# RELIGION AND THE CONSTITUTION

*Fifth Edition*

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# 2023-24 SUPPLEMENT TO THE CASEBOOK (FIFTH EDITION)

Wolters Kluwer

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***Consider inserting this material on p. 171 after* Masterpiece Cakeshop. *Alternatively, it could be added after p. 233 after the section titled, "Targeted Religious Accommodations."***

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## 303 CREATIVE, LLC v. ELENIS
143 S.Ct. 2298 (2023)

Justice GORSUCH delivered the opinion of the Court.

Like many States, Colorado has a law forbidding businesses from engaging in discrimination when they sell goods and services to the public. Laws along these lines have done much to secure the civil rights of all Americans. But in this particular case Colorado does not just seek to ensure the sale of goods or services on equal terms. It seeks to use its law to compel an individual to create speech she does not believe. The question we face is whether that course violates the Free Speech Clause of the First Amendment.

I.

A.

Through her business, 303 Creative LLC, Lorie Smith offers website and graphic design, marketing advice, and social media management services. Recently, she decided to expand her offerings to include services for couples seeking websites for their weddings. As she envisions it, her websites will provide couples with text, graphic arts, and videos to "celebrate" and "conve[y]" the "details" of their "unique love story." …

While Ms. Smith has laid the groundwork for her new venture, she has yet to carry out her plans. She worries that, if she does so, Colorado will force her to express views with which she disagrees…. Specifically, she worries that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman…. [S]he asserts [that] the First Amendment's Free Speech Clause protects her from being compelled to speak what she does not believe. The Constitution, she insists, protects her right to differ.

B.

To clarify her rights, [Smith sued in federal court for an injunction against application of the Colorado Anti-Discrimination Act (CADA). To have standing in such a pre-enforcement action, she had] to show "a credible threat" existed that Colorado would, in fact, seek to compel speech from her that she did not wish to produce. [CADA] defines a "public accommodation" broadly to include almost every public-facing business in the State [and] prohibits a public accommodation from denying "the full and equal enjoyment" of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait. Either state officials or private citizens may bring actions to enforce the law. [Potential penalties include fines, cease-and-desist orders, and mandatory educational programs or ongoing compliance reports.] As evidence [of a "credible threat" of enforcement], Ms. Smith pointed to Colorado's record of past enforcement actions under CADA, including [that in] *Masterpiece Cakeshop* [p. 161].

To facilitate the district court's resolution of the merits of her case, Ms. Smith and the State stipulated to a number of facts [including]:

- Ms. Smith is "willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender," and she "will gladly create custom graphics and websites" for clients of any sexual orientation.
- She will not produce content that "contradicts biblical truth" regardless of who orders it.
- Her belief that marriage is a union between one man and one woman is a sincerely held religious conviction.
- All of the graphic and website design services Ms. Smith provides are "expressive."
- The websites and graphics Ms. Smith designs are "original, customized" creations that "contribut[e] to the overall messages" her business conveys "through the websites" it creates.
- Just like the other services she provides, the wedding websites Ms. Smith plans to create "will be expressive in nature."
- Those wedding websites will be "customized and tailored" through close collaboration with individual couples, and they will "express Ms. Smith's and 303 Creative's message celebrating and promoting" her view of marriage.
- Viewers of Ms. Smith's websites "will know that the websites are [her] original artwork."
- To the extent Ms. Smith may not be able to provide certain services to a potential customer, "[t]here are numerous companies in the State of Colorado and across the nation that offer custom website design services."

[The district court ruled against Smith, and the Tenth Circuit affirmed.]

II.

The framers designed the Free Speech Clause of the First Amendment to protect the "freedom to think as you will and to speak as you think." *Boy Scouts of America* v. *Dale* [p. 287]…. "[I]f there is any fixed star in our constitutional constellation," *West Virginia Bd. of Ed.* v. *Barnette* [pp. 143, 460], it is the principle that the government may not interfere with "an uninhibited marketplace of ideas," [e.g.,] *McCullen* v. *Coakley* (2014).

From time to time, governments in this country have sought to test these foundational principles…. *Barnette* [held], for example, that [i]n seeking to compel students to salute the flag and recite a pledge, … state authorities … "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment ... to reserve from all official control."

A similar story unfolded in *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995). There, veterans organizing a St. Patrick's Day parade in Boston refused to include a group of gay, lesbian, and bisexual individuals in their event. The group argued that Massachusetts's public accommodations statute entitled it to participate in the parade as a matter of law. [But this Court held that] the parade was constitutionally protected speech and requiring the veterans to include voices they wished to exclude would impermissibly require them to "alter the expressive content of their parade." The veterans' choice of what to say (and not say) might have been unpopular, but they had a First Amendment right to present their message undiluted by views they did not share.

[Finally, in *Dale* held the Court held that public accommodations law could not require the Boy Scouts to retain an openly gay scoutmaster.] [F]orcing the Scouts to include Mr. Dale would "interfere with [its] choice not to propound a point of view contrary to its beliefs."

As these cases illustrate, the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or

deeply "misguided," *Hurley*, and likely to cause "anguish" or "incalculable grief," *Snyder* v. *Phelps* (2011)…. Generally, too, the government may not compel a person to speak its own preferred messages. Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include. All that offends the First Amendment just the same.

III.

Applying these principles to this case, we [hold] that the wedding websites Ms. Smith seeks to create qualify as "pure speech" under this Court's precedents. It is a conclusion that flows directly from the parties' stipulations. They have stipulated that Ms. Smith's websites promise to contain "images, words, symbols, and other modes of expression"[; t]hat every website will be her "original, customized" creation[; and] that [the websites will] "celebrate and promote the couple's wedding and unique love story" an[d] "celebrat[e] and promot[e]" what Ms. Smith understands to be a true marriage....

[T]he wedding websites Ms. Smith seeks to create involve [*her*] speech. Again, the parties' stipulations lead the way to that conclusion…. Ms. Smith intends to "ve[t]" each prospective project to determine whether it is one she is willing to endorse[,]will consult with clients to discuss "their unique stories as source material[,]" [and] will produce a final story for each couple using her own words and her own "original artwork." Of course, Ms. Smith's speech may combine with the couple's in the final product. But for purposes of the First Amendment that changes nothing. An individual "does not forfeit constitutional protection simply by combining multifarious voices" in a single communication. *Hurley*.

[Moreover,] Colorado seeks to compel speech Ms. Smith does not wish to provide…. [I]f Ms. Smith offers wedding websites celebrating marriages she endorses, the State intends to "forc[e her] to create custom websites" celebrating other marriages she does not. Colorado seeks to compel this speech in order to "excis[e] certain ideas or viewpoints from the public dialogue." *Turner Broadcasting System, Inc.* v. *FCC* (1994). Indeed, the Tenth Circuit recognized that the coercive "[e]liminati[on]" of dissenting "ideas" about marriage constitutes Colorado's "very purpose" in seeking to apply its law to Ms. Smith.

… If [Smith] wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs…. Under our precedents, that [is] an impermissible abridgment of the First Amendment's right to speak freely.

Consider what a contrary approach would mean. Under Colorado's logic, the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait. Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty. The government could require "an unwilling Muslim movie director to make a film with a Zionist message," or "an atheist muralist to accept a commission celebrating Evangelical zeal," so long as they would make films or murals for other members of the public with different messages. Equally, the government could force a male website designer married to another man to design websites for an organization that advocates against same-sex marriage. Countless other creative professionals, too, could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so….

In saying this much, we do not question the vital role public accommodations laws play in realizing the civil rights of all Americans. This Court has recognized that governments in this country have a "compelling interest" in eliminating discrimination in places of public accommodation. *Roberts* v. *United States Jaycees* (1984).…

Over time, governments in this country have expanded public accommodations laws in notable ways too. Statutes like Colorado's grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants. Often, these enterprises exercised something like monopoly power or hosted or transported others or their belongings much like bailees. [Citations omitted.] Over time, some States, Colorado included, have expanded the reach of these nondiscrimination rules to cover virtually every place of business engaged in any sales to the public.

Importantly, States have also expanded their laws to prohibit more forms of discrimination [including sexual orientation]. States may "protect gay persons, just as [they] 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." *Masterpiece Cakeshop*….

