FIRST AMENDMENT — SPEAKER-BASED DISTINCTIONS — NINTH CIRCUIT UPHOLDS PRELIMINARY INJUNCTION BARRING ENFORCEMENT OF CALIFORNIA REQUIREMENT THAT SEX OFFENDERS PROVIDE NOTICE OF INTERNET IDENTIFIERS AND SERVICE PROVIDERS TO LAW ENFORCEMENT. — *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014).

In November 2012, more than ten million Californians voted to enact Proposition 35, the Californians Against Sexual Exploitation (CASE) Act.[1] This ballot initiative, the most popular in the state's history, set forth a number of measures intended to combat human trafficking.[2] Most notably, the law required that all registered sex offenders provide law enforcement with written notice, within twenty-four hours, of any additions or changes to their "Internet identifiers" — email addresses, usernames, and the like — or Internet service providers.[3] Recently, in *Doe v. Harris*,[4] the Ninth Circuit upheld a preliminary injunction barring enforcement of the provisions of the CASE Act related to Internet use by sex offenders who have completed their terms of probation and parole,[5] finding that these measures were likely to fail intermediate First Amendment scrutiny.[6] Yet the Supreme Court's growing skepticism of laws that apply to particular classes of speakers suggests that the Ninth Circuit could have adopted a higher level of scrutiny when reviewing the CASE Act. Such a decision would have served to shore up First Amendment protections for those who need them most: uniquely unpopular and politically powerless groups.

The CASE Act was billed as an attempt to "combat human trafficking and exploitation."[7] It proposed a variety of measures to achieve this goal, including a requirement that registered sex offenders provide a list of "any and all Internet identifiers [that they had] established or used,"[8] including email addresses, usernames, screen names,

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[1] Yonatan Moskowitz, Legislative Note: State of California, *Not in My Digital Backyard: Proposition 35 and California's Sex Offender Username Registry*, 24 STAN. L. & POL'Y REV. 571, 571 (2013).

[2] *About*, CASEACT.ORG, http://www.caseact.org/about (last visited Mar. 29, 2015) [http://perma.cc/QD3Q-88H6].

[3] *Id.*; *see also* CAL. PENAL CODE § 290.014(b) (West 2014); Doe v. Harris, 772 F.3d 563, 567–69 (9th Cir. 2014).

[4] 772 F.3d 563.

[5] The Ninth Circuit agreed with the trial court, which noted that sex offenders who have "completed their terms of probation or parole" are provided "the full protection of the First Amendment." Doe v. Harris, No. C12-5713, 2013 WL 144048, at *3 (N.D. Cal. Jan. 11, 2013); *see also Doe*, 772 F.3d at 570.

[6] *Doe*, 772 F.3d at 570.

[7] *About*, *supra* note 2.

[8] *Doe*, 772 F.3d at 568 (quoting CAL. PENAL CODE § 290.015(a)(4)).

and "similar identifier[s],"[9] as well as "any and all [of their] Internet service providers."[10] Any additions or changes to these lists would have to be reported, via written notice, to law enforcement within twenty-four hours,[11] and violation of these provisions would be punishable by up to three years in prison.[12] On the day that the Act was intended to take effect, two individual plaintiffs[13] and the nonprofit group California Reform Sex Offender Laws, representing a "class of registered sex offenders who regularly use the Internet to advocate anonymously on behalf of sex offenders,"[14] filed suit, alleging that the Act's Internet-use measures violated the offenders' First Amendment rights to free speech and free association and were void for vagueness pursuant to the Fourteenth Amendment.[15]

The district court issued an order granting plaintiffs' request for a preliminary injunction, finding that they were likely to succeed on the merits of their free speech claim.[16] The court dismissed plaintiffs' argument that strict scrutiny was warranted in light of the fact that the CASE Act discriminated against a class of speakers, noting that this level of scrutiny was required only when "speaker-based laws . . . reflect the Government's preference for the substance of what the favored speakers have to say."[17] The court next concluded that the CASE Act was content neutral and, as such, intermediate scrutiny was warranted.[18] Even after adopting several narrowing con-

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[9] *Id.* at 569 (quoting CAL. PENAL CODE § 290.024(b)).

