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LAWWA 602: Law & Religion
Reading Materials

LAW & RELIGION

CHAPTER VII: THE FREE EXERCISE CLAUSE AFTER EMPLOYMENT DIVISION v. SMITH

Introduction

While some members of the Court have expressed an interest in overruling *Employment Division v. Smith* and instead applying strict scrutiny in all Free Exercise Clause cases, thus far that has not occurred. Instead, the Court has made it easier to conclude that a law is either not neutral or generally applicable or both so that the state must satisfy strict scrutiny. More importantly, in recent cases the Court has relied on the Free Exercise Clause to require the government to treat religion equally in situations where previously the benefit granted to religious entities was analyzed under the Establishment Clause, but not required under the Free Exercise Clause. For example, as a result of *Zelman v Simmons-Harris*, the government was allowed to include religious schools in its voucher program, but it also could limit the program to non-religious private schools if it chose. Under the recent cases, if secular private schools are included, sectarian schools have to be allowed to participate as well. In requiring this degree of equal treatment, the Court has, at the very least, eliminated much of the "play in the joints" between what the Establishment Clause permits and what the Free Exercise Clause compels. However, it is also possible to view this recent development as going as far as to require behavior previously outlawed by the Establishment Clause.

1. TRINITY LUTHERAN CHURCH v. COMER
137 S. Ct. 2012 (2017)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to footnote 3.

The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires. Trinity Lutheran Church applied for such a grant for its preschool and daycare center and would have received one, but for the fact that Trinity Lutheran is a church. The Department had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program. The question presented is whether the Department's policy violated the rights of Trinity Lutheran under the Free Exercise Clause of the First Amendment.

I.

The Trinity Lutheran Church Child Learning Center is a preschool and daycare center open throughout the year to serve working families in Boone County, Missouri, and the surrounding area. Established as a nonprofit organization in 1980, the Center merged with Trinity Lutheran

Church in 1985 and operates under its auspices on church property. The Center admits students of any religion, and enrollment stands at about 90 children ranging from age two to five.

The Center includes a playground that is equipped with the basic playground essentials: slides, swings, jungle gyms, monkey bars, and sandboxes. Almost the entire surface beneath and surrounding the play equipment is coarse pea gravel. Youngsters, of course, often fall on the playground or tumble from the equipment. And when they do, the gravel can be unforgiving.

In 2012, the Center sought to replace a large portion of the pea gravel with a pour-in-place rubber surface by participating in Missouri's Scrap Tire Program. Run by the State's Department of Natural Resources to reduce the number of used tires destined for landfills, the program offers reimbursement grants to qualifying nonprofit organizations that purchase playground surfaces made from recycled tires. It is funded through a fee imposed on the sale of new tires in the State.

Due to limited resources, the Department cannot offer grants to all applicants and so awards them on a competitive basis to those scoring highest based on several criteria, such as the poverty level of the population in the surrounding area and the applicant's plan to promote recycling. When the Center applied, the Department had a strict policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. That policy, in the Department's view, was compelled by Article I, Section 7 of the Missouri Constitution, which provides:

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

In its application, the Center disclosed its status as a ministry of Trinity Lutheran Church and specified that the Center's mission was "to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively." After describing the playground and the safety hazards posed by its current surface, the Center detailed the anticipated benefits of the proposed project: increasing access to the playground for all children, including those with disabilities, by providing a surface compliant with the Americans with Disabilities Act of 1990; providing a safe, long-lasting, and resilient surface under the play areas; and improving Missouri's environment. The Center also noted that the benefits of a new surface would extend beyond its students to the local community, whose children use the playground during non-school hours.

The Center ranked fifth among the 44 applicants in the 2012 Scrap Tire Program. But despite its high score, the Center was deemed categorically ineligible to receive a grant. In a letter rejecting the Center’s application, the program director explained that, under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church. The Department ultimately awarded 14 grants as part of the 2012 program. Because the Center was operated by Trinity Lutheran Church, it did not receive a grant.

Trinity Lutheran sued the Director of the Department in Federal District Court. The Church alleged that the Department's failure to approve the Center's application, pursuant to its policy of denying grants to religiously affiliated applicants, violates the Free Exercise Clause. The District

Court held that the Free Exercise Clause did not require the State to make funds available under the Scrap Tire Program to religious institutions like Trinity Lutheran.

II.

The parties agree that the Establishment Clause does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program. That does not, however, answer the question under the Free Exercise Clause, because we have recognized that there is "play in the joints" between what the Establishment Clause permits and the Free Exercise Clause compels.

The Free Exercise Clause "protect[s] religious observers against unequal treatment" and subjects to the strictest scrutiny laws that target the religious for "special disabilities" based on their "religious status." Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest "of the highest order." In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment.

III.

The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. Such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny. This conclusion is unremarkable in light of our prior decisions.

The Department's policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church. But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way, the State has punished the free exercise of religion: "To condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties."

The Department contends that merely declining to extend funds to Trinity Lutheran does not prohibit the Church from engaging in any religious conduct or otherwise exercising its religious rights. The Department has simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place. That decision does not meaningfully burden the Church's free exercise rights. Absent any such burden, the argument continues, the Department is free to heed the State's antiestablishment objection to providing funds directly to a church.

It is true the Department has not criminalized the way Trinity Lutheran worships or told the Church that it cannot subscribe to a certain view of the Gospel. But, as the Department itself acknowledges, the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." As the Court put it more than 50 years ago, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

Trinity Lutheran asserts a right to participate in a government benefit program without having to disavow its religious character. The "imposition of such a condition upon even a gratuitous benefit inevitably deters or discourages the exercise of First Amendment rights." *Sherbert*, 374 U.S. at 405. The discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant. Trinity Lutheran is a member of the community too, and the State's decision to exclude it for purposes of this public program must withstand the strictest scrutiny.[3]

The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. Our cases make clear that such a condition imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny.

Under that stringent standard, only a state interest "of the highest order" can justify the discriminatory policy. Yet the Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns. In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling. As we said when considering Missouri's same policy preference on a prior occasion, "the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause."

The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

To hear the Court tell it, this is a simple case about recycling tires to resurface a playground. The stakes are higher. This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country's longstanding commitment to a separation of church and state beneficial to both.

I.

Trinity Lutheran Church (Church) "operates . . . for the express purpose of carrying out the commission of . . . Jesus Christ as directed to His church on earth." The Church's religious beliefs include its desire to "associat[e] with the [Trinity Church Child] Learning Center." Located on Church property, the Learning Center provides daycare and preschool for about "90 children ages two to kindergarten."

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[3] [Original number of this footnote is 3]This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.

The Learning Center serves as "a ministry of the Church and incorporates daily religion and developmentally appropriate activities into . . . [its] program." In this way, "[t]hrough the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents" of the area.

The Learning Center's facilities include a playground, the unlikely source of this dispute. The Church provides the playground "in conjunction with an education program structured to allow a child to grow spiritually, physically, socially, and cognitively." This case began when the Church applied for funding to upgrade the playground's surface through Missouri's Scrap Tire Program. The Church sought $20,000 for a project to modernize the playground, part of its effort to gain state accreditation for the Learning Center as an early childhood education program. Missouri denied the funding based on Article I, §7, of its State Constitution.

II.

Properly understood then, this is a case about whether Missouri can decline to fund improvements to the facilities the Church uses to practice and spread its religious views. This Court has repeatedly warned that funding of exactly this kind—payments from the government to a house of worship—would cross the line drawn by the Establishment Clause. See, *e.g., Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 675 (1970); *Mitchell v. Helms*, 530 U.S. 793, 803-04 (2000) (O'Connor, J., concurring in judgment). So it is surprising that the Court mentions the Establishment Clause only to note the parties' agreement that it "does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program." Constitutional questions are decided by this Court, not the parties' concessions. The Establishment Clause does not allow Missouri to grant the Church's funding request because the Church uses the Learning Center, including its playground, in conjunction with its religious mission. The Court's silence on this front signals either its misunderstanding of the facts of this case or a startling departure from our precedents.

The government may not directly fund religious exercise. See *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947). Such funding violates the Establishment Clause because it impermissibly "advanc[es] religion." *Agostini v. Felton*, 521 U.S. 203, 223 (1997). Nowhere is this rule more clearly implicated than when funds flow directly from the public treasury to a house of worship. A house of worship exists to foster and further religious exercise. Within its walls, worshippers gather to practice and reaffirm their faith. And from its base, the faithful reach out to those not yet convinced of the group's beliefs. When a government funds a house of worship, it underwrites this religious exercise.

This case is no different. The Church seeks state funds to improve the Learning Center's facilities, which, by the Church's own avowed description, are used to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers. The Church's playground surface—like a Sunday School room's walls or the sanctuary's pews—are integrated with and integral to its religious mission. The conclusion that the funding the Church seeks would impermissibly advance religion is inescapable.

True, this Court has found some direct government funding of religious institutions to be consistent with the Establishment Clause. But the funding in those cases came with assurances that public funds would not be used for religious activity, despite the religious nature of the

institution. The Church has not and cannot provide such assurances here. The Church has a religious mission, one that it pursues through the Learning Center. The playground surface cannot be confined to secular use any more than lumber used to frame the Church's walls, glass stained and used to form its windows, or nails used to build its altar.

The Court may simply disagree with this account of the facts and think that the Church does not put its playground to religious use. If so, its mistake is limited to this case. But if it agrees that the State's funding would further religious activity and sees no Establishment Clause problem, then it must be implicitly applying a rule other than the one agreed to in our precedents.

Such a break with precedent would mark a radical mistake. The Establishment Clause protects both religion and government from the dangers that result when the two become entwined, "not by providing every religion with an equal opportunity (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of separation between church and state—at least where the heartland of religious belief, such as primary religious [worship], is at issue." *Zelman v. Simmons-Harris*, 536 U.S. 639, 722-23 (2002) (Breyer, J., dissenting).

III.

Even assuming the absence of an Establishment Clause violation and proceeding on the Court's preferred front—the Free Exercise Clause—the Court errs. It claims that the government may not draw lines based on an entity's religious "status." But we have repeatedly said that it can. When confronted with government action that draws such a line, we have carefully considered whether the interests embodied in the Religion Clauses justify that line. The question here is thus whether those interests support the line drawn in Missouri's Article I, §7, separating the State's treasury from those of houses of worship. They unquestionably do.

The Establishment Clause prohibits laws "respecting an establishment of religion" and the Free Exercise Clause prohibits laws "prohibiting the free exercise thereof." "[I]f expanded to a logical extreme," these prohibitions "would tend to clash with the other." *Walz*, 397 U.S. at 668–69. Even in the absence of a violation of one of the Religion Clauses, the interaction of government and religion can raise concerns that sound in both Clauses. For that reason, the government may sometimes act to accommodate those concerns, even when not required to do so by the Free Exercise Clause, without violating the Establishment Clause. "[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669. This space between the two Clauses gives government some room to recognize the unique status of religious entities and to single them out for exclusion from otherwise generally applicable laws.

Invoking this principle, this Court has held that the government may sometimes relieve religious entities from the requirements of government programs. A State need not, for example, require nonprofit houses of worship to pay property taxes. It may instead "spar[e] the exercise of religion from the burden of property taxation levied on private profit institutions" and spare the government "the direct confrontations and conflicts that follow in the train of those legal processes" associated with taxation. Nor must a State require nonprofit religious entities to abstain from making employment decisions on the basis of religion. It may instead avoid imposing on these institutions a "[f]ear of potential liability [that] might affect the way" it

"carried out what it understood to be its religious mission" and on the government the sensitive task of policing compliance. But the government may not invoke the space between the Religion Clauses in a manner that "devolve[s] into an unlawful fostering of religion."

Invoking this same principle, this Court has held that the government may sometimes close off certain government aid programs to religious entities. The State need not, for example, fund the training of a religious group's leaders, those "who will preach their beliefs, teach their faith, and carry out their mission," It may instead avoid the historic "antiestablishment interests" raised by the use of "taxpayer funds to support church leaders."

When reviewing a law that, like this one, singles out religious entities for exclusion from its reach, we thus have not myopically focused on the fact that a law singles out religious entities, but on the reasons that it does so. Missouri has decided that the unique status of houses of worship requires a special rule when it comes to public funds. Its Constitution reflects that choice. Missouri's decision reflects a reasonable and constitutional judgment.

