lehman v. City of Shaker *Heights*, 418 U.S. 298, 94 (1974)).

[20] *Suburban Mobility 2020*, *supra* note 5, at 12–13.

[21] *Id.* at 2–3.

[22] *Suburban Mobility 2012*, *supra* note 6, at 892.

[23] *Id.* at 894.

[24] United Food & Commercial Workers Union v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341, 358 (6th Cir. 1998) (quoting Air Line Pilots Ass'n v. Dep't of Aviation, 45 F.3d 1144, 1159 (7th Cir. 1995)).

[25] Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974).

[26] *United Food*, *supra* note 28, at 358–59.

[27] Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969).

reasonable because it provided guidance for distinguishing permissible and impermissible ads and required a minimal exercise of discretion.[28]

The Supreme Court's clarification of the reasonableness standard compelled the Sixth Circuit to reconsider. *Mansky* addressed a Minnesota law that banned voters from wearing "political" apparel at polling places, which are nonpublic forums.[29] The Court approved of the law's goal of keeping partisan discord out of polling locations.[30] At issue was the lack of a clear definition of the word "political," which effectively banned apparel mentioning groups with political views or issues on which a political candidate had taken a stance.[31] This ambiguous definition had confusing implications; a shirt with the text of the Second Amendment would be banned for "political" content because it invoked the divisive issue of gun rights, but a shirt with the text of the First Amendment would be acceptable.[32] Yet surely the First Amendment is firmly enshrined in the realm of politics. The Court concluded the "political" ban could not be applied objectively and states "must employ a more discernible approach."[33]

On reconsideration, the Sixth Circuit finds that SMART's similarly opaque definition of "political" ads is impermissible. Like the Supreme Court in *Mansky*, the Sixth Circuit had no qualms with the goals of SMART's advertising restrictions, but took issue with the "unmoored use of the term 'political'"[34] resulting in "an amorphous ban on political speech that cannot be objectively applied."[35] SMART's ban led to inconsistent results. SMART rejected the "fatwa" ad for its anti-Islamic sentiment, just as it once rejected a pro-life ad that listed websites discouraging abortion.[36] But SMART accepted an atheist ad promoting separation of church and state, which SMART conceded was a political topic.[37] The Sixth Circuit rejected SMART's "made-for-litigation" definition of "political"—"any advocacy of a position of any politicized issue"––as vague, unworkable, and susceptible to the same "haphazard interpretation" that *Mansky* found unacceptable.[38] SMART failed to articulate a "more discernible approach" to defining political speech, and the ban was constitutionally invalid.[39]

Even a reasonable restriction on free speech cannot prohibit certain viewpoints on topics it allows.[40] In *SMART 2012*, AFDI argued that SMART's

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[28] *Suburban Mobility 2012*, *supra* note 6, at 892–894.
[29] *Mansky*, *supra* note 7, at 1885–88.
[30] *Id.*
[31] *Id.* at 1888–91.
[32] *Id.*
[33] *Id.*
[34] *Mansky*, *supra* note 7, at 1888.
[35] *Suburban Mobility 2020*, *supra* note 5, at 494–98.
[36] *Id.* at 495.
[37] *Id.*
[38] *Id.* (quoting *Mansky*, *supra* note 7, at 1888).
[39] *Id.* at 497.
[40] *Rosenberger*, *supra* note 19, at 829–30.

"scorn or ridicule" ban was impermissible because it forbade anti-Islamic ads but would permit a pro-Islamic (or neutral) ad.[41] The Sixth Circuit disagreed, claiming that the banned content was the debate about sharia law in the United States, not Islam itself, and either side would be impermissibly political.[42] Because the Court saw the restriction as reasonable and viewpoint neutral, the ban was permissible.