[10] *Id.* at 568 (quoting CAL. PENAL CODE § 290.015(a)(5)). The other measures proposed by the CASE Act, as summarized by the bill's proponents, included increased penalties for human traffickers, mandatory human trafficking training for law enforcement, registration of all human traffickers as sex offenders, protection for victims in court proceedings, and the removal of the need to prove force to prosecute child sex traffickers. *See About*, *supra* note 2.

[11] *See Doe*, 772 F.3d at 568.

[12] CAL. PENAL CODE § 290.018(b); *see also* Doe v. Harris, No. C12-5713, 2013 WL 144048, at *9 (N.D. Cal. Jan. 11, 2013).

[13] The district court granted plaintiffs' motion to bring this suit anonymously. *Doe*, 2013 WL 144048, at *1 n.2.

[14] *Doe*, 772 F.3d at 569.

[15] *Doe*, 2013 WL 144048, at *1. The district court initially granted plaintiffs a temporary restraining order pending review of their request for a preliminary injunction. *See id.* at *2. The official proponents of Proposition 35, Chris Kelly and Daphne Phung, intervened in this action. *Id.*; *see also Doe,* 772 F.3d at 569; Moskowitz, *supra* note 1, at 572.

[16] *See Doe*, 2013 WL 144048, at *1, *3. In light of this finding, the court elected not to examine plaintiffs' additional claims. *Id.* at *3.

[17] *Id.* at *4 (omission in original) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994)) (internal quotation mark omitted).

[18] *Id.* ("Here, the Act reflects no such preference and operates without regard to the message that any registrant's speech conveys."). Intermediate First Amendment scrutiny requires that a law be "narrowly tailored to serve the government's legitimate, content-neutral interests." *Id.* (quoting Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 947 (9th Cir. 2011) (en banc)) (internal quotation mark omitted).

structions,[19] the court found that, while the CASE Act may advance a "legitimate government interest," namely combating online sex offenses and human trafficking, it was not narrowly tailored.[20] The court thus concluded that the CASE Act's Internet-use provisions "create[d] too great a chilling effect to pass constitutional muster."[21] As such, the court held that a preliminary injunction was appropriate in this case.[22]

The Ninth Circuit affirmed. Writing for a unanimous panel, Judge Bybee[23] first noted that "sex offenders who have completed their terms of probation and parole," such as the plaintiffs in this case, are entitled to the full protection of the First Amendment.[24] Turning next to the question of whether the CASE Act implicates the First Amendment,[25] Judge Bybee argued that, while the Act does not prohibit speech, its notification requirement burdened sex offenders "precisely when they are engaged in one activity — communicating through the Internet."[26] These provisions thus constituted a burden on speech that was subject to First Amendment scrutiny.[27] Judge Bybee drew further support for this conclusion from both the CASE Act's "inevitable effect" on "sex offenders' ability to engage in anonymous online speech"[28] and the tradition of subjecting "speaker regulations — such as disclosure requirements — to First Amendment scrutiny."[29]

Judge Bybee next addressed the level of scrutiny appropriate in this case.[30] Finding that the CASE Act makes "no reference to specific

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19 The court noted that "[b]efore determining whether a challenged provision violates the First Amendment, a court must first construe the provision." *Id.* Further, it "may impose a limiting construction only if a provision is, on its face, 'readily susceptible' to such a construction." *Id.* (quoting Reno v. ACLU, 521 U.S. 844, 884 (1997)). The court adopted narrowing constructions with respect to the CASE Act's definition of "Internet service providers" and "Internet identifiers." *Id.* Specifically, the court construed the Act to require that sex offenders report only the Internet service providers with which they have an account, rather than those they may simply use. *Id.* at *5. Similarly, the court construed "Internet identifier" to refer only to those identifiers used to engage in "interactive communication with others." *Id.*

20 *Id.* at *6–8. This finding was supported by the court's skepticism regarding the utility of applying these requirements to all 75,000 of California's registered sex offenders and the measures' broad application to all websites. *Id.* at *9–10.