This Court has consistently looked to history for guidance when applying the Constitution's Religion Clauses. Those Clauses guard against a return to the past, and so that past properly informs their meaning. See, *e.g.*, *Everson*, 330 U.S. at 14-15. This case is no different. This Nation's early experience with, and eventual rejection of, established religion—shorthand for "sponsorship, financial support, and active involvement of the sovereign in religious activity," *Walz*, 397 U. S. at 668—defies easy summary. No two States' experiences were the same. In some a religious establishment never took hold. In others establishment varied in terms of the sect (or sects) supported, the nature and extent of that support, and the uniformity of that support. Where establishment did take hold, it lost its grip at different times and at different speeds.

Despite this rich diversity of experience, the story relevant here is one of consistency. The use of public funds to support core religious institutions can safely be described as a hallmark of the States' early experiences with religious establishment. Every state establishment saw laws passed to raise public funds and direct them toward houses of worship and ministers. And as the States all disestablished, one by one, they all undid those laws.

Those who fought to end the public funding of religion based their opposition on a powerful set of arguments stemming from the basic premise that the practice harmed both government and religion. For them, support for religion compelled by the State marked an overstep of authority that would only lead to more. Equally troubling, it risked divisiveness by giving religions reason to compete for the State's beneficence. Faith, they believed, was a personal matter, entirely between an individual and his god. Religion was best served when sects reached out on the basis of their tenets alone, allowing adherents to come to their faith voluntarily. These arguments led to the end of state laws exacting payment for the support of religion.

This history shows that those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship. To us, their debates may seem abstract and this history remote. That is only because we live in a society that has long benefited from decisions made in response to these now centuries-old arguments, a society that those not so fortunate fought hard to build.

The same is true of this case. Turning over public funds to houses of worship implicates serious antiestablishment and free exercise interests. The history just discussed fully supports this conclusion. Common sense also supports this conclusion. Recall that a state may not fund religious activities without violating the Establishment Clause. A state can reasonably use status as a "house of worship" as a stand-in for "religious activities." Inside a house of worship, dividing the religious from the secular would require intrusive line-drawing by government, and monitoring those lines would entangle government with the house of worship's activities. And so while not every activity a house of worship undertakes will be inseparably linked to religious activity, "the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion." Finally, and of course, such funding implicates the free exercise rights of taxpayers by denying them the chance to decide for themselves whether and how to fund religion. If there is any " 'room for play in the joints' between" the Religion Clauses, it is here.

A prophylactic rule against the use of public funds for houses of worship is a permissible accommodation of these weighty interests. The rule has a historical pedigree. Almost all of the States that ratified the Religion Clauses operated under this rule. Today, thirty-eight States have a counterpart to Missouri's Article I, §7. The provisions, as a general matter, date back to or before these States' original Constitutions. That so many States have for so long drawn a line that prohibits public funding for houses of worship, based on principles rooted in this Nation's understanding of how best to foster religious liberty, supports the conclusion that public funding of houses of worship "is of a different ilk."

Missouri's Article I, §7 is closely tied to the state interests it protects. A straightforward reading of Article I, §7, prohibits funding only for "any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such." The Missouri courts have not read the State's Constitution to reach more broadly, to prohibit funding for other religiously affiliated institutions. The Scrap Tire Program at issue here proves the point. Missouri will fund a religious organization not "owned or controlled by a church," if its "mission and activities are secular (separate from religion, not spiritual in) nature" and the funds "will be used for secular (separate from religion; not spiritual) purposes rather than for sectarian (denominational, devoted to a sect) purposes." Article I, §7 thus stops Missouri only from funding specific entities, ones that set and enforce religious doctrine for their adherents. These are the entities that most acutely raise the establishment and free exercise concerns that arise when public funds flow to religion.

Missouri has recognized the simple truth that, even absent an Establishment Clause violation, the transfer of public funds to houses of worship raises concerns that sit exactly between the Religion Clauses. To avoid those concerns, and only those concerns, it has prohibited such funding. In doing so, it made the same choice made by the earliest States centuries ago and many other States in the years since. The Constitution permits this choice.

In the Court's view, none of this matters. It focuses on one aspect of Missouri's Article I, §7, to the exclusion of all else: that it denies funding to a house of worship, here the Church, "simply because of what it [i]s—a church." The Court describes this as a constitutionally impermissible line based on religious "status" that requires strict scrutiny. Its rule is out of step with our precedents in this area, and wrong on its own terms.

The Constitution creates specific rules that control how the government may interact with religious entities. And so of course a government may act based on a religious entity's "status" as such. It is that very status that implicates the interests protected by the Religion Clauses. Sometimes a religious entity's unique status requires the government to act. Other times, it merely permits the government to act. In all cases, the dispositive issue is not whether religious "status" matters—it does, or the Religion Clauses would not be at issue—but whether the government must, or may, act on that basis.

Start where the Court stays silent. Its opinion does not acknowledge that our precedents have expressly approved of a government's choice to draw lines based on an entity's religious status. *Walz*, 397 U.S. at 680. Those cases did not deploy strict scrutiny to create a presumption of unconstitutionality, as the Court does today. Instead, they asked whether the government had offered a strong enough reason to justify drawing a line based on that status.

The Court takes steps to avoid these precedents. It suggests this case is different because it involves "discrimination" in the form of the denial of access to a benefit. But in this area of law, a decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination. Keep in mind that "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." If the denial of a benefit others may receive is discrimination that violates the Free Exercise Clause, then the accommodations of religious entities we have approved would violate the free exercise rights of nonreligious entities. We have rejected that idea and instead focused on whether the government has provided a good enough reason, based in the values the Religion Clauses protect, for its decision.

The Court offers no real reason for rejecting the balancing approach in our precedents in favor of strict scrutiny, beyond its references to discrimination. The Court's desire to avoid what it views as discrimination is understandable. But in this context, the description is particularly inappropriate. A State's decision not to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns. It means only that the State has "establishe[d] neither atheism nor religion as its official creed." The Court's conclusion "that the only alternative to governmental support of religion is governmental hostility to it represents a giant step backward in our Religion Clause jurisprudence."

At bottom, the Court creates the following rule today: The government may draw lines on the basis of religious status to grant a benefit to religious persons or entities but it may not draw lines on that basis when doing so would further the interests the Religion Clauses protect in other ways. Nothing supports this lopsided outcome. Not the Religion Clauses, as they protect establishment and free exercise interests in the same constitutional breath, neither privileged over the other. Not precedent, since we have repeatedly explained that the Clauses protect not religion but "the individual's freedom of conscience"—that which allows him to choose religion, reject it, or remain undecided. And not reason, because as this case shows, the same interests served by lifting government-imposed burdens on certain religious entities may sometimes be equally served by denying government-provided benefits to certain religious entities.

On top of all of this, the Court's application of its new rule is mistaken. In concluding that Article I, §7, cannot withstand strict scrutiny, the Court describes Missouri's interest as a mere "policy preference for skating as far as possible from religious establishment concerns." The constitutional provisions of thirty-nine States—all but invalidated today—the weighty interests they protect, and the history they draw on deserve more than this judicial brush aside.[14]

Today's decision discounts centuries of history and jeopardizes the government's ability to remain secular. Just three years ago, this Court claimed to understand that, in this area of law, to "sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Town of Greece v. Galloway*, 572 U. S. ___, 134 S. Ct. 1811, 1819 (2014). It makes clear today that this principle applies only when preference suits.

IV.

The Court today dismantles a core protection for religious freedom provided in these Clauses. It holds not just that a government may support houses of worship with taxpayer funds, but that—at least in this case and perhaps in others—it must do so whenever it decides to create a funding program. History shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship. The Court today blinds itself to the outcome this history requires and leads us instead to a place where separation of church and state is a constitutional slogan, not a constitutional commitment.

2. MASTERPIECE CAKESHOP v. COLORADO CIVIL RIGHTS COMMISSION
138 S. Ct. 1719 (2018)

Justice Kennedy delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act. The Commission ruled in the couple's favor. The Colorado state courts affirmed the ruling, and this Court now must

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[14] [original number of this footnote is 14] In the end, the soundness of today's decision may matter less than what it might enable tomorrow. The principle it establishes can be manipulated to call for a similar fate for lines drawn on the basis of religious use. It is enough for today to explain why the Court's decision is wrong. See, for now, *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963) ("While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs").

decide whether the Commission's order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.

The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside.

I.

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes for birthday parties, weddings, and other events. Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. He has explained that his "main goal in life is to be obedient to" Jesus Christ and Christ's "teachings in all aspects of his life." And he seeks to "honor God through his work at Masterpiece Cakeshop." One of Phillips' religious beliefs is that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman." To Phillips, creating a

wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver. To prepare for their celebration, Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for "our wedding." They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not "create" wedding cakes for same-sex weddings. He explained, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same sex weddings." The couple left the shop without further discussion.

The following day, Craig's mother, who had accompanied the couple to the cakeshop and been present for their interaction with Phillips, telephoned to ask Phillips why he had declined to serve her son. Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage. He later explained his belief that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into."

For most of its history, Colorado has prohibited discrimination in places of public accommodation. Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation. CADA in relevant part provides as follows:

"It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."

The Act defines "public accommodation" broadly to include any "place of business engaged in any sales to the public and any place offering services . . . to the public," but excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes."

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division. The Division investigates each claim; and if it finds probable cause that CADA has been violated, it will refer the matter to the Colorado Civil Rights Commission. The Commission, in turn, decides whether to initiate a formal hearing before a state Administrative Law Judge (ALJ), who will hear evidence and argument before issuing a written decision. The decision of the ALJ may be appealed to the full Commission, a seven-member appointed body. The Commission holds a public hearing and deliberative session before voting on the case. If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures. Available remedies include orders to cease-and-desist a

discriminatory policy, to file regular compliance reports with the Commission, and "to take affirmative action, including posting notices setting forth the substantive rights of the public."

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in August 2012, shortly after the couple's visit to the shop. The complaint alleged that Craig and Mullins had been denied "full and equal service" at the bakery because of their sexual orientation, and that it was Phillips' "standard business practice" not to provide cakes for same-sex weddings.

The Civil Rights Division opened an investigation. The investigator found that "on multiple occasions," Phillips "turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception" because his religious beliefs prohibited it and because the potential customers "were doing something illegal" at that time. The investigation found that Phillips had declined to sell custom wedding cakes to six other same-sex couples. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips' shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop "had a policy of not selling baked goods to same-sex couples for this type of event." Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission.

The Commission found it proper to conduct a formal hearing, and it sent the case to a State ALJ. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor. It was undisputed that the shop is subject to state public accommodations laws. And the ALJ determined that Phillips' actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage.

Phillips raised two constitutional claims before the ALJ. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech. The ALJ rejected the contention that preparing a wedding cake is a form of protected speech.

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion. Citing this Court's precedent in *Employment Division v. Smith*, the ALJ determined that CADA is a "valid and neutral law of general applicability" and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause. The ALJ thus ruled in favor of Craig and Mullins on both constitutional claims.

The Commission affirmed the ALJ's decision in full. The Commission ordered Phillips to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples." It also ordered "comprehensive staff training on the Public Accommodations section" of CADA. The Commission additionally required Phillips to prepare "quarterly compliance reports" for a period of two years documenting "the number of patrons denied service" and why, along with "a statement describing the remedial actions taken."

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission's legal determinations and remedial order. The court rejected the argument that the "Commission's order

unconstitutionally compels" Phillips and the shop "to convey a celebratory message about same sex marriage." The court also rejected the argument that the Commission's order violated the Free Exercise Clause. Relying on this Court's precedent in *Smith*, the court stated that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability" on the ground that following the law would interfere with religious practice or belief. The Colorado Supreme Court declined to hear the case.

II.

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015), "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so central to their lives and faiths." Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs.

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise." Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

"I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later

state-court ruling reviewing the Commission's decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

On at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included "wording and images [the baker] deemed derogatory," featured "language and images [the baker] deemed hateful," or displayed a message the baker "deemed as discriminatory."

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell "birthday cakes, shower cakes, [and] cookies and brownies," to gay and lesbian customers as irrelevant. The Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers' conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that "[t]his case is distinguishable from the Colorado Civil Rights Division's recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed" when they refused to create the requested cakes. In those cases, the court continued, there was no impermissible discrimination because "the Division found that the bakeries . . . refuse[d] the patron's request . . . because of the offensive nature of the requested message."

A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips'

religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.

For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. The government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."

Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave "every appearance" of adjudicating Phillips' religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.

While the issues here are difficult to resolve, it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

III.

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the

Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market. The judgment of the Colorado Court of Appeals is reversed.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

There is much in the Court's opinion with which I agree. "[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." Gay persons may be spared from "indignities when they seek goods and services in an open market." I strongly disagree, however, with the Court's conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

The Court concludes that "Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires." This conclusion rests on evidence said to show the Colorado Civil Rights Commission's (Commission) hostility to religion. Hostility is discernible, the Court maintains, from the asserted "disparate consideration of Phillips' case compared to the cases of" three other bakers who refused to make cakes requested by William Jack. The Court also finds hostility in statements made at two public hearings on Phillips' appeal to the Commission. The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.