At the same time, this Court has also recognized that no public accommodations law is immune from the demands of the Constitution. In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech. In *Hurley*, the Court commented favorably on Massachusetts' public accommodations law, but made plain it could not be "applied to expressive activity" to compel speech. In *Dale*, the Court observed that New Jersey's public accommodations law had many lawful applications but held that it could "not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." …

Nor is it any answer, as the Tenth Circuit seemed to suppose, that Ms. Smith's services are "unique." In some sense, of course, her voice is unique; so is everyone's. But that hardly means a State may coopt an individual's voice for its own purposes. [If it did mean that, then] the better the artist, the finer the writer, the more unique his talent, the more easily his voice could be conscripted to disseminate the government's preferred messages. That would not respect the First Amendment; more nearly, it would spell its demise.

IV.

Before us, Colorado … seems to acknowledge that the First Amendment *does* forbid it from coercing Ms. Smith to create websites endorsing same-sex marriage or expressing any other message with which she disagrees. [But the State argues that] all Ms. Smith must do is repurpose websites she will create to celebrate marriages she *does* endorse for marriages she does *not*. She sells a product to some, the State reasons, so she must sell the same product to all…. [T]his case [the States says] involves only the sale of an ordinary commercial product and any burden on Ms. Smith's speech is purely "incidental." On the State's telling, then, speech more or less vanishes from the picture—and, with it, any need for First Amendment scrutiny….

This alternative theory, however, is difficult to square with the parties' stipulations. As we have seen, the State has stipulated that Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create "customized and tailored" speech for each couple…. The State has stipulated, too, that Ms. Smith's wedding websites "will be expressive in nature, using text, graphics, and in some cases videos to celebrate and promote the couple's wedding and unique love story." …

Of course, as the State emphasizes, Ms. Smith offers her speech for pay and does so through 303 Creative LLC, a company in which she is "the sole member-owner." But none of that makes a difference. Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return? Or that a visual artist who accepts commissions from the public does the same? Many of the world's great works of literature and art were created with an expectation of compensation. Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech. This fact underlies our cases involving everything from movie producers to book publishers to newspapers.

Colorado next urges us to focus on the *reason* Ms. Smith refuses to offer the speech it seeks to compel. She refuses, the State insists, because she objects to the "protected characteristics" of certain customers. But once more, the parties' stipulations speak differently. The parties agree that Ms. Smith "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites" do not violate her beliefs. That is a condition, the parties acknowledge, Ms. Smith applies to "all customers." Ms. Smith stresses, too, that she has not and will not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments. Nor, in any event, do the First Amendment's protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive….

[Finally, Colorado relies on *Rumsfeld v. FAIR* (2006).] In *FAIR*, a group of schools challenged a law requiring them, as a condition of accepting federal funds, to permit military recruiters space on campus on equal terms with other potential employers. The only expressive activity required of the law schools, the Court found, involved the posting of logistical notices along these lines: "'The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.'" And, the Court reasoned, compelled speech of this sort was "incidental" and a "far cry" from the speech at issue in our "leading First Amendment precedents [that] have established the principle that freedom of speech prohibits the government from telling people what they must say."

… Here, Colorado does not seek to impose an incidental burden on speech. It seeks to force an individual to "utter what is not in [her] mind" about a question of political and religious significance. [*Barnette*.]

V.

It is difficult to read the dissent and conclude we are looking at the same case…. [The dissent] reimagines the facts of this case from top to bottom. The dissent claims that Colorado wishes to regulate Ms. Smith's "conduct," not her speech. Forget Colorado's stipulation that Ms. Smith's activities are "expressive," and the Tenth Circuit's conclusion that the State seeks to compel "pure speech." …

[The dissent also] claims that, "for the first time in its history," the Court "grants a business open to the public" a "right to refuse to serve members of a protected class." Never mind that we do no such thing and Colorado *itself* has stipulated Ms. Smith will (as CADA requires) "work with all people regardless of ... sexual orientation." …

[T]he dissent spends much of its time adrift on a sea of hypotheticals about photographers, stationers, and others, asking if they too provide expressive services covered by the First Amendment. But those cases are not *this* case. Doubtless, determining what qualifies as expressive

activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity….[6]

… Eighty years ago in *Barnette*, this Court affirmed that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." The Court did so despite the fact that the speech rights it defended were deeply unpopular; at the time, the world was at war and many thought respect for the flag and the pledge "essential for the welfare of the state." *Id*. (Frankfurter, J., dissenting). Fifty years ago, this Court protected the right of Nazis to march through a town home to many Holocaust survivors and along the way espouse ideas antithetical to those for which this Nation stands….

Today, however, the dissent abandons what this Court's cases have recognized time and time again: A commitment to speech for only *some* messages and *some* persons is no commitment at all. By approving a government's effort to "[e]liminat[e]" disfavored "ideas," today's dissent is emblematic of an unfortunate tendency by some to defend First Amendment values only when they find the speaker's message sympathetic.

Reversed.

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join, dissenting.

… Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class. …

… When the civil rights and women's rights movements sought equality in public life, some public establishments refused. Some even claimed, based on sincere religious beliefs, constitutional rights to discriminate. The brave Justices who once sat on this Court decisively rejected those claims.

Now the Court faces a similar test. A business open to the public seeks to deny gay and lesbian customers the full and equal enjoyment of its services based on the owner's religious belief that same-sex marriages are "false." … As I will explain, the law in question targets conduct, not speech, for regulation, and the *act* of discrimination has never constituted protected expression under the First Amendment. Our Constitution contains no right to refuse service to a disfavored group. I dissent.

I.

A.

A "public accommodations law" is a law that guarantees to every person the full and equal enjoyment of places of public accommodation without unjust discrimination. The American people, through their elected representatives, have enacted such laws at all levels of government….

[CADA's] provision [prohibiting sexual-orientation discrimination in providing goods and services], known as the Act's "Accommodation Clause," applies to any business engaged in sales

[6] The dissent observes that public accommodations laws may sometimes touch on speech incidentally as they work to ensure ordinary, non-expressive goods and services are sold on equal terms. But as *Hurley* observed, there is nothing "incidental" about an infringement on speech when a public accommodations law is applied "peculiar[ly]" to compel expressive activity. The dissent notes that our case law has not sustained every First Amendment objection to an antidiscrimination rule, as with a law firm that sought to exclude women from partnership. [Citing *King & Spalding* and *Jaycees* cases.] But … very different considerations come into play when a law is used to force individuals to toe the government's preferred line when speaking (or associating to express themselves) on matters of significance.

"to the public." The Accommodation Clause does not apply to any "church, synagogue, mosque, or other place that is principally used for religious purposes."

In addition, CADA contains what is referred to as the Act's "Communication Clause," which makes it unlawful to advertise that services "will be refused, withheld from, or denied," or that an individual is "unwelcome" at a place of public accommodation, based on the same protected traits. In other words, just as a business open to the public may not refuse to serve customers based on race, religion, or sexual orientation, so too the business may not hang a sign that says, "No Blacks, No Muslims, No Gays."

A public accommodations law has two core purposes. First, the law ensures "*equal access* to publicly available goods and services." *Roberts*. For social groups that face discrimination, such access is vital. All the more so if the group is small in number or if discrimination against the group is widespread….

Second, a public accommodations law ensures *equal dignity* in the common market. Indeed, that is the law's "fundamental object": "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel*. This purpose does not depend on whether goods or services are otherwise available. "'Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his [social identity]. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment.'" *Id.* (Goldberg, J., concurring)….

To illustrate, imagine a funeral home in rural Mississippi agrees to transport and cremate the body of an elderly man who has passed away, and to host a memorial lunch. Upon learning that the man's surviving spouse is also a man, however, the funeral home refuses to deal with the family. Grief stricken, and now isolated and humiliated, the family desperately searches for another funeral home that will take the body. They eventually find one more than 70 miles away. *See First Amended Complaint in Zawadski v. Brewer Funeral Services, Inc*., No. 55CI1–17–cv–00019 (C. C. Pearl River Cty., Miss., Mar. 7, 2017), pp. 4–7. This ostracism, this otherness, is among the most distressing feelings that can be felt by our social species. K. Williams, Ostracism, 58 Ann. Rev. Psychology 425, 432–435 (2007).

Preventing the "unique evils" caused by "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages" is a compelling state interest "of the highest order." *Roberts*. Moreover, a law that prohibits only such acts by businesses open to the public is narrowly tailored to achieve that compelling interest. The law "responds precisely to the substantive problem which legitimately concerns the State": the harm from status-based discrimination in the public marketplace. *Id.*

... A public accommodations law does not force anyone to start a business, or to hold out the business's goods or services to the public at large. The law also does not compel any business to sell any particular good or service. But if a business chooses to profit from the public market, which is established and maintained by the state, the state may require the business to abide by a legal norm of nondiscrimination….