Matal indicates that the Sixth Circuit was wrong to treat SMART's "scorn or ridicule" ban as viewpoint neutral. The Supreme Court is skeptical vis-à-vis viewpoint discrimination, which it describes as an "egregious form of content discrimination,"[43] because it suggests "official suppression of ideas" by the government.[44] Such suppression is precisely the evil the First Amendment addresses: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." [45] The Supreme Court recognizes that because many issues beget a multitude of viewpoints, it is important to define viewpoint discrimination broadly.[46]

Matal concerned an Asian-American rock group called "The Slants" that chose its name to reclaim the derogatory term.[47] When the band tried to trademark its name, the Patent and Trademark Office (PTO) denied the application as a violation of a Lanham Act provision barring federal trademark registration for marks that would disparage "any persons, living or dead."[48] While the ban could "evenhandedly prohibit disparagement of all groups," the Court concluded that it discriminated on the basis of viewpoint.[49]

Like the anti-disparagement provision in *Matal*, the "scorn or ridicule" ban in SMART's advertising guidelines is a violation of the First Amendment.[50] Both restrictions discriminate based on viewpoint by facially discriminating between ideas that promote a group or topic and ideas that disparage it.[51] The Ninth Circuit adopted the same approach in 2018 when it ruled that a public transit agency violated an anti-Muslim group's First Amendment rights by refusing to run bus ads featuring names and headshots of sixteen purported terrorists.[52] *Matal* was also the crucial point of analysis for the Ninth Circuit,

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[41] *Suburban Mobility 2012*, *supra* note 6, at 894.

[42] *Id.* at 895.

[43] *Rosenberger*, *supra* note 19, at 829–30.

[44] R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992).

[45] *Suburban Mobility 2020*, supra note 5, at 498–99 (quoting Texas v. Johnson, 491 U.S. 397 (1989)).

[46] *See Rosenberger*, *supra* note 16, at 830–31; *R.A.V.*, *supra* note 44, at 388; *Matal*, *supra* note 6, at 1763.

[47] *Matal*, *supra* note 6, at 1747.

[48] *Id.* (citing 15 U.S.C. §1052(a)).

[49] *Id.* at 1763.

[50] *Suburban Mobility 2020*, *supra* note 3, at 500.

[51] *Id.*

[52] American Freedom Def. Initiative v. King County, 904 F.3d 1126, 1130–33 (9th Cir. 2018).

which ruled that the transit agency's restriction on ads that demean or disparage was viewpoint discrimination.[53]

SMART 2020 underlines the importance of the clarifications on free speech restrictions laid out in *Mansky* and *Matal*. The Supreme Court's staunch protection of free speech tracks with the First Amendment's literal and figurative primacy in American governance and culture. Americans love freedom of speech, even when we do not fully understand its complex legal implications. "We are eager to rest on free speech claims and, where they do not exist, to make them. With a reliability approaching that of the laws of physics, we may set it down that whenever the First Amendment can be invoked, it will be invoked."[54] This knee-jerk invocation of freedom of speech underscores the importance of drawing a clear line between protected and unprotected speech.

III. ALIGNING SMART WITH DIFFERENT THEORIES OF FREE SPEECH

Freedom of speech is inherently a line-drawing exercise. Although the First Amendment lays out freedom of speech in absolute terms, the Supreme Court has explicitly rejected an absolutist view of the First Amendment.[55] Virtually all Supreme Court Justices take the view that there are some restrictions to free speech,[56] such as perjury laws, obscenity laws, and shouting fire in a crowded theater.[57] Because freedom of speech is not an absolute, First Amendment philosophy must guide courts in their determination of what speech is protected. No single philosophy encompasses the full scope of the First Amendment—and no philosophy is without its critics. Four philosophies outline the goals of the First Amendment: promoting self-governance, discovering truth, allowing self-expression, and encouraging tolerance.[58]

Americans guard the right to free speech jealously even when it fails to support any of these goals, leaving its purpose unclear. Beyond the goal of allowing free government criticism, even the framers' intent is uncertain.[59] First Amendment judicial opinions never seem to cohere to a unified purpose because the purpose is either unarticulated, contradicted, or morally dubious. A synthetic

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[53] *Id.*

[54] Leslie Kendrick, *How Much Does Speech Matter?*, 129 Harv. L. Rev. 997, 997 (2016) (reviewing SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW (2014)).