I.

On March 13, 2014 — approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips' appeal from that decision — William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes "made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red `X' over the image. On one cake, he requested [on] one side[,] ... `God hates sin. Psalm 45:7' and on the opposite side of the cake `Homosexuality is a detestable sin. Leviticus 18:2.' On the second cake, [the one] with the image of the two groomsmen covered by a red `X' [Jack] requested [these words]: `God loves sinners' and on the other side `While we were yet sinners Christ died for us. Romans 5:8.'" In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery "does not discriminate" and "accept[s] all humans." The second bakery owner told Jack he "had done open Bibles and books many times and that they look amazing," but declined to make the specific cakes Jack described because the baker regarded the messages as "hateful." The third bakery, according to Jack, said it would bake the cakes, but would not include the requested message.

Jack filed charges against each bakery with the Colorado Civil Rights Division (Division). The Division found no probable cause to support Jack's claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. The Division observed that the bakeries regularly produced cakes and other baked goods with Christian symbols and had denied other customer requests for designs demeaning people whose dignity CADA protects. The Commission summarily affirmed the Division's no-probable-cause finding.

The Court concludes that "the Commission's consideration of Phillips' religious objection did not accord with its treatment of [the other bakers'] objections." But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack's requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries' refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips' refusal to serve Craig and Mullins: Phillips would not sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. Colorado prohibits precisely the discrimination Craig and Mullins encountered. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated — no better, no worse.

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers was irrelevant to the issue Craig and Mullins' case presented. What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple. In contrast, the other bakeries' sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer.

Nor was the Colorado Court of Appeals' "difference in treatment of these two instances based on the government's own assessment of offensiveness." Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display. The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division's finding that messages in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination. ("The Division found that the bakeries did not refuse [Jack's] request because of his creed, but rather because of the offensive nature of the requested message. [T]here was no evidence that the bakeries based

their decisions on [Jack's] religion [whereas Phillips] discriminat[ed] on the basis of sexual orientation."). I do not read the Court to suggest that the Colorado Legislature's decision to include certain protected characteristics in CADA is an impermissible government prescription of what is and is not offensive. To repeat, the Court affirms that "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as other members of the public."

II.

Statements made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say.

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals' judgment.

3. ESPINOZA v. MONTANA DEPARTMENT OF REVENUE
140 S. Ct. 2246 (2020)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, in which JUSTICES THOMAS, ALITO, GORSUCH, and KAVANAUGH joined.

The Montana Legislature established a program to provide tuition assistance to parents who send their children to private schools. The program grants a tax credit to anyone who donates to certain organizations that in turn award scholarships to selected students attending such schools. When petitioners sought to use the scholarships at a religious school, the Montana Supreme Court struck down the program. The Court relied on the "no-aid" provision of the State Constitution, which prohibits any aid to a school controlled by a "church, sect, or denomination." The question presented is whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision.

I.

In 2015, the Montana Legislature sought "to provide parental and student choice in education" by enacting a scholarship program for students attending private schools. The program grants a tax credit of up to $150 to any taxpayer who donates to a participating "student scholarship organization." The scholarship organizations then use the donations to award scholarships to children for tuition at a private school.

A family whose child is awarded a scholarship under the program may use it at any "qualified education provider"—that is, any private school that meets certain accreditation, testing, and safety requirements. Virtually every private school in Montana qualifies. Upon receiving a scholarship, the family designates its school of choice, and the scholarship organization sends the scholarship funds directly to the school. Neither the scholarship organization nor its donors can

restrict awards to particular types of schools.

The Montana Legislature also directed that the program be administered in accordance with Article X, section 6, of the Montana Constitution, which contains a "no-aid" provision barring government aid to sectarian schools. In full, that provision states:

"Aid prohibited to sectarian schools. . . . The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination."

Shortly after the scholarship program was created, the Montana Department of Revenue promulgated "Rule 1." That administrative rule prohibited families from using scholarships at religious schools. It did so by changing the definition of "qualified education provider" to exclude any school "owned or controlled in whole or in part by any church, religious sect, or denomination." The Department explained that the Rule was needed to reconcile the scholarship program with the no-aid provision of the Montana Constitution.

This suit was brought by three mothers whose children attend Stillwater Christian School. Stillwater is a private Christian school that meets the statutory criteria for "qualified education providers." Petitioners chose the school in large part because it "teaches the Christian values that [they] teach at home." Rule 1 blocked petitioners from using scholarship funds for tuition at Stillwater. To overcome that obstacle, petitioners sued the Department of Revenue in state court.

The trial court enjoined Rule 1, holding that it was based on a mistake of law. The court explained that the Rule was not required by the no-aid provision, because that provision prohibits only "appropriations," "not tax credits." The Montana Supreme Court reversed the trial court, holding that the program aided religious schools in violation of the no-aid provision. The Court went on to hold that the violation of the no-aid provision required invalidating the entire scholarship program. The Court explained that the program provided "no mechanism" for preventing aid from flowing to religious schools, and therefore the scholarship program could not be construed as consistent with the no-aid provision. As a result, the tax credit is no longer available to support scholarships at either religious or secular private schools.

II.

We have recognized a "`play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). Here, the parties do not dispute that the scholarship program is permissible under the Establishment Clause. Nor could they. We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs. Any Establishment Clause objection to the scholarship program here is particularly unavailing because the government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools. The Montana Supreme Court, however, held as a matter of state law that even such indirect government support qualified as "aid" prohibited under the Montana Constitution.

The question for this Court is whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program. We accept the Montana Supreme Court's interpretation of state law—including its determination that the scholarship program provided impermissible "aid" within the meaning of the Montana Constitution —and we assess whether excluding religious schools and affected families from that program was consistent with the Federal Constitution.

The Free Exercise Clause "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." Those "basic principle[s]" have long guided this Court. Most recently, *Trinity Lutheran* distilled these and other decisions to the same effect into the "unremarkable" conclusion that disqualifying otherwise eligible recipients from a public benefit "solely because of their religious character" imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny."

Here too Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school. This is apparent from the plain text. The provision bars aid to any school "controlled in whole or in part by any church, sect, or denomination." The provision plainly excludes schools from government aid solely because of religious status.

The Department counters that *Trinity Lutheran* does not govern here because the no-aid provision applies not because of the religious character of the recipients, but because of how the funds would be used— for "religious education." In *Trinity Lutheran*, a majority of the Court concluded that the Missouri policy violated the Free Exercise Clause because it discriminated on the basis of religious status. A plurality declined to address discrimination with respect to "religious uses of funding or other forms of discrimination." The plurality saw no need to consider such concerns because Missouri had discriminated "based on religious identity," which was enough to invalidate the state policy without addressing how government funds were used.

This case also turns expressly on religious status and not religious use. The Montana Supreme Court applied the no aid provision solely by reference to religious status. The Court repeatedly explained that the no-aid provision bars aid to "schools controlled in whole or in part by churches," "sectarian schools," and "religiously-affiliated schools." Applying this provision to the scholarship program, the Montana Supreme Court noted that most of the private schools that would benefit from the program were "religiously affiliated" and "controlled by churches," and the Court ultimately concluded that the scholarship program ran afoul of the Montana Constitution by aiding "schools controlled by churches." The Montana Constitution discriminates based on religious status just like the Missouri policy in *Trinity Lutheran*, which excluded organizations "owned or controlled by a church, sect, or other religious entity."

Undeterred by *Trinity Lutheran*, the Montana Supreme Court applied the no-aid provision to hold that religious schools could not benefit from the scholarship program. So applied, the provision "impose[s] special disabilities on the basis of religious status" and "condition[s] the availability of benefits upon a recipient's willingness to surrender [its] religiously impelled status." *Trinity Lutheran*, 137 S. Ct. at 2021-22 To be eligible for government aid under the

Montana Constitution, a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits "inevitably deters or discourages the exercise of First Amendment rights." *Trinity Lutheran*, 137 S. Ct. at 2022 (quoting *Sherbert v. Verner*, 374 U.S. 398, 405 (1963)). The Free Exercise Clause protects against even "indirect coercion," and a State "punishe[s] the free exercise of religion" by disqualifying the religious from government aid as Montana did here. Such status-based discrimination is subject to "the strictest scrutiny."

None of this is meant to suggest that we agree with the Department that some lesser degree of scrutiny applies to discrimination against religious uses of government aid. Some Members of the Court, moreover, have questioned whether there is a meaningful distinction between discrimination based on use or conduct and that based on status. We acknowledge the point but need not examine it here. It is enough in this case to conclude that strict scrutiny applies under *Trinity Lutheran* because Montana's no-aid provision discriminates based on religious status.

No "historic and substantial" tradition supports Montana's decision to disqualify religious schools from government aid. In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones. "Far from prohibiting such support, early state constitutions and statutes actively encouraged this policy."

The Department argues that a tradition against state support for religious schools arose in the second half of the 19th century, as more than 30 States—including Montana—adopted no-aid provisions. Such a development, of course, cannot by itself establish an early American tradition. In addition, many of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s. That proposal—which Congress nearly passed—would have added to the Federal Constitution a provision similar to the state no-aid provisions, prohibiting States from aiding "sectarian" schools. "[I]t was an open secret that 'sectarian' was code for 'Catholic.' " The Blaine Amendment was "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general"; many of its state counterparts have a similarly "shameful pedigree." The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause.

The Department argues that several States have rejected referendums to overturn or limit their no-aid provisions, and that Montana even re-adopted its own in the 1970s, for reasons unrelated to anti-Catholic bigotry. But, on the other side of the ledger, many States today—including those with no-aid provisions—provide support to religious schools through vouchers, scholarships, tax credits, and other measures. According to petitioners, 20 of 37 States with no-aid provisions allow religious options in publicly funded scholarship programs, and almost all allow religious options in tax credit programs.

We agree with the Department that the historical record is "complex." And it is true that governments over time have taken a variety of approaches to religious schools. But it is clear that there is no "historic and substantial" tradition against aiding such schools.

Two dissenters would chart new courses. Justice SOTOMAYOR would grant the government "some room" to "single ... out" religious entities "for exclusion," based on what she views as "the interests embodied in the Religion Clauses." Justice BREYER would adopt a "flexible, context-specific approach" that would afford much freer rein to judges than our current regime,

arguing that "there is 'no test-related substitute for the exercise of legal judgment.' "

The simplest response is that these dissents follow from prior separate writings, not from the Court's decision in *Trinity Lutheran* or the decades of precedent on which it relied. These precedents have "repeatedly confirmed" the straightforward rule that we apply today: When otherwise eligible recipients are disqualified from a public benefit "solely because of their religious character," we must apply strict scrutiny. This rule against express religious discrimination is no "doctrinal innovation." Far from it. As *Trinity Lutheran* explained, the rule is "unremarkable in light of our prior decisions." 137 S. Ct. at 2021.

Because the Montana Supreme Court applied the no-aid provision to discriminate against schools and parents based on the religious character of the school, the "strictest scrutiny" is required. That "stringent standard" is not "watered down but really means what it says." To satisfy it, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."

The Montana Supreme Court asserted that the no-aid provision serves Montana's interest in separating church and State "more fiercely" than the Federal Constitution. But "that interest cannot qualify as compelling" in the face of the infringement of free exercise here. *Trinity Lutheran*, 137 S. Ct. at 2024. A State's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause is limited by the Free Exercise Clause."

The Department, for its part, asserts that the no-aid provision actually promotes religious freedom. In the Department's view, the no-aid provision protects the religious liberty of taxpayers by ensuring that their taxes are not directed to religious organizations, and it safeguards the freedom of religious organizations by keeping the government out of their operations. An infringement of First Amendment rights, however, cannot be justified by a State's alternative view that the infringement advances religious liberty. Our federal system prizes state experimentation, but not "state experimentation in the suppression of free [exercise of religion]."

Furthermore, we do not see how the no-aid provision promotes religious freedom. This Court has repeatedly upheld government programs that spend taxpayer funds on equal aid to religious observers and organizations, particularly when the link between government and religion is attenuated by private choices. A school, concerned about government involvement with its religious activities, might decide not to participate in a government program. But we doubt that the school's liberty is enhanced by eliminating any option to participate in the first place.