B.

The legal duty of a business open to the public to serve the public without unjust discrimination is deeply rooted in our history. The true power of this principle, however, lies in its

capacity to evolve, as society comes to understand more forms of unjust discrimination and, hence, to include more persons as full and equal members of "the public."

1.

"At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Hurley* (quoting *Lane* v. *Cotton* (K.B. 1701)).… That is to say, a business's duty to serve all comers derived from its choice to hold itself out as ready to serve the public. This holding-out rationale became firmly established in early American law. [Citations omitted.]

The majority is therefore mistaken to suggest that public accommodations or common carriers historically assumed duties to serve all comers because they enjoyed monopolies or otherwise had market power. [N]owhere in the relevant case law "is monopoly suggested as the distinguishing characteristic." E. Adler, Business Jurisprudence, 28 Harv. L. Rev. 135, 156 (1914),…

2.

[The dissent reviewed the enactment of public accommodation laws (1) after the Civil War and (2) from the 1960s forward.]

Not only have public accommodations laws expanded to recognize more forms of unjust discrimination, such as discrimination based on race, sex, and disability, such laws have also expanded to include more goods and services as "public accommodations." What began with common inns, carriers, and smiths has grown to include restaurants, bars, movie theaters, sports arenas, retail stores, salons, gyms, hospitals, funeral homes, and transportation networks….

This broader scope, though more inclusive than earlier state public accommodations laws, is in keeping with the fundamental principle—rooted in the common law, but alive and blossoming in statutory law—that the duty to serve without unjust discrimination is owed to everyone, and it extends to any business that holds itself out as ready to serve the public. If you have ever taken advantage of a public business without being denied service because of who you are, then you have come to enjoy the dignity and freedom that this principle protects.

3.

Lesbian, gay, bisexual, and transgender (LGBT) people, no less than anyone else, deserve that dignity and freedom. The movement for LGBT rights, and the resulting expansion of state and local laws to secure gender and sexual minorities' full and equal enjoyment of publicly available goods and services, is the latest chapter of this great American story….

C.

Yet for as long as public accommodations laws have been around, businesses have sought exemptions from them … based on First Amendment freedoms of expression and association. This Court was unwavering in its rejection of those claims, as invidious discrimination "has never been accorded affirmative constitutional protections." *Norwood* v. *Harrison* (1973). In particular, the refusal to deal with or to serve a class of people is not an expressive interest protected by the First Amendment.

1.

Opponents of the Civil Rights Act of 1964 objected that the law would force business owners to defy their beliefs. They argued that the Act would deny them "any freedom to speak or to act on the basis of their religious convictions or their deep-rooted preferences for associating or not associating with certain classifications of people." Congress rejected those arguments….

[So did the Supreme Court. *Heart of Atlanta Motel* and *Katzenbach v. McClung* (both in 1964), held] that "prohibition of racial discrimination in public accommodations" did not "interfer[e] with personal liberty [to select or decline customers]." …

Next is *Newman* v. *Piggie Park Enterprises* (1968) (*per curiam*), in which the owner of a chain of drive-in establishments asserted that requiring him to "contribut[e]" to racial integration in any way violated the First Amendment by interfering with his religious liberty. Title II could not be applied to his business, he argued, because that would "'contraven[e] the will of God.'" The Court found this argument "patently frivolous." *Id.*

[Finally,] *Runyon* v. *McCrary* (1976), confronted the question whether "commercially operated" schools had a First Amendment right to exclude Black children, notwithstanding a federal law against racial discrimination in contracting. See 42 U. S. C. §1981…. [*Runyon* held that] the government's regulation of conduct did not "inhibit" the schools' ability to teach its preferred "ideas or dogma." Requiring the schools to abide by an antidiscrimination law was not the same thing as compelling the schools to express teachings contrary to their sincerely held "belief that racial segregation is desirable."

2.

First Amendment rights of expression and association were also raised to challenge laws against sex discrimination. In *Roberts* v. *United States Jaycees*, the United States Jaycees sought an exemption from a Minnesota law that forbids discrimination on the basis of sex in public accommodations…. The Court held that the "application of the Minnesota statute to compel the Jaycees to accept women" did not infringe the organization's First Amendment "freedom of expressive association." That was so because the State's public accommodations law did "not aim at the suppression of speech" and did "not distinguish between prohibited and permitted activity on the basis of viewpoint." …

[Likewise, the Court held] in *Hishon* v. *King & Spalding* (1984) that a law partnership had no constitutional right to discriminate on the basis of sex in violation of Title VII…. [C]ompliance with Title VII the Court held] did not "inhibi[t]" the partnership's ability to advocate for certain "ideas and beliefs." …

II…

B.

The First Amendment does not entitle petitioners to a special exemption from a state law that simply requires them to serve all members of the public on equal terms. Such a law does not directly regulate petitioners' speech at all, and petitioners may not escape the law by claiming an expressive interest in discrimination….

1.

This Court has long held that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell* v. *IMS Health* (2011). "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather

than conduct." *Rumsfeld* v. *FAIR*. This principle explains "why an ordinance against outdoor fires might forbid burning a flag and why antitrust laws can prohibit agreements in restraint of trade." *Sorrell*.

[In *United States* v. *O'Brien* (1968) [p. 188],] the Court upheld the application of a law against the destruction of draft cards to a defendant who had burned his draft card to protest the Vietnam War. [Although O'Brien's conduct was expressive, the Court nonetheless upheld the regulation of it under a low standard of constitutional scrutiny.]

[There is also *Rumsfeld v. FAIR* (discussed in the majority opinion, see p. 7 in the supplement).] The schools [there] provided recruiting assistance in the form of emails, notices on bulletin boards, and flyers. As the Court acknowledged, those services "clearly involve speech." And the Solomon Amendment required "schools offering such services to other recruiters" to provide them equally "on behalf of the military," even if the school deeply objected to creating such speech [because of the military's discrimination against gays and lesbians]. But that did not transform the equal provision of services into "compelled speech" of the kind barred by the First Amendment, because the school's speech was "only 'compelled' if, and to the extent, the school provides such speech for other recruiters." Thus, any speech compulsion was "plainly incidental to the Solomon Amendment's regulation of conduct." *Id.*

2.

The same principle resolves this case…. Recall that Smith wants to post a notice on her company's homepage that the company will refuse to sell any website for a same-sex couple's wedding. This Court, however, has already said that "a ban on race-based hiring may require employers to remove 'White Applicants Only' signs." *Sorrell*. [That proposition] is all but fatal to [her] argument, because it shows that even "pure speech" may be burdened incident to a valid regulation of conduct….

Crucially, [Colorado's] law "does not dictate the content of speech at all, which is only 'compelled' if, and to the extent," the company offers "such speech" to other customers. *FAIR*. Colorado does not require the company to "speak [the State's] preferred message." Nor does it prohibit the company from speaking the company's preferred message. The company could, for example, offer only wedding websites with biblical quotations describing marriage as between one man and one woman. (Just as it could offer only t-shirts with such quotations.) The company could also refuse to include the words "Love is Love" if it would not provide those words to any customer. All the company has to do is offer its services without regard to customers' protected characteristics. Any effect on the company's speech is therefore "incidental" to the State's content-neutral regulation of conduct.

Once these features of the law are understood, it becomes clear that petitioners' freedom of speech is not abridged in any meaningful sense, factual or legal. Petitioners remain free to advocate the idea that same-sex marriage betrays God's laws. Even if Smith believes God is calling her to do so through her for-profit company, the company need not hold out its goods or services to the public at large. Many filmmakers, visual artists, and writers never do. (That is why the law does not require Steven Spielberg or Banksy to make films or art for anyone who asks.) Finally, and most importantly, even if the company offers its goods or services to the public, it remains free under state law to decide what messages to include or not to include….

Another example might help to illustrate the point. A professional photographer is generally free to choose her subjects. She can make a living taking photos of flowers or celebrities. The State does not regulate that choice. If the photographer opens a portrait photography business

to the public, however, the business may not deny to any person, because of race, sex, national origin, or other protected characteristic, the full and equal enjoyment of whatever services the business chooses to offer. That is so even though portrait photography services are customized and expressive. If the business offers school photos, it may not deny those services to multiracial children because the owner does not want to create any speech indicating that interracial couples are acceptable. If the business offers corporate headshots, it may not deny those services to women because the owner believes a woman's place is in the home. And if the business offers passport photos, it may not deny those services to Mexican Americans because the owner opposes immigration from Mexico….

C.