21 *Id.* at *11.

22 In reaching this determination, the court also examined whether plaintiffs were "likely to suffer irreparable harm in the absence of an injunction" and could demonstrate that the public interest and balance of equities weighed in their favor. *Id.* The court found plaintiffs had succeeded in establishing all of these factors. *See id.*

23 Judge Bybee was joined by Judge Schroeder and Senior District Judge Timlin, sitting by designation.

24 *Doe*, 722 F.3d at 572.

25 *Id.*

26 *Id.*

27 *See id.* at 572–73.

28 *Id.* at 574 (emphasis omitted).

29 *Id.*

30 *See id.*

subject matters or viewpoints,"[31] he concluded that the Act is "content neutral" and thus subject to intermediate First Amendment scrutiny.[32] "[M]ore difficult," Judge Bybee opined, was the question of whether the CASE Act warranted a higher level of scrutiny because its Internet-use provisions constituted a speaker-based restriction.[33] Judge Bybee considered the possibility that the Court's statement in *Citizens United v. FEC*[34] that the First Amendment bars "restrictions distinguishing among different speakers; allowing speech by some but not others"[35] suggested that the CASE Act should be subject to strict scrutiny.[36] Judge Bybee acknowledged that the CASE Act, like the law at issue in *Citizens United*, creates a speaker-based distinction by "singl[ing] out registered sex offenders as a category of speakers."[37] However, he found that *Citizens United* was distinguishable from the instant case due to the fact that the CASE Act neither "target[s] political speech content" nor constitutes "a ban on speech."[38] Thus, the relevant inquiry was whether the CASE Act's restrictions can be "*justified* without reference to the content of the regulated speech."[39] Arguing that the Act's purpose was not to favor any particular viewpoint or subject matter but rather to combat human trafficking and sexual exploitation, Judge Bybee again concluded that intermediate scrutiny was warranted.[40]

Judge Bybee then found that the Internet-use provisions of the CASE Act were likely to fail intermediate First Amendment scrutiny.

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[31] *Id.*

[32] *Id.* at 575–76.

[33] *Id.*

[34] 130 S. Ct. 876 (2010).

[35] *Id.* at 898.

[36] *Doe*, 722 F.3d at 575.

[37] *Id.* (citing *Citizens United*, 130 S. Ct. at 898). The law at issue in *Citizens United* banned corporations from making certain types of expenditures related to political elections. *See Citizens United*, 130 S. Ct. at 886–87.

[38] *Doe*, 722 F.3d at 575.

[39] *Id.* (quoting Boos v. Barry, 485 U.S. 312, 320 (1988)) (internal quotation mark omitted). For example, Judge Bybee analogized the CASE Act to the regulation at issue in *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994), which required cable television systems to permit local broadcast television stations to use some of their channels, thereby distinguishing between over-the-air broadcasters and cable programmers and operators, to the detriment of the latter. *See Doe*, 722 F.3d at 575. As the law at issue in *Turner* was determined to be content neutral and distinguished between speakers "based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry," the *Turner* Court did not subject it to strict scrutiny. *Turner*, 512 U.S. at 645; *see also Doe*, 722 F.3d at 575–76.