The Department's argument is especially unconvincing because the infringement of religious liberty here broadly affects both religious schools and adherents. Montana's no-aid provision imposes a categorical ban—prohibiting "any type of aid" to religious schools. This prohibition is far more sweeping than the policy in *Trinity Lutheran*, which barred churches from one program for playground resurfacing. And the prohibition before us today burdens not only religious schools but also the families whose children attend or hope to attend them. Drawing on "enduring American tradition," we have long recognized the rights of parents to direct "the religious upbringing" of their children. *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 232 (1972). Many parents exercise that right by sending their children to religious schools, a choice protected by the

Constitution. But the no-aid provision penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school, and for no other reason.

The Department also suggests that the no-aid provision advances Montana's interests in public education. According to the Department, the no-aid provision safeguards the public school system by ensuring that government support is not diverted to private schools. But, under that framing, the no-aid provision is fatally underinclusive because its "objectives are not pursued with respect to analogous nonreligious conduct." A law does not advance "an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." Montana's interest in public education cannot justify a no-aid provision that requires only religious private schools to "bear [its] weight." A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some schools solely because they are religious.

III.

The Department argues that there is no free exercise violation here because the Montana Supreme Court ultimately eliminated the scholarship program altogether. According to the Department, now that there is no program, religious schools and adherents cannot complain that they are excluded from any generally available benefit.

The Montana Supreme Court invalidated the program pursuant to a state law provision that expressly discriminates on the basis of religious status. The Court applied that provision to hold that religious schools were barred from participating in the program. Then, seeing no other "mechanism" to make sure that religious schools received no aid, the court chose to invalidate the entire program. The final step in this reasoning eliminated the program, to the detriment of religious and non-religious schools alike. But the Court's error of federal law occurred at the beginning. Had the Court recognized that application of the no-aid provision "would violate the Free Exercise Clause," the Court would not have proceeded to find a violation of that provision. And, in the absence of such a state law violation, the Court would have had no basis for terminating the program. Because the elimination of the program flowed directly from the Court's failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision.

Given the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have "disregard[ed]" the no-aid provision and decided this case "conformably to the [C]onstitution" of the United States.

Justice THOMAS, with whom Justice GORSUCH joins, concurring.

The Court correctly concludes that Montana's no-aid provision expressly discriminates against religion in violation of the Free Exercise Clause. And it properly provides relief to Montana religious schools and the petitioners who wish to use Montana's scholarship program to send their children to such schools. I write separately to explain how this Court's interpretation of the Establishment Clause continues to hamper free exercise rights.

This case involves the Free Exercise Clause, not the Establishment Clause. But as in all cases involving a state actor, the modern understanding of the Establishment Clause is a "brooding omnipresence," ever ready to be used to justify the government's infringement on religious freedom. Under the modern, but erroneous, view of the Establishment Clause, the government

must treat all religions equally and treat religion equally to nonreligion. This "equality principle," the theory goes, prohibits the government from expressing any preference for religion—or even permitting any signs of religion in the governmental realm. Thus, when a plaintiff brings a free exercise claim, the government may defend its law, as Montana did here, on the ground that the law's restrictions are required to prevent it from "establishing" religion.

This understanding of the Establishment Clause is unmoored from the original meaning of the First Amendment. As I have explained in previous cases, at the founding, the Clause served only to "protec[t] States, and by extension their citizens, from the imposition of an established religion by the Federal Government." Under this view, the Clause resists incorporation against the States. There is mixed historical evidence concerning whether the Establishment Clause was understood as an individual right at the time of the Fourteenth Amendment's ratification. Even assuming that the Clause creates a right and that such a right could be incorporated, it would only protect against an "establishment" of religion as understood at the founding, i.e., " 'coercion of religious orthodoxy and of financial support by force of law and threat of penalty.' " Thus, the modern view, which presumes that States must remain both completely separate from religion to comply with the Establishment Clause, is fundamentally incorrect. Properly understood, the Establishment Clause does not prohibit States from favoring religion. They can legislate as they wish, subject only to the limitations in the State and Federal Constitutions.

I have previously made these points in Establishment Clause cases to show that the Clause likely has no application to the States or, if it is capable of incorporation, that the Court employs a far broader test than the Clause's original meaning. But the Court's wayward approach to the Establishment Clause also impacts its free exercise jurisprudence. Specifically, its overly expansive understanding of the former Clause has led to a correspondingly cramped interpretation of the latter. Under this Court's current approach, state and local governments may rely on the Establishment Clause to justify policies that others wish to challenge as violations of the Free Exercise Clause. Once the government demonstrates that its policy is required for compliance with the Constitution, any claim the policy infringes on free exercise cannot survive.

The Court's current understanding of the Establishment Clause actually thwarts, rather than promotes, equal treatment of religion. Under a proper understanding of the Establishment Clause, robust and lively debate about the role of religion in government is permitted, even encouraged, at the state and local level. The Court's distorted view of the Establishment Clause, however, removes the entire subject of religion from the realm of permissible governmental activity.

This Court's Establishment Clause jurisprudence communicates a message that religion is dangerous and in need of policing, which in turn has the effect of tilting society in favor of devaluing religion. Historical evidence suggests that many advocates for this separationist view were originally motivated by hostility toward certain disfavored religions. And this Court's adoption of a separationist interpretation has itself sometimes bordered on religious hostility. Justice Black, well known for his role in formulating the Court's modern Establishment Clause jurisprudence, once described Catholic petitioners as "powerful sectarian religious propagandists" "looking toward complete domination and supremacy" of their "preferences and prejudices." *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 251 (1968) (dissenting opinion).

Although such hostility may not be overtly expressed by the Court any longer, manifestations of this "trendy disdain for deep religious conviction" assuredly live on. Returning the Establishment Clause to its proper scope will go a long way toward allowing free exercise of religion to flourish as the Framers intended. I look forward to the day when the Court takes up this task in earnest.

JUSTICE GORSUCH, concurring.

Today, the Court explains how the Montana Constitution, as interpreted by the State Supreme Court, violates the First Amendment by discriminating against parents and schools based on their religious status or identity. The Court explains, too, why the State Supreme Court's decision to eliminate the tax credit program fails to mask the discrimination. I agree with all the Court says on these scores and join its opinion in full. I write separately only to address an additional point.

The Court characterizes the Montana Constitution as discriminating against parents and schools based on "religious status and not religious use." No doubt, the Court proceeds as it does to underscore how the outcome of this case follows from *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). No doubt, too, discrimination on the basis of religious status raises grave constitutional questions for the reasons the Court describes. But I was not sure about characterizing the State's discrimination in *Trinity Lutheran* as focused only on religious status, and I am even less sure about characterizing the State's discrimination here that way.

In the first place, discussion of religious activity, uses, and conduct—not just status —pervades this record. Not only is the record replete with discussion of activities, uses, and conduct, any jurisprudence grounded on a status-use distinction seems destined to yield more questions than answers. Does Montana seek to prevent religious parents and schools from participating in a public benefits program (status)? Or does the State aim to bar public benefits from being employed to support religious education (use)? Maybe it's possible to describe what happened here as status-based discrimination. But it seems equally, and maybe more, natural to say that the State's discrimination focused on what religious parents and schools do—teach religion. Nor are the line-drawing challenges here unique; they have arisen before and will again.

Most importantly, though, it is not as if the First Amendment cares. The Constitution forbids laws that prohibit the free exercise of religion. That guarantee protects not just the right to be a religious person, holding beliefs inwardly and secretly; it also protects the right to act on those beliefs outwardly and publicly. So whether the Montana Constitution is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way, unless the State can show its law serves some compelling and narrowly tailored governmental interest, conditions absent here for reasons the Court thoroughly explains.

Our cases have long recognized the importance of protecting religious actions, not just religious status. In fact, this Court has already recognized that parents' decisions about the education of their children—the very conduct at issue here—can constitute protected religious activity. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that Amish parents could not be compelled to send their children to a public high school if doing so would conflict with the dictates of their faith.

Consistently, too, we have recognized the First Amendment's protection for religious conduct in public benefits cases. When the government chooses to offer scholarships, unemployment benefits, or other affirmative assistance to its citizens, those benefits necessarily affect the "baseline against which burdens on religion are measured." So, as we have long explained, the government "penalize[s] religious activity" whenever it denies to religious persons an "equal share of the rights, benefits, and privileges enjoyed by other citizens." What benefits the government decides to give, it must give without discrimination against religious conduct.

Our cases illustrate the point. In *Sherbert v. Verner*, 374 U.S. 398 (1963), for example, a State denied unemployment benefits to Adell Sherbert not because she was a Seventh Day Adventist but because she had put her faith into practice by refusing to labor on the day she believed God had set aside for rest. Recognizing her right to exercise her religion freely, the Court held that Ms. Sherbert was entitled to benefits. Similarly, in *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707 (1981), the Court held that Eddie Thomas had the right to resign from his job and still collect an unemployment check after he decided he could not assemble military tank turrets consistent with the teachings of his faith. In terms that speak equally to our case, the Court explained that the government tests the Free Exercise Clause whenever it "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs."

The First Amendment protects religious uses and actions for good reason. What point is it to tell a person that he is free to be Muslim but he may be subject to discrimination for doing what his religion commands, attending Friday prayers, living his daily life in harmony with the teaching of his faith, and educating his children in its ways? What does it mean to tell an Orthodox Jew that she may have her religion but may be targeted for observing her religious calendar? Often, governments lack effective ways to control what lies in a person's heart or mind. But they can bring to bear enormous power over what people say and do. The right to be religious without the right to do religious things would hardly amount to a right at all.

If the government could intrude so much in matters of faith, winners and losers would soon emerge. Those apathetic about religion or passive in its practice would suffer little in a world where only inward belief or status is protected. But what about those with a deep faith that requires them to do things legislative majorities might find unseemly or uncouth— like knocking on doors to spread their beliefs or teaching their children at home? "[T]hose who take their religion seriously, who think that their religion should affect the whole of their lives," and those whose religious beliefs and practices are least popular, would face the greatest disabilities. A right meant to protect minorities instead could become a cudgel to ensure conformity.

In public benefits cases like the one before us individuals are forced only to choose between forgoing state aid or pursuing some aspect of their faith. The government does not put a gun to the head, only a thumb on the scale. But, as so many of our cases explain, the Free Exercise Clause doesn't easily tolerate either; any discrimination against religious exercise must meet the demands of strict scrutiny. In this way, the Clause seeks to ensure that religion remains "a matter of voluntary choice by individuals and their associations, [where] each sect `flourish[es]

according to the zeal of its adherents and the appeal of its dogma,'" influenced by neither where the government points its gun nor where it places its thumb.

Montana's Supreme Court disregarded these foundational principles. Effectively, the court told the state legislature and parents of Montana like Ms. Espinoza: You can have school choice, but if anyone dares to choose to send a child to an accredited religious school, the program will be shuttered. That condition on a public benefit discriminates against the free exercise of religion. Calling it discrimination on the basis of religious status or religious activity makes no difference: It is unconstitutional all the same.

Justice GINSBURG, with whom Justice KAGAN joins, dissenting.

The Montana Legislature enacted a scholarship program to fund tuition for students attending private secondary schools. The Montana Supreme Court struck down that program in its entirety. The program, the state court ruled, conflicted with the State Constitution's no-aid provision. Parents who sought to use the program's scholarships to fund their children's religious education challenged the state court's ruling. They argue that the Montana court's application of the no-aid provision violated the Free Exercise Clause. The parents argue—and this Court's majority accepts—that the provision is unconstitutional because the First Amendment prohibits discrimination in tuition-benefit programs based on a school's religious status. Because the state court's decision does not so discriminate, I would reject petitioners' free exercise claim.

This Court's decisions have recognized that a burden on religious exercise may occur both when a State proscribes religiously motivated activity and when a law pressures an adherent to abandon her religious faith or practice. The Free Exercise Clause thus protects against "indirect coercion or penalties on the free exercise of religion." Invoking that principle in *Trinity Lutheran*, the Court observed that disqualifying an entity from a public benefit "solely because of [the entity's] religious character" can impose "a penalty on the free exercise of religion." The Court then concluded that a law making churches ineligible for a government playground-refurbishing grant impermissibly burdened the church's religious exercise by "put[ting it] to the choice between being a church and receiving a government benefit."

Petitioners argue that the Montana Supreme Court's decision fails when measured against *Trinity Lutheran*. I do not see how. Past decisions in this area have entailed differential treatment occasioning a burden on a plaintiff's religious exercise. This case is missing that essential component. Recall that the Montana court remedied the state constitutional violation by striking the scholarship program in its entirety. Under that decree, secular and sectarian schools alike are ineligible for benefits, so the decision cannot be said to entail differential treatment based on petitioners' religion. Put somewhat differently, petitioners argue that the Free Exercise Clause requires a State to treat institutions and people neutrally when doling out a benefit—and neutrally is how Montana treats them in the wake of the state court's decision.