The Court reaches the wrong answer in this case because it asks the wrong questions. The question is not whether the company's products include "elements of speech." (They do.) The question is not even whether CADA would require the company to create and sell speech, notwithstanding the owner's sincere objection to doing so, if the company chooses to offer "such speech" to the public. (It would.) These questions do not resolve the First Amendment inquiry any more than they did in *FAIR*. Instead, the proper focus is on the character of state action and its relationship to expression. Because Colorado seeks to apply CADA only to the refusal to provide same-sex couples the full and equal enjoyment of the company's publicly available services, so that the company's speech "is only 'compelled' if, and to the extent," the company chooses to offer "such speech" to the public, any burden on speech is "plainly incidental" to a content-neutral regulation of conduct. *Id.*

The majority attempts to distinguish this clear holding of *FAIR* by suggesting that the compelled speech in *FAIR* was "incidental" because it was "logistical" (*e.g.*, "The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m."). [But this] skips over the Court's key reasoning for why any speech compulsion wa[s] "incidental" to the Amendment's regulation of conduct: It would occur only "if, and to the extent," the regulated entity provided "such speech" to others….

[Moreover,] the majority completely ignores the categorical nature of the exemption claimed by petitioners. Petitioners maintain, as they have throughout this litigation, that they will refuse to create *any* wedding website for a same-sex couple. Even an announcement of the time and place of a wedding (similar to the majority's example from *FAIR*) abridges petitioners' freedom of speech, they claim, because "the announcement of the wedding itself is a concept that [Smith] believes to be false." Indeed, petitioners here concede that if a same-sex couple came across an opposite-sex wedding website created by the company and requested an identical website, with only the names and date of the wedding changed, petitioners would refuse.[11] That is status-based discrimination, plain and simple….

*Hurley* and *Dale*, by contrast, involved "peculiar" applications of public accommodations laws, not to "the act of discriminating . . . in the provision of publicly available goods" by "clearly

[11] Because petitioners have never sold a wedding website to anyone, the record contains only a mockup website. The mockup confirms what you would expect: The website provides details of the event, a form to RSVP, a gift registry, etc. The customization of these elements pursuant to a content-neutral regulation of conduct does not unconstitutionally intrude upon any protected expression of the website designer. Yet Smith claims a First Amendment right to refuse to provide *any* wedding website for a same-sex couple. Her claim therefore rests on the idea that her act of service is itself a form of protected expression. In granting Smith's claim, the majority collapses the distinction between status-based and message-based refusals of service.

commercial entities," but rather to private, nonprofit expressive associations in ways that directly burdened speech. *Hurley* (private parade); *Dale* (Boy Scouts). The Court … stressed that the speech burdens in those cases were not incidental to prohibitions on status-based discrimination because the associations did not assert that "mere acceptance of a member from a particular group would impair [the association's] message." *Dale* (reasoning that Dale was excluded for being a gay rights activist, not for being gay); *id.* (explaining that in *Hurley*, "the parade organizers did not wish to exclude the GLIB [Irish-American gay, lesbian, and bisexual group] members because of their sexual orientations, but because they wanted to march behind a GLIB banner").

Here, the opposite is true. 303 Creative LLC is a "clearly commercial entit[y]." The company comes under the regulation of CADA only if it sells services to the public, and only if it denies the equal enjoyment of such services because of sexual orientation. The State confirms that the company is free to include or not to include any message in whatever services it chooses to offer. And the company confirms that it plans to engage in status-based discrimination….

Frustrated by this inescapable logic, the majority dials up the rhetoric, asserting that "Colorado seeks to compel [the company's] speech in order to excise certain ideas or viewpoints from the public dialogue." The State's "very purpose in seeking to apply its law," in the majority's view, is "the coercive elimination of dissenting ideas about marriage." That is an astonishing view of the law. It is contrary to the fact that a law requiring public-facing businesses to accept all comers "is textbook viewpoint neutral," *Christian Legal Soc.* v. *Martinez* (2010) [p. 602]; [and] contrary to the fact that the Accommodation Clause and the State's application of it here allows Smith to include in her company's goods and services whatever "dissenting views about marriage" she wants….

So it is dispiriting to read the majority suggest that this case resembles *Barnette*. A content-neutral equal-access policy is "a far cry" from a mandate to "endorse" a pledge chosen by the Government. *FAIR*. This Court has said "it trivializes the freedom protected in *Barnette*" to equate the two. *Id.* Requiring Smith's company to abide by a law against invidious discrimination in commercial sales to the public does not conscript her into espousing the government's message. It does not "invad[e]" her "sphere of intellect" or violate her constitutional "right to differ." All it does is require her to stick to her bargain: "The owner who hangs a shingle and offers her services to the public cannot retreat from the promise of open service; to do so is to offer the public marked money. It is to convey the promise of a free and open society and then take the prize away from the despised few." J. Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B. U. L. Rev. 929, 949 (2015).

III.

Today is a sad day in American constitutional law and in the lives of LGBT people. The Supreme Court of the United States declares that a particular kind of business, though open to the public, has a constitutional right to refuse to serve members of a protected class. The Court does so for the first time in its history. By issuing this new license to discriminate in a case brought by a company that seeks to deny same-sex couples the full and equal enjoyment of its services, the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status. In this way, the decision itself inflicts a kind of stigmatic harm, on top of any harm caused by denials of service. The opinion of the Court is, quite literally, a notice that reads: "Some services may be denied to same-sex couples." …

Although the consequences of today's decision might be most pressing for the LGBT community, the decision's logic cannot be limited to discrimination on the basis of sexual

orientation or gender identity. The decision threatens to balkanize the market and to allow the exclusion of other groups from many services. A website designer could equally refuse to create a wedding website for an interracial couple, for example. How quickly we forget that opposition to interracial marriage was often because "'Almighty God ... did not intend for the races to mix.'" *Loving* v. *Virginia* (1967). Yet the reason for discrimination need not even be religious, as this case arises under the Free Speech Clause. A stationer could refuse to sell a birth announcement for a disabled couple because she opposes their having a child. A large retail store could reserve its family portrait services for "traditional" families. And so on.[16]

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## NOTES AND QUESTIONS

**1. Freedom of Speech and Free Exercise of Religion.** As *303 Creative* dramatizes, religious objectors' challenges to regulation conflicting with their beliefs—a key subject of this chapter—can rest on freedom of speech as well as freedom of religion. Among other examples, two foundational rulings protecting people against compulsion to speak involved religious objections by Jehovah's Witnesses: *Board of Ed. v. Barnette* (discussed in *303 Creative*) and *Wooley v. Maynard*, 430 U.S. 705 (1977) (upholding vehicle owner's objection to displaying license plate with state motto "Live Free or Die"). By definition, the two First Amendment claims have different reaches. Free speech claims reach further in that they can be brought by nonreligious as well as religious objectors. But religious-exercise claims reach further in that they can be brought by persons not engaged in expressive activities. Should religious-freedom claims extend beyond expressive situations? How far? For example, should a sole-proprietor wedding-limousine company be able to decline to drive a same-sex couple?

**2. The Scope of *303 Creative*.** Based on *303 Creative*, can you state a test for when application of a public accommodations law will unconstitutionally require a business to express views with which it disagrees? How broadly do you expect the opinion to extend? Consider some of the dissent's hypotheticals. Could an executive-portrait photographer refuse to do portraits of women because it would imply his approval of women in leadership roles? Could a card artist refuse to design a birth-announcement card "for a disabled couple because she opposes their having a child"? Could a large publicly traded company refuse to provide custom expressive services for same-sex weddings? Realistically, how common are these cases likely to be? Economic self-interest clearly nudges service providers to expand, not contract, their customer base. Might these cases be self-limiting in an economic sense?

Consider also questions about the scope of the dissent's arguments. Isn't the majority correct that the dissent's position would allow governments to force a variety of artists who sell their work to produce work inconsistent with their beliefs? Must a Jewish florist create floral arrangements for a church on Easter Sunday, knowing that white lilies are a symbol of the

[16] The potential implications of the Court's logic are deeply troubling. Would *Runyon* v. *McCrary* have come out differently if the schools had argued that accepting Black children would have required them to create original speech, like lessons, report cards, or diplomas, that they deeply objected to? What if the law firm in *Hishon* v. *King & Spalding* had argued that promoting a woman to the partnership would have required it to alter its speech, like letterhead or court filings, in ways that it would rather not? Once you look closely, "compelled speech" (in the majority's facile understanding of that concept) is everywhere.

resurrection? Must a music band perform a political event for a candidate it detests, in a jurisdiction that forbid political discrimination? Does the dissent give a satisfactory response to this point?