[40] *See Doe*, 722 F.3d at 576. Judge Bybee is not alone in this determination. A number of courts examining similar prohibitions on sex offenders' online speech have found that these statutes should be subjected to intermediate scrutiny. *See, e.g.*, Doe v. Prosecutor, 705 F.3d 694, 698 (7th Cir. 2013); Doe v. Shurtleff, 628 F.3d 1217, 1223 (10th Cir. 2010); Doe v. Nebraska, 898 F. Supp. 2d. 1086, 1093, 1107–08 (D. Neb. 2012); White v. Baker, 696 F. Supp. 2d 1289, 1307–08 (N.D. Ga. 2010).

While the Act was clearly intended to further a legitimate governmental interest — combating sexual exploitation[41] — it nonetheless unnecessarily chilled speech protected by the First Amendment.[42] In particular, the court found that three aspects of the law could unnecessarily deter "sex offenders from engaging in legitimate expressive activity": the significant ambiguity regarding the information sex offenders were required to report, the absence of adequate constraints on law enforcement's ability to disclose sex offenders' Internet identifiers to the public, and the short timeframe in which sex offenders were required to report any changes to their Internet identifiers.[43] Judge Bybee thus held that a preliminary injunction was appropriate in this case.[44]

Doe v. Harris has been rightly heralded as an important stepping stone in establishing constitutional safeguards for anonymous Internet speech.[45] However, the Ninth Circuit passed over an opportunity to strengthen the First Amendment protections provided to unpopular and politically powerless speakers by electing not to expand upon the Supreme Court's growing skepticism of speaker-based restrictions — evinced in *Citizens United* and *Sorrell v. IMS Health Inc.*[46] — and apply a heightened level of scrutiny in this case. These decisions suggest a growing aversion to certain speaker-based restrictions, the exact contours of which remain unclear. Yet there is good reason to believe that this nascent doctrine could and should be extended to protect not only the interests of corporations[47] but also politically powerless and unpopular individuals, such as the plaintiffs in this case.[48] Regulations like the CASE Act, which restrict the speech of disfavored speakers, not only inherently raise the possibility that the government may have attempted to burden these individuals' speech for improper purposes,

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41 *Doe*, 772 F.3d at 577.

42 *Id.* at 577–78.

43 *Id.* at 582; *see id.* at 578–82.

44 *See id.* at 583. He reached this determination after finding that the additional requirements for granting a preliminary injunction — that plaintiffs were "likely to suffer irreparable injury in the absence of a preliminary injunction, and that the balance of equities and the public interest tip in [their] favor" — were met. *Id.* at 582 (quoting Thalheimer v. City of San Diego, 645 F.3d 1109, 1128 (9th Cir. 2011)).

45 *See, e.g.*, David Post, *Convicted Sex Offenders, Jehovah's Witnesses, and the First Amendment*, WASH. POST: VOLOKH CONSPIRACY (Nov. 19, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/19/convicted-sex-offenders-jehovahs-witnesses-and-the-first-amendment [http://perma.cc/R6DT-TAVK].

46 131 S. Ct. 2653 (2011).

47 This term is intended here to refer not only to the corporations afforded broad protections in *Citizens United* but also to the pharmaceutical marketers and manufacturers who benefited from the Court's ruling in *Sorrell*.

48 This comment is not the first to suggest that scrutiny of speaker-based restrictions in *Citizens United* and *Sorrell* should be extended to other contexts. *See, e.g.*, Zoran Tasic, Note, *The Speaker the Court Forgot: Re-evaluating NLRA Section 8(b)(4)(B)'s Secondary Boycott Restrictions in Light of* Citizens United *and* Sorrell, 90 WASH. U. L. REV. 237 (2012).

but also may have a uniquely harmful effect on both the targeted speakers and the broader "marketplace of ideas" protected by the First Amendment.