Accordingly, the Montana Supreme Court's decision does not place a burden on petitioners' religious exercise. Petitioners may still send their children to a religious school. And the Montana Supreme Court's decision does not pressure them to do otherwise. Unlike the law in Trinity Lutheran, the decision below puts petitioners to no "choice": Neither giving up their faith, nor

declining to send their children to sectarian schools, would affect their entitlement to scholarship funding. There simply are no scholarship funds to be had.

True, petitioners expected to be eligible for scholarships under the legislature's program, and to use those scholarships at a religious school. True, the Montana court's decision disappointed those expectations along with those of parents who send their children to secular private schools. But, as Justice SOTOMAYOR observes, this Court has consistently refused to treat neutral government action as unconstitutional solely because it fails to benefit religious exercise.

These considerations should be fatal to petitioners' free exercise claim, yet the Court does not confront them. Instead, the Court decides a question that this case does not present: "[W]hether excluding religious schools and affected families from [the scholarship] program was consistent with the Federal Constitution." The Court goes on to hold that the Montana Supreme Court's application of the no-aid provision violates the Free Exercise Clause because it " 'condition[s] the availability of benefits upon a recipient's willingness to surrender [its] religiously impelled status.' " As I see it, the decision below—which maintained neutrality between sectarian and nonsectarian private schools—did no such thing.

In the Court's recounting, the Montana court first held that religious schools must be excluded from the scholarship program—necessarily determining that the Free Exercise Clause permitted that result—and subsequently struck the entire program as a way of carrying out its holding. But the initial step described by this Court is imaginary. The Montana court determined that the scholarship program violated the no-aid provision because it resulted in aid to religious schools. Declining to rewrite the statute to exclude those schools, the state court struck the program in full. In doing so, the court never made religious schools ineligible for an otherwise available benefit, and it never decided that the Free Exercise Clause would allow that outcome.

Thus, contrary to this Court's assertion, the no-aid provision did not require the Montana Supreme Court to "exclude" religious schools from the scholarship program. The provision mandated only that the state treasury not be used to fund religious schooling. As this case demonstrates, that mandate does not necessarily require differential treatment. The no-aid provision can be implemented in two ways. A State may distinguish within a benefit program between secular and sectarian schools, or it may decline to fund all private schools. The Court agrees that the First Amendment permits the latter course. Because that is the path the Montana Supreme Court took in this case, there was no reason for this Court to address the alternative.

By urging that it is impossible to apply the no-aid provision in harmony with the Free Exercise Clause, the Court seems to treat the no-aid provision itself as unconstitutional. However, the state courts were never asked to address the constitutionality of the no-aid provision divorced from its application to a specific government benefit. This Court therefore had no call to reach that issue. The only question properly raised is whether application of the no-aid provision to bar all state-sponsored private-school funding violates the Free Exercise Clause. For the reasons stated, it does not.

Nearing the end of its opinion, the Court writes: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." Because Montana's Supreme Court did not make such a decision—

its judgment put all private school parents in the same boat—this Court had no occasion to address the matter. On that sole ground, I dissent from the Court's judgment.

Justice BREYER, with whom Justice KAGAN joins as to Part I, dissenting.

The First Amendment's Free Exercise Clause guarantees the right to practice one's religion. At the same time, its Establishment Clause forbids government support for religion. Taken together, the Religion Clauses have helped our Nation avoid religiously based discord while securing liberty for those of all faiths.

This Court has long recognized that an overly rigid application of the Clauses could bring their mandates into conflict and defeat their basic purpose. See, e.g., *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668-69 (1970). And this potential conflict is nowhere more apparent than in cases involving state aid that serves religious purposes or institutions. In such cases, the Court has said, there must be constitutional room, or "`play in the joints,'" between "what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). Whether a particular state program falls within that space depends upon the nature of the aid at issue, considered in light of the Clauses' objectives.

The majority barely acknowledges the play-in-the-joints doctrine here. It holds that the Free Exercise Clause forbids a State to draw any distinction between secular and religious uses of government aid to private schools that is not required by the Establishment Clause. The majority's approach and its conclusion in this case, I fear, risk the kind of entanglement and conflict that the Religion Clauses are intended to prevent. I consequently dissent.

I.

We all recognize that the First Amendment prohibits discrimination against religion. At the same time, our history and federal constitutional precedent reflect a deep concern that state funding for religious teaching might fuel religious discord and division and thereby threaten religious freedom itself. The Court has consequently made it clear that the Constitution commits the government to a "position of neutrality" in respect to religion.

The inherent tension between the Establishment and Free Exercise Clauses means, however, that the "course of constitutional neutrality in this area cannot be an absolutely straight line." *Walz*, 397 U.S. at 669. Indeed, "rigidity could defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited."

That, in significant part, is why the Court has held that "there is room for play in the joints" between the Clauses' express prohibitions that is "productive of a benevolent neutrality," allowing "religious exercise to exist without sponsorship and without interference." It has held that there "are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." And that "play in the joints" should play a determinative role here.

It may be that, under our precedents, the Establishment Clause does not forbid Montana to subsidize the education of petitioners' children. But, the question here is whether the Free Exercise Clause requires it to do so. The majority believes that the answer to that question is

"yes." It writes that "once a State decides" to support nonpublic education, "it cannot disqualify some private schools solely because they are religious." I shall explain why I disagree.

The majority finds that *Trinity Lutheran* controls. I disagree. In my view, the program at issue is importantly different from the program we found unconstitutional in *Trinity Lutheran*. Montana has chosen not to fund (at a distance) "an essentially religious endeavor"—an education designed to " 'induce religious faith.' " That kind of program cannot be likened to Missouri's decision to exclude a church school from applying for a grant to resurface its playground.

And what is it that leads the majority to conclude that funding the study of religion is like paying to fix up a playground? The majority's principal argument appears to be that, as in *Trinity Lutheran*, Montana has excluded religious schools from its program "solely because of the religious character of the schools."

It is true that Montana's no-aid provision broadly bars state aid to schools based on their religious affiliation. But this case does not involve a claim of status-based discrimination. The schools do not apply or compete for scholarships, they are not parties to this litigation, and no one purports to represent their interests. We are instead faced with a suit by parents who assert that their free exercise rights are violated by the application of the no-aid provision to prevent them from using taxpayer-supported scholarships to attend the schools of their choosing. In other words, the problem is what petitioners " 'propos[e] to do—use the funds to' " obtain a religious education.

Even if the schools' status were relevant, I do not see what bearing the majority's distinction could have here. There is no dispute that religious schools seek generally to inspire religious faith and values in their students. How else could petitioners claim that barring them from using state aid to attend these schools violates their free exercise rights? Thus, the question in this case—unlike in *Trinity Lutheran* —boils down to what the schools would do with state support. Here we confront a State's decision not to fund the inculcation of religious truths.

Among those who gave shape to the young Republic were people, including Madison and Jefferson, who perceived a grave threat to individual liberty and communal harmony in tax support for the teaching of religious truths. These "historic and substantial" concerns have consistently guided the Court's application of the Religion Clauses since. The Court's special attention to these views should come as no surprise, for the risks the Founders saw have only become more apparent over time. In the years since the Civil War, the number of religions practiced in our country has grown to scores. And that has made it more difficult to avoid suspicions of favoritism—or worse—when government becomes entangled with religion.

Nor can I see how it could make a difference that the Establishment Clause might permit the State to subsidize religious education through a program like Montana's. The tax benefit here inures to donors, who choose to support a particular scholarship organization. That organization, in turn, awards scholarships to students for the qualifying school of their choice. The majority points to cases in which we have upheld programs where, as here, state funds make their way to religious schools by means of private choices. As the Court acknowledged in *Trinity Lutheran*, however, that does not answer the question whether providing such aid is required.

Neither does it address related concerns that I have previously described. Private choice cannot help the taxpayer who does not want to finance the propagation of religious beliefs, whether his own or someone else's. It will not help religious minorities too few in number to support a school that teaches their beliefs. And it will not satisfy those whose religious beliefs preclude them from participating in a government-sponsored program. Some or many of the persons who fit these descriptions may well feel ignored—or worse—when public funds are channeled to religious schools. These feelings may, in turn, sow religiously inspired political conflict and division—a risk that is considerably greater where States are required to include religious schools in programs like the one before us here. And it is greater still where, as here, those programs benefit only a handful of a State's many religious denominations. Indeed, the records of Montana's constitutional convention show that these concerns were among the reasons that a religiously diverse group of delegates, including faith leaders of different denominations, supported the no-aid provision.

In an effort to downplay this risk, the majority contends that "Montana's Constitution does not zero in on any particular 'religious' course of instruction." But . . . [w]e have long recognized that unrestricted cash payments of this kind raise special establishment concerns. And for good reason: The subsidy petitioners demand would go to pay for, among other things, the salaries of teachers and administrators who have been found in at least some instances to "personify [the] beliefs" of the churches that employ them. If, for 250 years, we have drawn a line at forcing taxpayers to pay the salaries of those who teach their faith from the pulpit, I do not see how we can require Montana to adopt a different view respecting those who teach it in the classroom.

II.

In reaching its conclusion that the Free Exercise Clause requires Montana to allow petitioners to use taxpayer-supported scholarships to pay for their children's religious education, the majority makes several doctrinal innovations that, in my view, are misguided and threaten adverse consequences.

Although the majority refers in passing to the "play in the joints" between that which the Establishment Clause forbids and that which the Free Exercise Clause requires, its holding leaves that doctrine a shadow of its former self. Having concluded that there is no obstacle to subsidizing a religious education under our Establishment Clause precedents, the majority says little more about Montana's antiestablishment interests or the reasoning that underlies them. It does not engage with the State's concern that its funds not be used to support religious teaching. Instead, the Court holds that it need not consider how Montana's funds would be used because, in its view, all distinctions on the basis of religion—whether in respect to playground grants or devotional teaching—are similarly and presumptively unconstitutional.

Setting aside the problems with the majority's characterization of this case, I think the majority is wrong to replace the flexible, context-specific approach of our precedents with a test of "strict" or "rigorous" scrutiny. And it is wrong to imply that courts should use that same heightened scrutiny whenever a government benefit is at issue. Experience has taught us that "we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication." If the Court has found it possible to walk the "`tight rope'"

between the two Religion Clauses, it is only by "preserving doctrinal flexibility and recognizing the need for a sensible and realistic application" of those provisions.

Montana's law does not punish religious exercise. It does not deny anyone, because of their faith, the right to participate in political affairs. And it does not require students to choose between their religious beliefs and receiving secular government aid. The State has simply chosen not to fund programs that, in significant part, typically involve the teaching and practice of religious devotion. And "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."

The Court's reliance in our prior cases on the notion of "play in the joints," our hesitation to apply presumptions of unconstitutionality, and our tendency to confine benefit-related holdings to the context in which they arose all reflect a recognition that great care is needed if we are to realize the Religion Clauses' basic purpose "to promote and assure the fullest scope of religious liberty and religious tolerance for all and to nurture the conditions which secure the best hope of attainment of that end."

For one thing, government benefits come in many shapes and sizes. The appropriate way to approach a State's benefit-related decision may well vary depending upon the relation between the Religion Clauses and the specific benefit and restriction at issue. The majority claims that giving weight to these considerations would be a departure from our precedent and give courts too much discretion to interpret the Religion Clauses. But we have long understood that the "application" of the First Amendment's mandate of neutrality "requires interpretation of a delicate sort." "Each value judgment under the Religion Clauses," we have explained, must "turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so."

Nor does the majority's approach avoid judicial entanglement in difficult and sensitive questions. To the contrary, it burdens courts with the more complex task of untangling disputes between religious organizations and state governments, instead of giving deference to state legislators' choices to avoid such issues altogether. At the same time, it puts States in a legislative dilemma, caught between the demands of the Free Exercise and Establishment Clauses, without "breathing room" to help ameliorate the problem.

I agree with the majority that it is preferable in some areas of the law to develop generally applicable tests. The problem, as our precedents show, is that the interaction of the Establishment and Free Exercise Clauses makes it particularly difficult to design a test that vindicates the Clauses' competing interests in all—or even most—cases. That is why, far from embracing mechanical formulas, our precedents repeatedly and frankly acknowledge the need for precisely the kind of "`judgment-by-judgment analysis'" the majority rejects.

The Court's occasional efforts to declare rules in spite of this experience have failed to produce either coherence or consensus in our First Amendment jurisprudence. The persistence of such disagreements bears out what I have said—namely, that rigid, bright-line rules like the one the Court adopts today too often work against the underlying purposes of the Religion Clauses. And a test that fails to advance the Clauses' purposes is, in my view, far worse than no test at all.