And again, how common are these cases likely to be? Why do plaintiffs want services from people who are unwilling to provide them and then take the trouble to sue (or file an administrative complaint)? Is there anything self-limiting about these motivations?

**3. Justiciability and Concreteness.** The Court implicitly held that Lorie Smith faced a sufficient threat of enforcement of CADA, thus satisfying Article III's requirements of standing and ripeness. Like individuals who express other views, whether liberal or conservative, Smith had an interest in avoiding the chilling effect on her speech from the threat of enforcement. But one rationale for limits on justiciable cases is to ensure that the court has "a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982). Does the pre-enforcement posture of *303 Creative*—the absence of a full litigation record—hamper efforts to determine how broad is the category of "expressive" activities the opinion declares? Or do the party stipulations on which the Court relies provide adequate facts to compare future cases? How does this case compare to other First Amendment pre-enforcement challenges?

**4. Disconnects and Broad Statements.** In many ways, the majority and dissent in *303 Creative* talk past each other. For example, the majority notes that Smith is willing to serve gays and lesbians in contexts other than a wedding. The dissent answers that discrimination in only some services is still discrimination. (Ollie's Barbecue, the restaurant involved in the 1964 Civil Rights Act litigation, served black customers at the take-out window but not in the dining room.) But is the majority really denying that Smith's act would count as discrimination? Or is it simply saying that Smith's objection was bona fide, and limited in its effects, because it extended only to compelled expression of the specific view to which she objected (namely, celebration of a same-sex wedding)?

On the other hand, the majority asserts that the state's purpose in applying the CADA to Smith was "to excise certain ideas or viewpoints from the public dialogue." Is that assertion warranted given the other purposes that underlie public accommodations laws (ensuring people's access to goods and services, protecting them from insecurity and humiliation caused by denials of service)? Would this assertion cover *all* applications of public accommodations law, not only those where the law forces the alleged discriminator to engage in unwanted speech? (After all, this assertion focuses on the state's purpose, not the discriminator's activities.) Does this assertion threaten to undercut nondiscrimination laws broadly? And was the assertion necessary to the Court's ruling?

***Consider inserting this material at p. 219, at the end of section III.B.3 ("RLUIPA").***

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## NOTE ON FREE EXERCISE RIGHTS AND CLERGY IN EXECUTION CHAMBERS

In a series of recent cases, the Court has held that prisoners facing capital punishment by lethal injection must be allowed to have a clergy member or spiritual advisor of their own faith present in the execution chamber to pray with and comfort them.

The first lawsuits involved claims of denominational discrimination. Domeneque Ray, a Muslim inmate under a death sentence, challenged Alabama's refusal to allow any clergy in the execution chamber except the prison's official chaplain (who was, unsurprisingly, a Christian). The lower courts stayed his execution, but the Court vacated the stay on the ground that Ray had waited until too close to the execution to seek relief. *See Dunn v. Ray*, 139 S. Ct. 661 (2019) (mem.). But a few months later, a 6-3 Court stayed Texas's execution of inmate Patrick Murphy unless the state granted his request to have his Buddhist clergyman, "or another Buddhist reverend of the State's choosing," in the execution chamber. *See Murphy v. Collier*, 139 S. Ct. 1475 (2019) (mem.). Texas permitted state-employed chaplains in the chamber but did not employ any Buddhists as chaplains (only Christians and Muslims). Both these cases were decided on the Court's emergency, or "shadow" docket, without full briefing or oral argument. Texas then adopted a rule forbidding any clergy to be physically present at an execution, thus eliminating the denominational discrimination that previous claims had challenged. Two years later, a federal court of appeals held that this policy would likely violate RLUIPA and enjoined an execution. And the Supreme Court, by a 5-4 vote, declined to vacate the injunction. *See Dunn v. Smith*, 141 S. Ct. 725 (2021) (mem.). In response, Texas amended its rule again, allowing a clergy member of the prisoner's religious persuasion to be present in the execution chamber, but not to speak aloud or to touch the prisoner.

Then in 2022, the Supreme Court finally heard a case involving these issues on the merits (not on the emergency docket). The case involved a Texas death-row inmate, John Ramirez, who requested that the state allow his pastor, Dana Moore, not just to be present in the chamber but to pray aloud and "lay hands on" (gently touch) him during the execution. *See Ramirez v. Collier*, 142 S. Ct. 1264 (2022). By an 8-1 vote, the Court held that if the state proceeded with Ramirez's execution, a preliminary injunction—again under RLUIPA—would be proper to force Texas to grant Ramirez's requests concerning the pastor. The sole dissent, by Justice Thomas, rested on the procedural question of timeliness rather than on the merits. The Prison Litigation Reform Act, 42 U.S.C. § 1997e, requires inmates to raise their claims in a timely fashion through prison grievance processes. The majority held that Ramirez filed timely grievances in compliance with the PLRA.

On the merits of the RLUIPA claim, the state first challenged the sincerity of Ramirez's assertion that he needed Pastor Moore to touch him while praying. In an earlier complaint, Ramirez had said that the pastor "need not touch [him] at any time during the execution." The Court acknowledged that "evolving litigation positions may suggest a prisoner's goal is delay rather than sincere religious exercise." But it concluded that "the prior complaint—dismissed … one week after it was filed"—did not "outweigh[ ] the ample evidence that Ramirez's beliefs are sincere."

The majority then found that, although the state had compelling interests in preventing complications or disruption during a lethal injection, it had not met its burden under RLUIPA to demonstrate that categorical bans on ministers praying audibly or touching inmates were the least restrictive means of securing those interests. "As for audible prayer, there is a rich history of

clerical prayer at the time of a prisoner's execution, dating back well before the founding of our Nation" to English and colonial practice. The Court noted that "both the Federal Government and Alabama have recently permitted audible prayer and speech" and that "Texas has 'historically and routinely allowed prison chaplains to audibly pray' with the condemned." Because there was no evidence that Pastor Moore would cause disruption, the state's argument was "speculation" and "fail[ed] to engage in the sort of case-by-case analysis that RLUIPA requires" (citing *Holt v. Hobbs*). Prisons, the Court said, could limit the volume of any prayers, remove the advisor immediately for failure to comply, and require the advisor "to sign penalty-backed pledges" to abide by limitations.

With respect to the pastor touching Ramirez, the state argued first that touching would increase the risk of complications in the execution. But the Court noted that Texas already allowed clergy to stand three feet from the prisoner, adding: "We do not see how letting the spiritual advisor stand slightly closer, reach out his arm, and touch a part of the prisoner's body well away from the site of any IV line would meaningfully increase risk." The state could direct the touching away from IV lines, train clergy on where to touch, and limit touching at "critical" moments such as the insertion of IV lines. The Court added:

> Texas does nothing to rebut these obvious alternatives, instead suggesting that it is Ramirez's burden to "identify any less restrictive means." That gets things backwards. Once a plaintiff has made out his initial case under RLUIPA, it is the government that must show its policy "is the least restrictive means of furthering [a[ compelling governmental interest." [Quoting the statute.]

Finally, the Court rejected the claim that any touching by clergy "might further traumatize a victim's family members …, reminding them that their [murdered] loved one received no such solace." The Court noted that the request here was only for the pastor "to respectfully touch Ramirez's foot or lower leg," and that the state's "real concern seems to be with other, potentially more problematic requests down the line. RLUIPA, however, requires that courts take cases one at a time, considering only 'the particular claimant whose sincere exercise of religion is being substantially burdened.'"

Finally, the majority held that the other preliminary-injunction factors, such as the balance of equities and the public interest, favored relief. And it concluded by urging states to adopt "clear rules in advance" as to when death-row prisoners must request religious accommodations and what clergy members may do, as well as "streamlined procedures" for addressing such requests so as to avoid delaying executions.

Justice Kavanaugh, concurring, joined the majority opinion but made additional points. He noted that applying "compelling-interest" analysis to practices that increase the risk of harm can be complex because "it is difficult [to determine] how much additional risk of great harm is too much for a court to order the State to bear":

> Importantly, however, the Court does not merely point to its own policy assessment of how much risk the State must tolerate in the execution room. [It] also relies in part on the history of religious advisors at executions…. As the Court explains, experience matters in assessing whether less restrictive alternatives could still satisfy the State's compelling interest.