For decades, the organizing principle underlying the Supreme Court's approach to determining the level of First Amendment scrutiny when evaluating a regulation or statute has been whether the law at issue is content neutral or content based.[49] Yet as the Ninth Circuit's opinion in *Doe* acknowledges,[50] in recent years the Supreme Court appears to have begun to recognize a separate inquiry when evaluating the level of scrutiny for First Amendment analysis: whether the law in question explicitly creates a speaker-based distinction. Two cases in particular, *Citizens United* and *Sorrell*, appear to have played a key role in establishing this principle. In *Citizens United*, the Court explicitly rejected "restrictions distinguishing among different speakers, allowing speech by some but not others,"[51] when examining a law that barred corporations from making independent expenditures for speech that constituted "electioneering communications" or expressly advocated for the election or defeat of a candidate.[52] Similarly, in *Sorrell* the fact that a law imposed a "content- and *speaker-based*"[53] burden on commercial speech[54] appears to have strongly influenced the Court's decision to apply "heightened judicial scrutiny" to a regulation that prohibited pharmaceutical marketers and manufacturers from using pharmacy records that reveal doctors' prescribing practices for marketing purposes.[55]

While the contours of this emerging doctrine remain unclear, the notion that the Supreme Court has begun to pay closer attention to, and require a greater level of scrutiny for, speaker-based laws has been gaining traction amongst scholars.[56] Professor Michael Kagan in par-

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[49] *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1348 (2006).

[50] *See Doe*, 772 F.3d at 575 (turning to a discussion of whether or not the CASE Act impermissibly imposed speaker-based restrictions *after* concluding that the Act was content neutral).

[51] Citizens United v. FEC, 130 S. Ct. 876, 898 (2010).

[52] *See id.* at 897.

[53] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667 (2011) (emphasis added).

[54] Commercial speech can be defined as "speech of any form that advertises a product or service for profit or for business purpose" and has traditionally received comparatively less protection than other forms of speech under the First Amendment. 2 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 8.18 (2d ed. 2014) (quoting RONALD D. ROTUNDA & JOHN E. NOWAK, 5 TREATISE ON CONSTITUTIONAL LAW § 20.26 (2014)) (internal quotation marks omitted).

[55] *Sorrell*, 131 S. Ct. at 2666. The Court specifically noted that the statute at issue "disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers." *Id.* at 2663.

[56] *See* Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. (forthcoming 2015); *see also* Charlotte Garden, Citizens United *and the First Amendment of Labor Law*, 43 STETSON L. REV. 571, 586–87 (2014) (noting that *Citizens United* stands

ticular has championed this view, arguing that speaker-based distinctions should be understood as a "new pillar of free speech law."[57] Thus, while it may well be premature to suggest that any and all laws targeting specific speakers should be subject to a greater degree of scrutiny — as Judge Bybee correctly noted, many laws currently embrace such distinctions[58] — the Ninth Circuit could have drawn more heavily upon the Court's growing skepticism of speaker-based laws when evaluating the CASE Act.

Moreover, if there is any instance in which the growing skepticism of, and willingness to more closely examine, laws creating speaker-based distinctions should be applied, it would seem to be in the case of a regulation that targets the speech of uniquely unpopular and politically powerless speakers. As Justice (then Professor) Kagan once noted, the Court's First Amendment jurisprudence can be understood as having "as its primary, though unstated, object the discovery of improper governmental motives."[59] The question of whether a law is "content-based" has long been viewed as a proxy for determining if such illicit purposes exist.[60] Yet for groups such as sex offenders, who are "arguably the most despised members of our society,"[61] some laws burdening their First Amendment rights can likely be understood not as an attempt to remove a particular type of "content" from public dis-