Consider some of the practical problems that may arise from the Court's holding. The States have taken advantage of the "play in the joints" between the Religion Clauses to craft programs of public aid to education that address their local needs. Although most state constitutions have no-aid provisions like Montana's, those provisions are only one part of a broader system of local regulation. Some States have concluded that their no-aid provisions do not bar scholarships to students at religious schools, while others without such clauses have nevertheless chosen not to fund religious education. Today's decision upends those arrangements without stopping to ask whether they might actually further the objectives of the Religion Clauses.

And what are the limits of the Court's holding? The majority asserts that States "need not subsidize private education." But it does not explain why that is so. Accepting the majority's distinction between public and nonpublic schools does little to address the uncertainty that its holding introduces. What about charter schools? States vary in how they permit charter schools to be structured, funded, and controlled. How would the majority's rule distinguish between those States in which support for charter schools is akin to public school funding and those in which it triggers a constitutional obligation to fund private religious schools? The majority's rule provides no guidance, even as it sharply limits the ability of courts and legislatures to balance the potentially competing interests that underlie the Free Exercise and Antiestablishment Clauses.

It is not easy to discern "the boundaries of the neutral area between" the two Religion Clauses "within which the legislature may legitimately act." And it is more difficult still in cases, such as this one, where the Constitution's policy in favor of free exercise, on one hand, and against state sponsorship, on the other, are in conflict. In such cases, I believe there is "no test-related substitute for the exercise of legal judgment." That judgment "must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes." Here, those purposes lead me to believe that Montana's differential treatment of religious schools is constitutional. "If any room exists between the two Religion Clauses, it must be here." For these reasons, I respectfully dissent.

JUSTICE SOTOMAYOR, dissenting.

The majority holds that a Montana scholarship program unlawfully discriminated against religious schools by excluding them from a tax benefit. The threshold problem, however, is that such tax benefits no longer exist for anyone in the State. The Montana Supreme Court invalidated the program on state-law grounds, thereby foreclosing the as-applied challenge petitioners raise here. The Court nevertheless reframes the case and appears to ask whether a longstanding Montana constitutional provision is facially invalid under the Free Exercise Clause. But by resolving a constitutional question not presented, the Court fails to heed Article III principles older than the Religion Clause it expounds.

Not only is the Court wrong to decide this case at all, it decides it wrongly. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), this Court held, "for the first time, that the Constitution requires the government to provide public funds directly to a church." *Id.* at 2027 (SOTOMAYOR, J., dissenting). Here, the Court invokes that precedent to require a State to subsidize religious schools if it enacts an education tax credit. Because this

decision further "slights both our precedents and our history" and "weakens this country's longstanding commitment to a separation of church and state beneficial to both." I respectfully dissent.

I.

The Montana Supreme Court invalidated a state tax-credit program because it was inconsistent with the Montana Constitution's "no-aid provision," Art. X, § 6(1), which forbids government appropriations for sectarian purposes, including funding religious schools. In so doing, the court expressly declined to resolve federal constitutional issues. The court also remedied the only potential harm of discriminatory treatment by striking down the program altogether. After the state court's decision, neither secular nor sectarian schools receive the program's tax benefits.

Petitioners' free exercise claim is not cognizable. The Free Exercise Clause, the Court has said, protects against "indirect coercion or penalties on the free exercise of religion." Accordingly, this Court's cases have required not only differential treatment, but also a resulting burden on religious exercise. Neither differential treatment nor coercion exists here because the Montana Supreme Court invalidated the tax-credit program entirely. Because no secondary school (secular or sectarian) is eligible for benefits, the state court's ruling neither treats petitioners differently based on religion nor burdens their religious exercise. Petitioners remain free to send their children to the religious school of their choosing and to exercise their faith.

To be sure, petitioners may want to apply for scholarships and would prefer that Montana subsidize their children's religious education. But this Court had never before held unconstitutional government action that merely failed to benefit religious exercise. "The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' " Put another way, the Constitution does not compel Montana to create or maintain a tax subsidy.

The Court sidesteps these obstacles by asking a question that this case does not raise and that the Montana Supreme Court did not answer: whether by excluding "religious schools and affected families from [a scholarship] program," Montana's no-aid provision was "consistent with the Federal Constitution."

Having held that petitioners may not be "exclu[ded] from the scholarship program" that no longer exists, the Court remands to the Montana Supreme Court for "further proceedings not inconsistent with this opinion." But it is hard to tell what this Court wishes the state court to do. There is no program from which petitioners are currently "exclu[ded]," so must the Montana Supreme Court order the State to recreate one? Has this Court just announced its authority to require a state court to order a state legislature to fund religious exercise, overruling centuries of contrary precedent and historical practice? Indeed, it appears that the Court has declared that once Montana created a tax subsidy, it forfeited the right to eliminate it if doing so would harm religion. This is a remarkable result, all the more so because the Court strains to reach it.

The Court views its decision as "simply restor[ing] the status quo established by the Montana Legislature." But it overlooks how that status quo allowed the State Supreme Court to cure any

disparate treatment of religion while still giving effect to a state constitutional provision ratified by the citizens of Montana. Today's decision replaces a remedy chosen by representatives of Montanans and designed to honor the will of the electorate with one that the Court prefers instead.

II.

Even on its own terms, the Court's answer to its hypothetical question is incorrect. The Court relies principally on *Trinity Lutheran*, which held that ineligibility for a government benefit impermissibly burdened a church's religious exercise by "put[ting it] to the choice between being a church and receiving a government benefit." Invoking that precedent, the Court concludes that Montana must subsidize religious education if it also subsidizes nonreligious education.

The Court's analysis of Montana's defunct tax program reprises the error in *Trinity Lutheran*. Contra the Court's current approach, our free exercise precedents had long granted the government "some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws."

Until *Trinity Lutheran*, the right to exercise one's religion did not include a right to have the State pay for that religious practice. That is because a contrary rule risks reading the Establishment Clause out of the Constitution. Although the Establishment Clause "permit[s] some government funding of secular functions performed by sectarian organizations," the Court's decisions "provide[d] no precedent for the use of public funds to finance religious activities." After all, the government must avoid "an unlawful fostering of religion." Thus, to determine the constitutionality of government action that draws lines based on religion, our precedents "carefully considered whether the interests embodied in the Religion Clauses justify that line." *Trinity Lutheran*, 137 S. Ct. at 2031 (SOTOMAYOR, J., dissenting). The relevant question had always been not whether a State singles out religious entities, but why it did so.

A State may refuse to extend certain aid programs to religious entities when doing so avoids "historic and substantial" antiestablishment concerns. Petitioners seek to procure taxpayer funds to support religious schooling. Indeed, one of the concurrences lauds petitioners' spiritual pursuit, acknowledging that they seek state funds for manifestly religious purposes like "teach[ing] religion" so that petitioners may "outwardly and publicly" live out their religious tenets. But those deeply religious goals confirm why Montana may properly decline to subsidize religious education. Involvement in such spiritual matters implicates both the Establishment Clause and the free exercise rights of taxpayers, "denying them the chance to decide for themselves whether and how fund religion," *Trinity Lutheran*, 137 S. Ct., at 2036 (SOTOMAYOR, J., dissenting). Previously, this Court recognized that a "prophylactic rule against the use of public funds" for "religious activities" appropriately balanced the Religion Clauses' differing but equally weighty interests.

The Court further suggests that by abstaining from funding religious activity, the State is "suppress[ing]" and "penaliz[ing]" religious activity. But a State's decision not to fund religious activity does not "disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns." That is, a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."

Finally, it is no answer to say that this case involves "discrimination." A "decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination." *Trinity Lutheran*, 137 S. Ct. at 2038-39 (SOTOMAYOR, J., dissenting). So too here.

Today's ruling is perverse. Without any need or power to do so, the Court appears to require a State to reinstate a tax-credit program that the Constitution did not demand in the first place. We once recognized that "[w]hile the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." Today's Court, by contrast, rejects the Religion Clauses' balanced values in favor of a new theory of free exercise, and it does so only by setting aside well-established judicial constraints. I respectfully dissent.

4. FULTON v. CITY OF PHILADELPHIA
141 S. Ct. 1868 (2021)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, in which JUSTICES BREYER, SOTOMAYOR, KAGAN, KAVANAUGH, and BARRETT joined.

Catholic Social Services is a foster care agency in Philadelphia. The City stopped referring children to CSS upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. The City will renew its foster care contract with CSS only if the agency agrees to certify same-sex couples. The question presented is whether the actions of Philadelphia violate the First Amendment.

I.

The Catholic Church has served the needy children of Philadelphia for over two centuries. In 1798, a priest in the City organized an association to care for orphans whose parents had died in a yellow fever epidemic. When criticism of asylums mounted in the Progressive Era, the Church established the Catholic Children's Bureau to place children in foster homes. Petitioner CSS continues that mission today.

The Philadelphia foster care system depends on cooperation between the City and private foster agencies like CSS. When children cannot remain in their homes, the City's Department of Human Services assumes custody of them. The Department enters standard annual contracts with private foster agencies to place some of those children with foster families.

The placement process begins with review of prospective foster families. Pennsylvania law gives the authority to certify foster families to state-licensed foster agencies like CSS. Before certifying a family, an agency must conduct a home study during which it considers statutory criteria including the family's "ability to provide care, nurturing and supervision to children," "[e]xisting family relationships," and ability "to work in partnership" with a foster agency. The agency must decide whether to "approve, disapprove or provisionally approve the foster family."

When the Department seeks to place a child with a foster family, it sends its contracted agencies a request, known as a referral. The agencies report whether any of their certified

families are available, and the Department places the child with what it regards as the most suitable family. The agency continues to support the family throughout the placement.

The religious views of CSS inform its work in this system. CSS believes that "marriage is a sacred bond between a man and a woman." Because the agency understands the certification of prospective foster families to be an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children. No same-sex couple has ever sought certification from CSS. If one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples.

For over 50 years, CSS successfully contracted with the City to provide foster care services while holding to these beliefs. But things changed in 2018. After receiving a complaint about a different agency, a newspaper ran a story in which a spokesman for the Archdiocese of Philadelphia stated that CSS would not be able to consider prospective foster parents in same-sex marriages. The City Council called for an investigation, saying that the City had "laws in place to protect its people from discrimination that occurs under the guise of religious freedom." The Philadelphia Commission on Human Relations launched an inquiry. And the Commissioner of the Department of Human Services held a meeting with the leadership of CSS. She remarked that "things have changed since 100 years ago," and "it would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church." Immediately after the meeting, the Department informed CSS that it would no longer refer children to the agency.

The City later explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the Fair Practices Ordinance. The City stated that it would not enter a full foster care contract with CSS in the future unless the agency agreed to certify same-sex couples.

CSS and three foster parents affiliated with the agency filed suit against the City, the Department, and the Commission. The Support Center for Child Advocates and Philadelphia Family Pride intervened as defendants. As relevant here, CSS alleged that the referral freeze violated the Free Exercise and Free Speech Clauses of the First Amendment.

II.

The Free Exercise Clause, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. As an initial matter, it is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement. And "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."

Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible. *Employment Division v. Smith* held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so

long as they are neutral and generally applicable. CSS urges us to overrule *Smith*, and the concurrences in the judgment argue in favor of doing so. But we need not revisit that decision here. This case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable.

Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. CSS points to evidence in the record that it believes demonstrates that the City has transgressed this neutrality standard, but we find it more straightforward to resolve this case under the rubric of general applicability.

A law is not generally applicable if it "invite[s]" the government to consider the particular reasons for a person's conduct by providing " 'a mechanism for individualized exemptions.' " For example, in *Sherbert v. Verner* (1963), a Seventh-day Adventist was fired because she would not work on Saturdays. Unable to find a job that would allow her to keep the Sabbath as her faith required, she applied for unemployment benefits. The State denied her application under a law prohibiting eligibility to claimants who had "failed, without good cause . . . to accept available suitable work." We held that the denial infringed her free exercise rights and could be justified only by a compelling interest.

Smith later explained that the unemployment benefits law in *Sherbert* was not generally applicable because the "good cause" standard permitted the government to grant exemptions based on the circumstances underlying each application. *Smith* went on to hold that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.

The City initially argued that CSS's practice violated section 3.21 of its standard foster care contract. We conclude, however, that this provision is not generally applicable as required by *Smith*. The current version of section 3.21 specifies in pertinent part: "Rejection of Referral. Provider shall not reject a child or family including, but not limited to, . . . prospective foster or adoptive parents, for Services based upon . . . their . . . sexual orientation . . . unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion."