What if future claims by inmates and clergy go further than those in *Ramirez*: for example, requesting that the minister stand closer to the inmate or lay hands on the head or shoulders (even if that is closer to the IV line)? Does the majority opinion give enough guidance on how far states must accommodate such claims? In his concurrence, Kavanaugh advised states to exercise a "dose of caution" in their rules restricting clergy in the execution chamber, in order to "avoid persistent future litigation and the accompanying delays" that undercut the "interests of victims' families in finally obtaining closure." Justice Thomas, the lone dissenter, predicted that as a result of *Ramirez*, "[p]risoners, ably represented by the death penalty defense bar, will propose new accommodations tailored to elicit an objection from the State," and a state will be under pressure to accept even an accommodation "it thinks is dangerous," rather than "litigate and delay the execution, knowing that the delay will count against it in the equitable balance." Are his concerns valid?

***Consider inserting this material after Spencer v. World Vision (which ends on p. 233) in the section on Targeted Legislative Accommodations at the end of section III-B ("Free Exercise After Smith").***

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Precisely because work and religion both play a significant role in many peoples' lives, disputes will inevitably arise over how should religious beliefs and commitments should be handled in public and private workplaces. In *Spencer v. World Vision* [p. 221], we looked at the statutory provision in Title VII that protects religious *employers*, immunizing them from certain employment-discrimination claims. We now turn to the statutory provision in Title VII that protects religious *employees*.

As originally enacted in 1964, Title VII forbade employers from "discriminat[ing] against any individual . . . because of such individual's race, color, *religion*, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1) (emphasis added). As it stands now, Title VII not only forbids religious discrimination, but also imposes on employers an affirmative duty to "reasonably accommodate" the religious needs of their employees unless it would create an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

The Supreme Court recently addressed the meaning of this statutory provision, and the opinion discusses its rich history:

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GROFF v. DEJOY
143 S.Ct. 2279 (2023)

JUSTICE ALITO delivered the opinion of the Court.

I.

Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest . . . In 2012, Groff began his employment with the United States Postal Service (USPS) . . . He became a Rural Carrier Associate, a job that required him to assist regular carriers in the delivery of mail. When he took the position, it generally did not involve Sunday work. But within a few years, that changed. In 2013, USPS entered into an agreement with Amazon to begin facilitating Sunday deliveries, and in 2016, USPS signed a memorandum of understanding with the relevant union (the National Rural Letter Carriers' Association) that set out how Sunday and holiday parcel delivery would be handled. During a 2-month peak season, each post office would use its own staff to deliver packages. At all other times, Sunday and holiday deliveries would be carried out by employees (including Rural Carrier Associates like Groff) working from a regional hub . . .

The memorandum specifies the order in which USPS employees are to be called on for Sunday work outside the peak season. First in line are each hub's "Assistant Rural Carriers"—part-time employees who are assigned to the hub and cover only Sundays and holidays. Second are any volunteers from the geographic area, who are assigned on a rotating basis. And third are all other carriers, who are compelled to do the work on a rotating basis. Groff fell into this third category, and after the memorandum of understanding was adopted, he was told that he would be

required to work on Sunday. He then sought and received a transfer to Holtwood, a small rural USPS station that had only seven employees and that, at the time, did not make Sunday deliveries. But in March 2017, Amazon deliveries began there as well.

With Groff unwilling to work on Sundays, USPS made other arrangements. During the peak season, Sunday deliveries that would have otherwise been performed by Groff were carried out by the rest of the Holtwood staff, including the postmaster, whose job ordinarily does not involve delivering mail. During other months, Groff's Sunday assignments were redistributed to other carriers assigned to the regional hub. Throughout this time, Groff continued to receive "progressive discipline" for failing to work on Sundays. Finally, in January 2019, he resigned.

II.

A.

Since its passage, Title VII of the Civil Rights Act of 1964 has made it unlawful for covered employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges [of] employment, because of such individual's . . . religion." 42 U.S.C. § 2000e–2(a)(1). As originally enacted, Title VII did not spell out what it meant by discrimination "because of . . . religion," but shortly after the statute's passage, the EEOC interpreted that provision to mean that employers were sometimes required to "accommodate" the "reasonable religious needs of employees." 29 C.F.R. § 1605.1(a)(2) (1967). After some tinkering, the EEOC settled on a formulation that obligated employers "to make reasonable accommodations to the religious needs of employees" whenever that would not work an "undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1 (1968).

Between 1968 and 1972, the EEOC elaborated on its understanding of undue hardship in a long line of decisions addressing a variety of policies. Those decisions addressed many accommodation issues that still arise frequently today, including the wearing of religious garb and time off from work to attend to religious obligations.

EEOC decisions did not settle the question of undue hardship. In 1970, the Sixth Circuit held (in a Sabbath case) that Title VII as then written did not require an employer "to accede to or accommodate" religious practice because that "would raise grave" Establishment Clause questions. *Dewey v. Reynolds Metals Co*. This Court granted certiorari, but then affirmed by an evenly divided vote.

Responding to *Dewey* and another decision rejecting any duty to accommodate an employee's observance of the Sabbath, Congress amended Title VII in 1972. Tracking the EEOC's regulatory language, Congress provided that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

B.

[The Court turns to its decision in *Trans World Airlines, Inc. v. Hardison* (1977)]. Larry Hardison was hired as a clerk at the Stores Department in the Kansas City base of Trans World Airlines (TWA). The Stores Department was responsible for providing parts needed to repair and maintain aircraft. After taking this job, Hardison underwent a religious conversion. He began to observe the Sabbath by absenting himself from work from sunset on Friday to sunset on Saturday, and this conflicted with his work schedule. The problem was solved for a time when Hardison,

who worked in Building 1, switched to the night shift, but it resurfaced when he sought and obtained a transfer to the day shift in Building 2 so that he could spend evenings with his wife. In that new building, he did not have enough seniority to avoid work during his Sabbath. Attempts at accommodation failed, and he was eventually discharged on grounds of insubordination.

Hardison sued TWA and his union, the International Association of Machinists and Aerospace Workers (IAM). The Eighth Circuit found [for Hardison] and [b]oth TWA and IAM then filed petitions for certiorari.

When the Court [granted certiorari], all counsel had good reason to expect that the Establishment Clause would figure prominently in the Court's analysis. As noted above, in June 1971, the Court, by an equally divided vote, had affirmed the Sixth Circuit's decision in *Dewey*, which had heavily relied on Establishment Clause avoidance to reject the interpretation of Title VII set out in the EEOC's reasonable-accommodation guidelines. Just over three weeks later, the Court had handed down its (now abrogated) decision in *Lemon v. Kurtzman* (1971) which adopted a test under which any law whose "principal or primary effect" "was to advance religion" was unconstitutional. Because it could be argued that granting a special accommodation to a religious practice had just such a purpose and effect, some thought that *Lemon* posed a serious problem for the 1972 amendment of Title VII.

Against this backdrop, both TWA and IAM challenged the constitutionality of requiring any accommodation for religious practice. The Summary of Argument in TWA's brief began with this categorical assertion: "The religious accommodation requirement of Title VII violates the Establishment Clause of the First Amendment." Brief for Petitioner TWA at 19. Applying the three-part *Lemon* test, TWA argued that any such accommodation has the primary purpose and effect of advancing religion and entails "pervasive" government "entanglement . . . in religious issues." Brief at 20.

Despite the prominence of the Establishment Clause in the briefs submitted by the parties and their amici, constitutional concerns played no on-stage role in the Court's opinion, which focused instead on seniority rights. The opinion stated that "the principal issue on which TWA and the union came to this Court" was whether Title VII "require[s] an employer and a union who have agreed on a seniority system to deprive senior employees of their seniority rights in order to accommodate a junior employee's religious practices." *Hardison*. The Court held that Title VII imposed no such requirement. This conclusion, the Court found, was "supported by the fact that seniority systems are afforded special treatment under Title VII itself." It noted that Title VII expressly provides special protection for "bona fide seniority systems," and it cited precedent reading the statute "to make clear that the routine application of a bona fide seniority system [is] not unlawful under Title VII." Invoking these authorities, the Court found that the statute did not require an accommodation that involuntarily deprived employees of seniority rights.

Applying this interpretation of Title VII and disagreeing with the Eighth Circuit's evaluation of the factual record, the Court identified no way in which TWA, without violating seniority rights, could have feasibly accommodated Hardison's request for an exemption from work on his Sabbath. The Court found that not enough co-workers were willing to take Hardison's shift voluntarily, that compelling them to do so would have violated their seniority rights, and that leaving the Stores Department short-handed would have adversely affected its essential mission.