[55] Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961).

[56] Justice Hugo Black took an absolutist approach to the First Amendment in 1960, when he wrote: "The phrase 'Congress shall make no law' is composed of plain words, easily understood. The language is absolute. . . . [T]he Framers themselves did this balancing when they wrote the [First Amendment]. . . . Courts have neither the right nor the power to make a different judgment." Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 879 (1960). Justice William O. Douglas sometimes joined his colleague in this absolutist approach. *Konigsberg*, *supra* note 63, at 56 (Black, J., dissenting, joined by Douglas, J.).

[57] Schenck v. United States, 249 U.S. 47, 52 (1919).

[58] *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[59] RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1–18. (1994).

theory of free speech based on individual rights would preserve the First Amendment's goals and avoid complicating an already disjointed patchwork of jurisprudence. *SMART 2020* illustrates this point; the ad at issue offers no legitimate government criticism, no ideas bending toward truth. The autonomy it advances comes at the expense of others' sense of safety, and if it seeks to promote tolerance, it has yet to fulfill that promise.

Freedom of speech arose to promote open discussion of politics and allow citizens to voice their concerns, hold public officials accountable, make informed political decisions, and criticize the government.[60] Though the Supreme Court has never said the First Amendment *only* protects political speech,[61] it has stated that the ability to criticize the government is "the central meaning of the First Amendment."[62] Both in its history and its judicial interpretation, the First Amendment protects the right to political speech: the right to speak freely about the government. Based on this understanding of the term "political," SMART's rejected fatwa ad is not political speech, because surely a criticism of sharia law is not a criticism of the United States government, which is decidedly not an Islamic institution. The speech in the ad is constitutionally protected, but it clearly does not serve the goal of educating the public about political choices or criticizing the United States government. Nor is it wise to publish loaded religious rhetoric on a public transit bus, where any layperson might understand that speech to be sponsored or at least tolerated by the government—for the latter, they would be correct.

But "the fitting remedy for evil counsels is good ones."[63] Truth does not tend to spring from a pure source, but rather to distill over time from a clash of contradictory ideas. The marketplace of ideas approach is based on this logic: "the 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."[64] The battle between evil ideas and truth is often lengthy and can cause irrevocable harm. "In the long run, true ideas do tend to drive out false ones. The problem is that the short run may be very long, that one short run follows hard upon another, and that we may become overwhelmed by the inexhaustible supply of freshly minted, often very seductive, false ideas."[65] The alternative to free speech requires government intervention, which many argue would quickly lead to abuse of that authority.[66] We must draw the line between these extremes.

Although the "scorn and ridicule" ban is unconstitutional, it had a worthy goal: preventing its ads from causing suffering to individuals or groups. Anti-

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[60] *See* ZECHARIAH CHAFFEE, JR., FREE SPEECH IN THE UNITED STATES 21 (1941).
[61] Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).
[62] New York Times v. Sullivan, 376 U.S. 254, 273 (1964).
[63] *Whitney*, *supra* note 66, at 375.
[64] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[65] Harry Wellington, *On Freedom of Expression*, 88 Yale. L.J. 1105, 1130–32 (1979).
[66] *See* MELVILLE NIMMER, NIMMER ON FREE SPEECH 1–12 (1984).

Islamic sentiment and violence is strong in America,[67] and if the fatwa ad does not directly incite violence, it does nothing to mitigate that danger. Publishing a pro-Islamic ad in retaliation would likely inflame existing tensions, not promote heathy debate. Germany bans displays of Nazi symbols, and the legality of that practice in the United States does little to serve our democratic ideals. Because there is no central, unifying theory for the First Amendment, we must impose our own purpose and philosophy.