This provision requires an agency to provide "Services," defined as "the work to be performed under this Contract," to prospective foster parents regardless of their sexual orientation. Like the good cause provision in *Sherbert*, section 3.21 incorporates a system of individual exemptions, made available in this case at the "sole discretion" of the Commissioner. The City has made clear that the Commissioner "has no intention of granting an exception" to CSS. But the City "may not refuse to extend that [exemption] system to cases of 'religious hardship' without compelling reason" . . . .

III.

The contractual non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable. The concurrence protests that the "Court granted certiorari to decide whether to overrule [Smith]," and chides the Court for seeking to "sidestep the question." But the Court also granted review to decide whether Philadelphia's

actions were permissible under our precedents.

CSS has demonstrated that the City's actions are subject to "the most rigorous of scrutiny" under those precedents. Because the City's actions are therefore examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision here.

A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

The City asserts that its non-discrimination policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children. The City states these objectives at a high level of generality, but the First Amendment demands a more precise analysis. Rather than rely on "broadly formulated interests," courts must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.

Once properly narrowed, the City's asserted interests are insufficient. Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS's certification practices.

Such speculation is insufficient to satisfy strict scrutiny, particularly because the authority to certify foster families is delegated to agencies by the State, not the City. That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its nondiscrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.

As Philadelphia acknowledges, CSS has "long been a point of light in the City's foster-care system." CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment.

JUSTICE BARRETT, with whom JUSTICE KAVANAUGH joins, and with whom JUSTICE BREYER joins as to all but the first paragraph, concurring.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990), this Court held that

a neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise. Petitioners, their amici, scholars, and Justices of this Court have made serious arguments that *Smith* ought to be overruled. While history looms large in this debate, I find the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances. In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.

Yet what should replace *Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced. There would be a number of issues to work through if *Smith* were overruled.

To name a few: Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Should there be a distinction between indirect and direct burdens on religious exercise? And if the answer is strict scrutiny, would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws come out the same way?

We need not wrestle with these questions in this case, though, because the same standard applies regardless whether *Smith* stays or goes. A longstanding tenet of our free exercise jurisprudence—one that both pre-dates and survives *Smith*—is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions. . . .

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, concurring in the judgment.

This case presents an important constitutional question that urgently calls out for review: whether this Court’s governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990), the Court abruptly pushed aside nearly 40 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to S*mith*, provides no protection. This severe holding is ripe for reexamination.

There is no question that *Smith*'s interpretation can have startling consequences. Here are a few examples. Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. The Act would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the

United States. Or suppose that a State, following the example of several European countries, made it unlawful to slaughter an animal that had not first been rendered unconscious. That law would be fine under *Smith* even though it would outlaw kosher and halal slaughter. Or suppose that a jurisdiction in this country, following the recommendations of medical associations in Europe, banned the circumcision of infants. A San Francisco ballot initiative in 2010 proposed just that. A categorical ban would be allowed by *Smith* even though it would prohibit an ancient and important Jewish and Muslim practice. Or suppose that this Court or some other court enforced a rigid rule prohibiting attorneys from wearing any form of head covering in court. The rule would satisfy *Smith* even though it would prevent Orthodox Jewish men, Sikh men, and many Muslim women from appearing. Many other examples could be added.

We may hope that legislators and others with rulemaking authority will not go as far as *Smith* allows, but the present case shows that the dangers posed by *Smith* are not hypothetical. . . .

We should reconsider *Smith* without further delay. The correct interpretation of the Free Exercise Clause is a question of great importance, and *Smith*'s interpretation is hard to defend. It can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption. It swept aside decades of established precedent, and it has not aged well. Its interpretation has been undermined by subsequent scholarship on the original meaning of the Free Exercise Clause.

Contrary to what many initially expected, *Smith* has not provided a clear-cut rule that is easy to apply, and experience has disproved the *Smith* majority's fear that retention of the Court's prior free-exercise jurisprudence would lead to "anarchy."

When *Smith* reinterpreted the Free Exercise Clause, four Justices—Brennan, Marshall, Blackmun, and O'Connor—registered strong disagreement. After joining the Court, Justice Souter called for *Smith* to be reexamined. So have five sitting Justices. So have some of the country's most distinguished scholars of the Religion Clauses. On two separate occasions, Congress, with virtual unanimity, expressed the view that *Smith*'s interpretation is contrary to our society's deep-rooted commitment to religious liberty. In enacting the Religious Freedom Restoration Act of 1993, and the Religious Land Use and Institutionalized Persons Act of 2000, Congress tried to restore the constitutional rule in place before Smith was handed down. Those laws, however, do not apply to most state action, and they leave huge gaps. It is high time for us to take a fresh look at what the Free Exercise Clause demands. . . .

Smith was wrongly decided. As long as it remains on the books, it threatens a fundamental freedom. And while precedent should not lightly be cast aside, the Court's error in *Smith* should now be corrected. . . .

If *Smith* is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.

Whether this test should be rephrased or supplemented with specific rules is a question that

need not be resolved here because Philadelphia's ouster of CSS from foster care work simply does not further any interest that can properly be protected in this case. As noted, CSS's policy has not hindered any same-sex couples from becoming foster parents, and there is no threat that it will do so in the future. . . .

5. CARSON v. MAKIN
142 S. Ct. 1987 (2022)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, in which JUSTICES THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT joined.

Maine has enacted a program of tuition assistance for parents who live in school districts that do not operate a secondary school of their own. Under the program, parents designate the secondary school they would like their child to attend—public or private—and the school district transmits payments to that school to help defray the costs of tuition. Most private schools are eligible to receive the payments, so long as they are "nonsectarian." The question presented is whether this restriction violates the Free Exercise Clause of the First Amendment.

Prior to 1981, parents could direct the tuition assistance payments to religious schools. Indeed, in the 1979–1980 school year, over 200 Maine students opted to attend such schools through the tuition assistance program. In 1981, however, Maine imposed a new requirement that any school receiving tuition assistance payments must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." That provision was enacted in response to an opinion by the Maine attorney general taking the position that public funding of private religious schools violated the Establishment Clause of the First Amendment. We subsequently held, however, that a benefit program under which private citizens "direct government aid to religious schools wholly as a result of their own genuine and independent private choice" does not offend the Establishment Clause. *Zelman v. Simmons-Harris* (2002). Following our decision in *Zelman*, the Maine Legislature considered a proposed bill to repeal the "nonsectarian" requirement, but rejected it.

The "nonsectarian" requirement for participation in Maine's tuition assistance program remains in effect today. The Department has stated that, in administering this requirement, it "considers a sectarian school to be one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith." "The Department's focus is on what the school teaches through its curriculum and related activities, and how the material is presented." "[A]ffiliation or association with a church or religious institution is one potential indicator of a sectarian school," but "it is not dispositive."

This case concerns two families that live in SAUs [school administrative units] that neither maintain their own secondary schools nor contract with any nearby secondary school. Petitioners David and Amy Carson reside in Glenburn, Maine. When this litigation commenced, the Carsons' daughter attended high school at Bangor Christian Schools (BCS), which was founded in 1970 as a ministry of Bangor Baptist Church. The Carsons sent their daughter to BCS because of the school's high academic standards and because the school's Christian worldview aligns with

their sincerely held religious beliefs. Given that BCS is a "sectarian" school that cannot qualify for tuition assistance payments under Maine's program, the Carsons paid the tuition for their daughter to attend BCS themselves.

Petitioners Troy and Angela Nelson live in Palermo, Maine. When this litigation commenced, the Nelsons' daughter attended high school at Erskine Academy, a secular private school, and their son attended middle school at Temple Academy, a "sectarian" school affiliated with Centerpoint Community Church. The Nelsons sent their son to Temple Academy because they believed it offered him a high-quality education that aligned with their sincerely held religious beliefs. While they wished to send their daughter to Temple Academy too, they could not afford to pay the cost of the Academy's tuition for both of their children.

BCS and Temple Academy are both accredited by the New England Association of Schools and Colleges (NEASC), and the Department considers each school a "private school approved for attendance purposes" under the State's compulsory attendance requirement. Yet because neither school qualifies as "nonsectarian," neither is eligible to receive tuition payments under Maine's tuition assistance program. Absent the "nonsectarian" requirement, the Carsons and the Nelsons would have asked their respective SAUs to pay the tuition to send their children to BCS and Temple Academy, respectively.

In 2018, petitioners brought suit against the commissioner of the Maine Department of Education. They alleged that the "nonsectarian" requirement of Maine's tuition assistance program violated the Free Exercise Clause and the Establishment Clause. . . .

II.

The Free Exercise Clause of the First Amendment protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." In particular, we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits. See *Sherbert v. Verner* (1963). A State may not withhold unemployment benefits, for instance, on the ground that an individual lost his job for refusing to abandon the dictates of his faith.

We have recently applied these principles in the context of two state efforts to withhold otherwise available public benefits from religious organizations. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), we considered a Missouri program that offered grants to qualifying nonprofit organizations that installed cushioning playground surfaces made from recycled rubber tires. The Missouri Department of Natural Resources maintained an express policy of denying such grants to any applicant owned or controlled by a church, sect, or other religious entity. The Trinity Lutheran Church Child Learning Center applied for a grant to resurface its gravel playground, but the Department denied funding on the ground that the Center was operated by the Church.

We deemed it "unremarkable in light of our prior decisions" to conclude that the Free Exercise Clause did not permit Missouri to "expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."

Two Terms ago, in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), we

reached the same conclusion as to a Montana program that provided tax credits to donors who sponsored scholarships for private school tuition. The Montana Supreme Court held that the program, to the extent it included religious schools, violated a provision of the Montana Constitution that barred government aid to any school controlled in whole or in part by a church, sect, or denomination. As a result of that holding, the State terminated the scholarship program, preventing the petitioners from accessing scholarship funds they otherwise would have used to fund their children's educations at religious schools.

We again held that the Free Exercise Clause forbade the State's action. The application of the Montana Constitution's no-aid provision, we explained, required strict scrutiny because it "bar[red] religious schools from public benefits solely because of the religious character of the schools."

The "unremarkable" principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case. Maine offers its citizens a benefit: tuition assistance payments for any family whose school district does not provide a public secondary school. *Espinoza* applied these basic principles in the context of religious education that we consider today. There, as here, we considered a state benefit program under which public funds flowed to support tuition payments at private schools. And there, as here, that program specifically carved out private religious schools from those eligible to receive such funds. While the wording of the Montana and Maine provisions is different, their effect is the same: to "disqualify some private schools" from funding "solely because they are religious." A law that operates in that manner, we held in *Espinoza*, must be subjected to "the strictest scrutiny."

To satisfy strict scrutiny, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." "A law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases."

This is not one of them. As noted, a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause. Maine's decision to continue excluding religious schools from its tuition assistance program after *Zelman* thus promotes stricter separation of church and state than the Federal Constitution requires.

But as we explained in both *Trinity Lutheran* and *Espinoza*, such an "interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise." Justice Breyer stresses the importance of "government neutrality" when it comes to religious matters, but there is nothing neutral about Maine's program. The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion. A State's anti-establishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise.

III.

Maine may provide a strictly secular education in its public schools. But BCS and Temple Academy—like numerous other recipients of Maine tuition assistance payments—are not public schools. In order to provide an education to children who live in certain parts of its far-flung

State, Maine has decided not to operate schools of its own, but instead to offer tuition assistance that parents may direct to the public or private schools of their choice. Maine's administration of that benefit is subject to free exercise principles—including the prohibition on denying the benefit based on a recipient's religious exercise.

The dissents are wrong to say that under our decision today Maine "must" fund religious education. Maine chose to allow some parents to direct state tuition payments to private schools; that decision was not "forced upon" it. The State retains a number of options: it could expand the reach of its public school system, increase the availability of transportation, provide some combination of tutoring, remote learning, and partial attendance, or even operate boarding schools. As we held in *Espinoza*, a "State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."

The Court of Appeals also attempted to distinguish this case from *Trinity Lutheran* and *Espinoza* on the ground that the funding restrictions in those cases were "solely status-based religious discrimination," while the challenged provision here "imposes a use-based restriction." Justice BREYER makes the same argument.