The Court also rejected two other options offered in Justice Marshall's dissent: (1) paying other workers overtime wages to induce them to work on Saturdays and making up for that increased cost by requiring Hardison to work overtime for regular wages at other times and (2) forcing TWA to pay overtime for Saturday work for three months, after which, the dissent thought,

Hardison could transfer back to the night shift in Building 1. The Court dismissed both of these options as not "feasible," but it provided no explanation for its evaluation of the first. In dissent, Justice Marshall suggested one possible reason: that the collective bargaining agreement might have disallowed Hardison's working overtime for regular wages. But the majority did not embrace that explanation.

As for the second, the Court disputed the dissent's conclusion that Hardison, if he moved back to Building 1, would have had enough seniority to choose to work the night shift. That latter disagreement was key. The dissent thought that Hardison could have resumed the night shift in Building 1 after just three months, and it therefore calculated what it would have cost TWA to pay other workers' overtime wages on Saturdays for that finite period of time. According to that calculation, TWA's added expense for three months would have been $150 (about $1,250 in 2022 dollars). But the Court doubted that Hardison could have regained the seniority rights he had enjoyed in Building 1 prior to his transfer, and if that were true, TWA would have been required to pay other workers overtime for Saturday work indefinitely. Even under Justice Marshall's math, that would have worked out to $600 per year at the time, or roughly $5,000 per year today.

In the briefs and at argument, little space was devoted to the question of determining when increased costs amount to an "undue hardship" under the statute, but a single, but oft-quoted, sentence in the opinion of the Court, if taken literally, suggested that even a pittance might be too much for an employer to be forced to endure. The line read as follows: "To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship."

Although this line would later be viewed by many lower courts as the authoritative interpretation of the statutory term "undue hardship," it is doubtful that it was meant to take on that large role. In responding to Justice Marshall's dissent, the Court described the governing standard quite differently, stating three times that an accommodation is not required when it entails "substantial" "costs" or "expenditures." This formulation suggests that an employer may be required to bear costs and make expenditures that are not "substantial." Of course, there is a big difference between costs and expenditures that are not "substantial" and those that are "de minimis," which is to say, so "very small or trifling" that that they are not even worth noticing. *Black's Law Dictionary* 388 (5th ed. 1979).

The Court's response to Justice Marshall's estimate of the extra costs that TWA would have been required to foot is also telling. The majority did not argue that Justice Marshall's math produced considerably "more than a de minimis cost" (as it certainly did). Instead, the Court responded that Justice Marshall's calculation involved assumptions that were not "feasible under the circumstances" and would have produced a different conflict with "the seniority rights of other employees."

Ultimately, then, it is not clear that any of the possible accommodations would have actually solved Hardison's problem without transgressing seniority rights. The *Hardison* Court was very clear that those rights were off-limits. Its guidance on "undue hardship" in situations not involving seniority rights is much less clear.

C.

Even though *Hardison*'s reference to "de minimis" was undercut by conflicting language and was fleeting in comparison to its discussion of the "principal issue" of seniority rights, lower courts have latched on to "de minimis" as the governing standard.

To be sure, as the Solicitor General notes, some lower courts have understood that the protection for religious adherents is greater than "more than . . . de minimis" might suggest when

read in isolation. But a bevy of diverse religious organizations has told this Court that the de minimis test has blessed the denial of even minor accommodation in many cases, making it harder for members of minority faiths to enter the job market. *See, e.g., Brief for The Sikh Coalition et al. as Amici Curiae* 15, 19–20 ("the de minimis standard eliminates any meaningful mandate to accommodate Sikh practices in the workplace" and "emboldens employers to deny reasonable accommodation requests"); *Brief for Council on American-Islamic Relations as Amicus Curiae* 3 (Muslim women wearing religiously mandated attire "have lost employment opportunities" and have been excluded from "critical public institutions like public schools, law enforcement agencies, and youth rehabilitation centers"); *Brief for Union of Orthodox Jewish Congregations of America as Amicus Curiae* 14–15 (because the "de minimis cost" test "can be satisfied in nearly any circumstance," "Orthodox Jews once again [are] left at the mercy of their employers' good graces"); *Brief for Seventh-day Adventist Church in Canada et al. as Amici Curiae* 8 (joint brief of Sabbatarian faiths arguing that Sabbath accommodation under the de minimis standard is left to "their employers' and coworkers' goodwill").

The EEOC has also accepted *Hardison* as prescribing a "more than a de minimis cost" test, 29 C.F.R. § 1605.2(e)(1) (2022), but has tried in some ways to soften its impact. It has specifically cautioned (as has the Solicitor General in this case) against extending the phrase to cover such things as the "administrative costs" involved in reworking schedules, the "infrequent" or temporary "payment of premium wages for a substitute," and "voluntary substitutes and swaps" when they are not contrary to a "bona fide seniority system." §§ 1605.2(e)(1), (2).

Nevertheless, some courts have rejected even the EEOC's gloss on "de minimis."[12] And in other cases, courts have rejected accommodations that the EEOC's guidelines consider to be ordinarily required, such as the relaxation of dress codes and coverage for occasional absences.[13]

Today, the Solicitor General disavows its prior position that *Hardison* should be overruled—but only on the understanding that *Hardison* does not compel courts to read the "more than de minimis" standard "literally" or in a manner that undermines *Hardison*'s references to "substantial" cost. With the benefit of comprehensive briefing and oral argument, we agree.

III.

We hold that showing "more than a de minimis cost," as that phrase is used in common parlance, does not suffice to establish "undue hardship" under Title VII. *Hardison* cannot be reduced to that one phrase. In describing an employer's "undue hardship" defense, *Hardison* referred repeatedly to "substantial" burdens, and that formulation better explains the decision. We therefore, like the parties, understand *Hardison* to mean that "undue hardship" is shown when a

[12] For example, two years ago, the Seventh Circuit told the EEOC that it would be an undue hardship on Wal-Mart (the Nation's largest private employer, with annual profits of over $11 billion) to be required to facilitate voluntary shift-trading to accommodate a prospective assistant manager's observance of the Sabbath. *EEOC v. Walmart Stores East, L.P.*, 992 F.3d 656, 659–660 (7th Cir. 2021).

[13] *See, e.g., Wagner v. Saint Joseph's/Candler Health System, Inc.*, 2022 WL 905551, *4–*5 (SD Ga., Mar. 28, 2022) (Orthodox Jew fired for taking off for High Holy Days); *Camara v. Epps Air Serv., Inc.*, 292 F.Supp. 3d 1314, 1322, 1331–1332 (ND Ga., 2017) (Muslim woman who wore a hijab fired because the sight of her might harm the business in light of "negative stereotypes and perceptions about Muslims"); *El-Amin v. First Transit, Inc.*, 2005 WL 1118175, *7–*8 (SD Ohio, May 11, 2005) (Muslim employee terminated where religious services conflicted with "two hours" of training a week during a month of daily training); *EEOC v. Sambo's of Ga., Inc.*, 530 F. Supp. 86, 91 (ND Ga., 1981) (hiring a Sikh man as a restaurant manager would be an undue hardship because his beard would have conflicted with "customer preference").

burden is substantial in the overall context of an employer's business. This fact-specific inquiry comports with both *Hardison* and the meaning of "undue hardship" in ordinary speech.

A.

As we have explained, we do not write on a blank slate in determining what an employer must prove to defend a denial of a religious accommodation, but we think it reasonable to begin with Title VII's text. After all, as we have stressed over and over again in recent years, statutory interpretation must begin with, and ultimately heed, what a statute actually says. Here, the key statutory term is "undue hardship." In common parlance, a "hardship" is, at a minimum, "something hard to bear." *Random House Dictionary of the English Language* 646 (1966) (Random House) . . . [A] hardship is more severe than a mere burden. So even if Title VII said only that an employer need not be made to suffer a "hardship," an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Those costs would have to rise to the level of hardship, and adding the modifier "undue" means that the requisite burden, privation, or adversity must rise to an "excessive" or "unjustifiable" level. The Government agrees, noting that "undue hardship means something greater than hardship." Brief for United States 30.

When "undue hardship" is understood in this way, it means something very different from a burden that is merely more than de minimis, i.e., something that is "very small or trifling." *Black's Law Dictionary*, at 388. So considering ordinary meaning while taking *Hardison* as a given, we are pointed toward something closer to *Hardison*'s references to "substantial additional costs" or "substantial expenditures."