Some First Amendment scholars argue that freedom of speech is crucial to individual autonomy[68] and "a spirit that demands self-expression."[69] Yet we limit self-expression when it threatens the autonomy of others, as with obscenity laws, and many have used similar logic to argue that pornography and hate speech should not receive First Amendment protection.[70] The same rationale might apply to rhetoric, like the fatwa ad, that targets a particular group.

The final argument for free speech is that it promotes tolerance by exposing individuals to ideas that they might not otherwise encounter.[71] First Amendment doctrine here encounters the tolerance paradox, which asserts that unlimited tolerance leads to the disappearance of tolerance. "[I]f we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them. . . . We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant."[72] Tolerance is a noble goal, but it, like free speech, must have limits to be meaningful.

Free speech must legitimize government by furthering individual interests, rather than protecting one at the expense of the other.[73] *SMART 2020* is a correct interpretation of the law with a morally dubious result: hateful religious rhetoric forced upon unsuspecting commuters on public transit. There is a disconnect between our laws and our morals, our reflexive protection of free speech with little regard to social consequences. *SMART 2020* is morally shocking because

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[67] Shortly before the 2016 presidential election, the *New York Times* reported that hate crimes against American Muslims (and those perceived as Muslims because of their skin tone or style of dress) were at their highest levels since the aftermath of the 2001 terror attacks. According to numerous experts in hate crimes and some of the attackers themselves, anti-Islamic rhetoric from then-candidate Donald Trump was an important motivating force for these attacks. Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, N.Y. TIMES (Sept. 17, 2016), https://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html.

[68] *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 994 (1978).

[69] Procunier v. Martinez, 416 U.S. 396 (1974) (Marshall, J., concurring).

[70] CATHARINE MACKINNON, FEMINISM UNMODIFIED 146–213 (1987); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982).

[71] Tolerance theory dates back to 1859, when British philosopher John Stuart Mill wrote that individual freedom needed protection from government tyranny, censorship, and paternalism. *See generally* JOHN STUART MILL, ON LIBERTY (1859).

[72] KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 581 (1945).

[73] *Free Speech Constitutionalism*, *supra* note 8, at 1043.

an anti-Islamic ad in modern-day America is far more likely to sow hatred and prejudice than to spark honest and productive debate. The law should explicitly balance the value of individual speech against its likely social consequences. Anti-Islamic speech is not self-expression, but an attack on others' self-expression that directly limits that right. The Court protects this speech even though it does little to advance any First Amendment goals. A strict reading of the First Amendment does not serve democratic goals or help create a freer country. It restricts freedom by allowing evil counsels free reign to bulldoze individuals' right to safety.

Free speech in America is expansive, sprawling; Americans are proud of this fact. The idea of free speech restrictions is anathema to many Americans because First Amendment rights have come to represent freedom writ large. "It can seem as though there's no principled way out of this conundrum: if you equate democracy with the proliferation of free speech, then how can you, in good conscience, restrict it?"[74] But in the wake of the 2020 election, with its pervasive "fake news" and interminable (but necessary) fact-checking, Americans are coming around to the idea of imposing restrictions on free speech.[75] The law must reflect, embody, and respond to Americans' changing values and concerns, including those regarding the lofty ideal of free speech. Luckily, the first step is not to restrict free speech, but to define its boundaries.

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[74] Astra Taylor, *The Future of Democracy: The Right to Listen*, THE NEW YORKER (Jan. 27, 2020), https://www.newyorker.com/news/the-future-of-democracy/the-right-to-listen.

[75] Joshua Eferighe, *Why Americans Are Rethinking Free Speech*, OZY (Nov. 2, 2020), https://www.ozy.com/news-and-politics/why-americans-are-rethinking-free-speech/396971/.