In *Trinity Lutheran*, the Missouri Constitution banned the use of public funds in aid of "any church, sect or denomination of religion." We noted that the case involved "express discrimination based on religious identity," which was sufficient unto the day in deciding it, and that our opinion did "not address religious uses of funding." So too in *Espinoza*, the discrimination at issue was described by the Montana Supreme Court as a prohibition on aiding "schools controlled by churches," and we analyzed the issue in terms of "religious status and not religious use." Foreshadowing Maine's argument here, Montana argued that its case was different from *Trinity Lutheran*'s because it involved not playground resurfacing, but general funds that "could be used for religious ends by some recipients, particularly schools that believe faith should `permeate[]' everything they do." We explained, however, that the strict scrutiny triggered by status-based discrimination could not be avoided by arguing that "one of its goals or effects [was] preventing religious organizations from putting aid to religious uses." And we noted that nothing in our analysis was "meant to suggest that we agree[d] with [Montana] that some lesser degree of scrutiny applies to discrimination against religious uses of government aid."

Maine's argument, however—along with the decision below and Justice BREYER's dissent—is premised on precisely such a distinction. That premise, however, misreads our precedents. In *Trinity Lutheran* and *Espinoza*, we held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. This case illustrates why. "[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism. Indeed, Maine concedes that the Department barely engages in any such scrutiny when enforcing the "nonsectarian" requirement. That suggests that any status-use distinction lacks a meaningful application not only in theory, but in practice as well. In short, the prohibition on status-based discrimination is not a permission to engage in

use-based discrimination.

Maine's "nonsectarian" requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, and with whom JUSTICE SOTOMAYOR joins except as to Part I–B, dissenting.

The First Amendment begins by forbidding the government from "mak[ing] [any] law respecting an establishment of religion." It next forbids them to make any law "prohibiting the free exercise thereof." The Court today pays almost no attention to the words in the first Clause while giving almost exclusive attention to the words in the second. The majority also fails to recognize the " 'play in the joints' " between the two Clauses. That "play" gives States some degree of legislative leeway. It sometimes allows a State to further anti-establishment interests by withholding aid from religious institutions without violating the Constitution's protections for the free exercise of religion. In my view, Maine's nonsectarian requirement falls squarely within the scope of that constitutional leeway. I respectfully dissent. . . .

I.

B.

I have previously discussed my views of the relationship between the Religion Clauses and how I believe these Clauses should be interpreted to advance their goal of avoiding religious strife. Here I simply note the increased risk of religiously based social conflict when government promotes religion in its public school system. "[T]he prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled," can "give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment" sought to prevent.

This potential for religious strife is still with us. We are today a Nation with well over 100 different religious groups, from Free Will Baptist to African Methodist, Buddhist to Humanist. People in our country adhere to a vast array of beliefs, ideals, and philosophies. And with greater religious diversity comes greater risk of religiously based strife, conflict, and social division. The Religion Clauses were written in part to help avoid that disunion. As Thomas Jefferson, one of the leading drafters and proponents of those Clauses, wrote, " 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' " And as James Madison, another drafter and proponent, said, compelled taxpayer sponsorship of religion "is itself a signal of persecution," which "will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects." To interpret the Clauses with these concerns in mind may help to further their original purpose of avoiding religious-based division.

I have also previously explained why I believe that a "rigid, bright-line" approach to the Religion Clauses—an approach without any leeway or "play in the joints"—will too often work

against the Clauses' underlying purposes. Not all state-funded programs that have religious restrictions carry the same risk of creating social division and conflict. In my view, that risk can best be understood by considering the particular benefit at issue, along with the reasons for the particular religious restriction at issue. Recognition that States enjoy a degree of constitutional leeway allows States to enact laws sensitive to local circumstances while also allowing this Court to consider those circumstances in light of the basic values underlying the Religion Clauses.

In a word, to interpret the two Clauses as if they were joined at the hip will work against their basic purpose: to allow for an American society with practitioners of over 100 different religions, and those who do not practice religion at all, to live together without serious risk of religion-based social divisions. . . .

II.

The majority believes that the principles set forth in this Court's earlier cases easily resolve this case. But they do not. We have previously found, as the majority points out, that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." We have thus concluded that a State may, consistent with the Establishment Clause, provide funding to religious schools through a general public funding program if the "government aid ... reach[es] religious institutions only by way of the deliberate choices of . . . individual [aid] recipients."

But the key word is "may." We have never previously held what the Court holds today, namely, that a State must (not may) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education.

What happens once "may" becomes "must"? Does that transformation mean that a school district that pays for public schools must pay equivalent funds to parents who wish to send their children to religious schools? Does it mean that school districts that give vouchers for use at charter schools must pay equivalent funds to parents who wish to give their children a religious education? What other social benefits are there the State's provision of which means—under the majority's interpretation of the Free Exercise Clause— that the State must pay parents for the religious equivalent of the secular benefit provided? The concept of "play in the joints" means that courts need not, and should not, answer with "must" these questions that can more appropriately be answered with "may."

. . . .

III.

In my view, Maine's nonsectarian requirement is constitutional because it supports, rather than undermines, the Religion Clauses' goal of avoiding religious strife. Forcing Maine to fund schools that provide the sort of religiously integrated education offered by Bangor Christian and Temple Academy creates a similar potential for religious strife as that raised by promoting religion in public schools. It may appear to some that the State favors a particular religion over others, or favors religion over nonreligion. Members of minority religions, with too few adherents to establish schools, may see injustice in the fact that only those belonging to more popular religions can use state money for religious education. Taxpayers may be upset at having to finance the propagation of religious beliefs that they do not share and with which they

disagree. And parents in school districts that have a public secondary school may feel indignant that only some families in the State—those families in the more rural districts without public schools—have the opportunity to give their children a Maine-funded religious education.

Maine's nonsectarian requirement also serves to avoid religious strife between the State and the religious schools. Given that Maine is funding the schools as part of its effort to ensure that all children receive the basic public education to which they are entitled, Maine has an interest in ensuring that the education provided at these schools meets certain curriculum standards. Religious schools, on the other hand, have an interest in teaching a curriculum that advances the tenets of their religion. And the schools are of course entitled to teach subjects in the way that best reflects their religious beliefs. But the State may disagree with the particular manner in which the schools have decided that these subjects should be taught.

This is a situation ripe for conflict, as it forces Maine into the position of evaluating the adequacy or appropriateness of the schools' religiously inspired curriculum. Maine does not want this role. As one legislator explained, one of the reasons for the nonsectarian requirement was that "[g]overnment officials cannot, and should not, review the religious teachings of religious schools." Another legislator cautioned that the State would be unable to "reconcile" the curriculum of "private religious schools who teach religion in the classroom" with Maine "standards . . . that do not include any sort of religion in them."

I emphasize the problems that may arise out of today's decision because they reinforce my belief that the Religion Clauses do not require Maine to pay for a religious education simply because, in some rural areas, the State will help parents pay for a secular education. After all, the Establishment Clause forbids a State from paying for the practice of religion itself. And state neutrality in respect to the teaching of the practice of religion lies at the heart of this Clause. There is no meaningful difference between a State's payment of the salary of a religious minister and the salary of someone who will teach the practice of religion to a person's children. At bottom, there is almost no area "as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits." The Establishment Clause was intended to keep the State out of this area.

Maine wishes to provide children within the State with a secular, public education. This wish embodies, in significant part, the constitutional need to avoid spending public money to support what is essentially the teaching and practice of religion. That need is reinforced by the fact that we are today a Nation of more than 330 million people who ascribe to over 100 different religions. In that context, state neutrality with respect to religion is particularly important. The Religion Clauses give Maine the right to honor that neutrality by choosing not to fund religious schools as part of its public school tuition program. I believe the majority is wrong to hold the contrary. And with respect, I dissent.

Justice SOTOMAYOR, dissenting.

This Court continues to dismantle the wall of separation between church and state that the Framers fought to build. Justice BREYER explains why the Court's analysis falters on its own terms, and I join all but Part I-B of his dissent. I write separately to add three points.

First, this Court should not have started down this path five years ago. Before *Trinity Lutheran*, it was well established that "both the United States and state constitutions embody distinct views" on "the subject of religion"—"in favor of free exercise, but opposed to establishment"—"that find no counterpart" with respect to other constitutional rights. Because of this tension, the Court recognized " 'room for play in the joints' between" the Religion Clauses, with "some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." Using this flexibility, and consistent with a rich historical tradition, States and the Federal Government could decline to fund religious institutions. Moreover, the Court for many decades understood the Establishment Clause to prohibit government from funding religious exercise.

Over time, the Court eroded these principles in certain respects. See, *e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002) (allowing government funds to flow to religious schools if private individuals selected the benefiting schools; the government program was "entirely neutral with respect to religion"; and families enjoyed a "genuine choice among options public and private, secular and religious"). Nevertheless, the space between the Clauses continued to afford governments "some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws." *Trinity Lutheran*, 137 S.Ct. at 2031 (SOTOMAYOR, J., dissenting).

Trinity Lutheran veered sharply away from that understanding. After assuming away an Establishment Clause violation, the Court revolutionized Free Exercise doctrine by equating a State's decision not to fund a religious organization with presumptively unconstitutional discrimination on the basis of religious status. A plurality, however, limited the Court's decision to "express discrimination based on religious identity" (i.e., status), not "religious uses of funding." In other words, a State was barred from withholding funding from a religious entity "solely because of its religious character," 137 S. Ct., at 2024 (opinion of the Court), but retained authority to do so on the basis that the funding would be put to religious uses. Two Terms ago, the Court reprised and extended *Trinity Lutheran*'s error to hold that a State could not limit a private-school voucher program to secular schools. *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2255 (2020). The Court, however, again refrained from extending *Trinity Lutheran* from funding restrictions based on religious status to those based on religious uses.

As Justice BREYER explains, this status-use distinction readily distinguishes this case from *Trinity Lutheran* and *Espinoza*. I warned in *Trinity Lutheran*, however, that the Court's analysis could "be manipulated to call for a similar fate for lines drawn on the basis of religious use." 137 S. Ct., at 2041, n. 14 (dissenting opinion) [See p. 276, n. 14 of this chapter]. That fear has come to fruition: The Court now holds for the first time that "any status-use distinction" is immaterial in both "theory" and "practice." It reaches that conclusion by embracing arguments from prior separate writings and ignoring decades of precedent affording governments flexibility in navigating the tension between the Religion Clauses. As a result, in just a few years, the Court has upended constitutional doctrine, shifting from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars.

Second, the consequences of the Court's rapid transformation of the Religion Clauses must not be understated. From a doctrinal perspective, the Court's failure to apply the play-in-the-joints principle here leaves one to wonder what, if anything, is left of it. The Court's increasingly expansive view of the Free Exercise Clause risks swallowing the space between the Religion Clauses that once "permit[ted] religious exercise to exist without sponsorship and without interference." Walz, 397 U.S. at 669.

From a practical perspective, today's decision directs the State of Maine (and, by extension, its taxpaying citizens) to subsidize institutions that undisputedly engage in religious instruction. In addition, while purporting to protect against discrimination of one kind, the Court requires Maine to fund what many of its citizens believe to be discrimination of other kinds. See ante, at 2010-2011 (BREYER, J., dissenting) (summarizing Bangor Christian Schools' and Temple Academy's policies denying enrollment to students based on gender identity, sexual orientation, and religion). The upshot is that Maine must choose between giving subsidies to its residents or refraining from financing religious teaching and practices.

Finally, the Court's decision is especially perverse because the benefit at issue is the public education to which all of Maine's children are entitled under the State Constitution. As this Court has long recognized, the Establishment Clause requires that public education be secular and neutral as to religion. The Court avoids this framing of Maine's benefit because, it says, "Maine has decided not to operate schools of its own, but instead to offer tuition assistance that parents may direct to the public or private schools of their choice." In fact, any such "deci[sion]" was forced upon Maine by "the realities of remote geography and low population density" which render it impracticable for the State to operate its own schools in many communities.

The Court's analysis does leave some options open to Maine. For example, under state law, school administrative units (SAUs) that cannot feasibly operate their own schools may contract directly with a public school in another SAU, or with an approved private school, to educate their students. I do not understand today's decision to mandate that SAUs contract directly with schools that teach religion, which would go beyond *Zelman*'s private-choice doctrine and blatantly violate the Establishment Clause. Nonetheless, it is irrational for this Court to hold that the Free Exercise Clause bars Maine from giving money to parents to fund the only type of education the State may provide consistent with the Establishment Clause: a religiously neutral one. Nothing in the Constitution requires today's result.

What a difference five years makes. In 2017, I feared that the Court was "lead[ing] us ... to a place where separation of church and state is a constitutional slogan, not a constitutional commitment." *Trinity Lutheran*, 137 S. Ct., at 2041 (dissenting opinion). Today, the Court leads us to a place where separation of church and state becomes a constitutional violation. If a State cannot offer subsidies to its citizens without being required to fund religious exercise, any State that values its historic antiestablishment interests more than this Court does will have to curtail the support it offers to its citizens. With growing concern for where this Court will lead us next, I respectfully dissent.