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for the proposition that "speaker-based distinctions are subject to close First Amendment scrutiny," *id.* at 587, and that "the Court's language [in *Sorrell*] suggests that the principle that only intermediate (and not strict) First Amendment scrutiny applies in the context of commercial speech is, at minimum, eroded in the context of . . . speaker-based distinctions," *id.* at 586); Jake Linford, *The Institutional Progress Clause*, 16 VAND. J. ENT. & TECH. L. 533, 540–42 (2014) (arguing that "the Court recently took a sharp turn back toward the principle of a speaker-neutral First Amendment," *id.* at 540, and noting that the Court in *Sorrell* applied "heightened scrutiny" and, in justifying its holding, "expressed concern about the [law at issue]'s speaker-based effects, independent of content," *id.* at 542). Acceptance of this idea, however, is by no means universal. Indeed, the idea that *Citizens United* should be read as establishing a higher level of review for laws that suppress the speech of particular speakers was considered by one author to constitute such a significant break from the Court's First Amendment precedent that he suggested that it should instead be read as a "Press Clause" case. *See* Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 447–49 (2013). Moreover, some commentators have interpreted the Court's ruling in *Bluman v. FEC*, 132 S. Ct. 1087 (2012) (mem.), a memorandum affirmation of a D.C. Circuit decision upholding the constitutionality of a law prohibiting political contributions or expenditures by foreign nationals, as a potential retreat from the Court's rejection of speaker-based laws. *See, e.g.*, Lyle Denniston, *Is* Citizens United *Already Shrinking?*, SCOTUSBLOG (May 30, 2012, 8:02 PM), http://www.scotusblog.com/2012/05/is-citizens-united-already-shrinking [http://perma.cc/Y5CD-838F].

57 Kagan, *supra* note 56, at 3.

58 *See Doe*, 772 F.3d at 575.

59 Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

60 *See* McDonald, *supra* note 49, at 1348–49.

61 Heather Ellis Cucolo & Michael L. Perlin, *"They're Planting Stories in the Press": The Impact of Media Distortions on Sex Offender Law and Policy*, 3 U. DENV. CRIM. L. REV. 185, 185 (2013).

course but to limit the speech of disfavored speakers altogether. This concern is only heightened when the group whose speech has been targeted is not only unpopular but also politically powerless and is thus least able to combat laws, such as the CASE Act, that improperly suppress its speech. It therefore seems plausible that heightened scrutiny for speaker-based distinctions singling out unpopular speakers could and should play an important role in attempting to identify improper efforts to limit the speech of certain individuals.[62]

Furthermore, heightened review of speaker-based regulations is potentially even more important when the regulations at issue target the anonymous speech of an unpopular group. Such laws are likely to have a substantial impact on the affected group's ability to give voice to its opinions and dramatically diminish the strength of what was likely already a limited number of voices. Indeed, the Supreme Court has previously highlighted the importance of anonymous speech to unpopular speakers, noting 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."[63] Moreover, if a court were to apply heightened scrutiny to speaker-based distinctions targeting unpopular groups, it would not be the first time that First Amendment doctrine acknowledged that otherwise acceptable burdens on speech may prove to be unduly onerous, and thus impermissible, when imposed upon disfavored speakers.[64]

While the future of the Supreme Court's suspicion of speaker-based laws remains uncertain, it is clear that there are normative benefits to expanding the scope of *Citizens United* and *Sorrell* and applying a heightened level of scrutiny to laws that target not only corporations but also uniquely unpopular speakers. Moreover, litigation regarding regulations, such as the CASE Act, that target speakers who are amongst the most unpopular in our society, provides a unique chance to explore the potential contours of this emerging doctrine. Thus the *Doe* court may have passed over an important opportunity to extend, or more fully explore, the ambit of the Supreme Court's First Amendment speaker-based protections.

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[62] *Cf.* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1076 (2012) ("Without judicial intervention to set boundaries, legislators will continue to respond to the community's collective fear [of sex offenders] with expanding laws that punish the sex offender.").

[63] Talley v. California, 362 U.S. 60, 64 (1960).

[64] For example, a "minority party" can be exempted from a disclosure requirement that otherwise applies to all political parties if it can show that it would likely cause its contributors to face "threats, harassment, or reprisals." Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 88 (1982) (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976)). While this case was considered to implicate freedom of association, the principles it recognizes have equal salience here.