Similarly, while we do not rely on the pre-1972 EEOC decisions described above to define the term, we do observe that these decisions often found that accommodations that entailed substantial costs were required. Nothing in this history plausibly suggests that "undue hardship" in Title VII should be read to mean anything less than its meaning in ordinary use . . .

B.

In this case, both parties agree that the "de minimis" test is not right, but they differ slightly in the alternative language they prefer. Groff likes the phrase "significant difficulty or expense." Brief for Petitioner 15. The Government, disavowing its prior position that Title VII's text requires overruling *Hardison*, points us to *Hardison*'s repeated references to "substantial expenditures" or "substantial additional costs." Brief for United States 28–29. We think it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.

What matters more than a favored synonym for "undue hardship" (which is the actual text) is that courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, "size and operating cost of [an] employer." Brief for United States 40.

C.

The main difference between the parties lies in the further steps they would ask us to take in elaborating upon their standards. Groff would not simply borrow the phrase "significant difficulty or expense" from the Americans with Disabilities Act (ADA) but would have us instruct lower courts to "draw upon decades of ADA caselaw.". The Government, on the other hand, requests that we opine that the EEOC's construction of *Hardison* has been basically correct.

Both of these suggestions go too far. We have no reservations in saying that a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by our clarifying decision today. After all, as a public advocate for employee rights, much of the EEOC's guidance has focused on what should be accommodated. Accordingly, today's clarification may prompt little, if any, change in the agency's guidance explaining why no undue hardship is imposed by temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs. See 29 C.F.R. § 1605.2(d). But it would not be prudent to ratify in toto a body of EEOC interpretation that has not had the benefit of the clarification we adopt today. What is most important is that "undue hardship" in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the common-sense manner that it would use in applying any such test.

D.

The erroneous de minimis interpretation of *Hardison* may have had the effect of leading courts to pay insufficient attention to what the actual text of Title VII means with regard to several recurring issues. Since we are now brushing away that mistaken view of *Hardison*'s holding, clarification of some of those issues—in line with the parties' agreement in this case—is in order.

First, on the second question presented, both parties agree that the language of Title VII requires an assessment of a possible accommodation's effect on "the conduct of the employer's business." 42 U.S.C. § 2000e(j). As the Solicitor General put it, not all "impacts on coworkers . . . are relevant," but only "coworker impacts" that go on to "affec[t] the conduct of the business." So an accommodation's effect on co-workers may have ramifications for the conduct of the employer's business, but a court cannot stop its analysis without examining whether that further logical step is shown in a particular case.

On this point, the Solicitor General took pains to clarify that some evidence that occasionally is used to show "impacts" on coworkers is "off the table" for consideration. Specifically, a coworker's dislike of "religious practice and expression in the workplace" or "the mere fact [of] an accommodation" is not "cognizable to factor into the undue hardship inquiry." To the extent that this was not previously clear, we agree. An employer who fails to provide an accommodation has a defense only if the hardship is "undue," and a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered "undue." If bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself.

Second, as the Solicitor General's authorities underscore, Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. This distinction matters. Faced with an accommodation request like Groff 's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary.

IV.

Having clarified the Title VII undue-hardship standard, we think it appropriate to leave the context-specific application of that clarified standard to the lower courts in the first instance. The Third Circuit assumed that *Hardison* prescribed a "more than a de minimis cost" test, and this may

have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees. Without foreclosing the possibility that USPS will prevail, we think it appropriate to leave it to the lower courts to apply our clarified context-specific standard, and to decide whether any further factual development is needed.

JUSTICE SOTOMAYOR, with whom JUSTICE JACKSON joins, concurring.

As both parties here agree, the phrase "more than a de minimis cost" from *Trans World Airlines, Inc. v. Hardison* was loose language . . . The statutory standard is "undue hardship," not trivial cost . . .

Petitioner Gerald Groff asks this Court to overrule *Hardison* and to replace it with a "significant difficulty or expense" standard. The Court does not do so. That is a wise choice . . . Congress is free to revise this Court's statutory interpretations. The Court's respect for Congress's decision not to intervene promotes the separation of powers by requiring interested parties to resort to the legislative rather than the judicial process to achieve their policy goals. This justification for statutory stare decisis is especially strong here because Congress has spurned multiple opportunities to reverse *Hardison* . . . [In fact,] Congress has revised Title VII multiple times in response to other decisions of this Court, yet never in response to *Hardison*.

Groff also asks the Court to decide that Title VII requires the United States Postal Service to show undue hardship to its business, not to Groff 's co-workers. The Court, however, recognizes that Title VII requires "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (emphasis added). Because the "conduct of [a] business" plainly includes the management and performance of the business's employees, undue hardship on the conduct of a business may include undue hardship on the business's employees. *See, e.g.*, *Hardison* (deprivation of employees' bargained-for seniority rights constitutes undue hardship). There is no basis in the text of the statute, let alone in economics or common sense, to conclude otherwise. Indeed, for many businesses, labor is more important to the conduct of the business than any other factor.

To be sure, some effects on co-workers will not constitute "undue hardship" under Title VII. For example, animus toward a protected group is not a cognizable "hardship" under any antidiscrimination statute. In addition, some hardships, such as the labor costs of coordinating voluntary shift swaps, are not "undue" because they are too insubstantial. Nevertheless, if there is an undue hardship on the conduct of the employer's business, then such hardship is sufficient, even if it consists of hardship on employees. With these observations, I join the opinion of the Court.

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## NOTES AND QUESTIONS

**1. What's the Line?** Instead of resolving Gerald Groff's case, the Court leaves it to the lower courts on remand, saying simply that employers "must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." Do you have a sense of what this means? When would a religious exemption require "substantial increased costs"? When wouldn't it? In Part II(B), the Court goes to lengths to report a factual dispute back in *Hardison* between the majority opinion and Justice Marshall's dissent—Justice Marshall thought Hardison could have been accommodated with only a one-time

$1,250 expenditure by TWA, while the majority thought it would have cost TWA $5,000 per year to accommodate Hardison. What's the relevance of this?

As *Groff* reiterates, the *Hardison* decision emphasized that religious accommodations could not override other employees' seniority rights under a collective bargaining agreement. But in 2023, far fewer workplaces are unionized or covered by such agreements than in 1977. How, if at all, does that affect the analysis of costs to others from a work-day accommodation?

Also reconsider *Holt v. Hobbs* (p. 213), where the Court required the Arkansas prison system to allow prisoner to have ½-inch beards, pursuant to the Religious Freedom Restoration Act (RFRA). As in *Groff*, the Court refused to issue clear lines about which exemptions were required and which were not (see p. 217-18, note 1). Is the lack of certainty more of a problem when the defendant is a private party, as opposed to the government?

**2. Burdens on Third Parties.** If Gerald Groff does not have to work on Sundays, the Postal Service will want someone else to work in his place. Depending on the facts, that could be a reason for the Postal Service to deny Groff a religious exemption. Now if Groff could get someone to voluntarily cover his shift, that seems like an easy fix. (Note how the Court seems to suggest "voluntary shift swapping" is an accommodation that employers definitely have to provide.) But what if Groff can't find anyone else? Is the employer required to force other employees to take his shifts? Is that an "undue burden" on the employer? How do burdens on co-workers factor into the legal analysis? The Court says that "not all impacts on coworkers are relevant, but only coworker impacts that go on to affect the conduct of the business." What does that mean? What does Justice Sotomayor's concurrence take it to mean?

Relatedly, what about the Establishment Clause? The next section in the book, Part III-C, deals with Establishment Clause limits on religious accommodations. Some scholars argue that religious accommodations violate the Establishment Clause when they impose significant burdens on nonconsenting third parties. What does *Groff v. DeJoy* say about that possibility? Some also thought the textually implausible reading of Title VII adopted in *Hardison* was silently driven by such a theory. As you go through the next section of the book, do not forget about *Groff*. Also how does *Groff* fit with *Estate of Thornton v. Caldor*, the Establishment Clause case at the beginning of this book (p. 7)? Is there a greater Establishment Clause problem when the government is requiring accommodation by a private party than when government is removing a burden resulting from its own action?

**3. A Recent Development.** Statistics from the EEOC show that the number of employees filing charges of religious-discrimination charges had been declining in recent years, from a peak of 4,151 in 2011 down to 2,111 in 2021. In 2022, however, the number of charges jumped to more than 13,000—6 times more than the previous year, and 3 times more than any previous year. As the EEOC notes, this seems to be due to a "significant increase in vaccine-related charges filed on the basis of religion." https://www.eeoc.gov/data/religion-based-charges-charges-filed-eeoc-fy-1997-fy-2022.

***Consider inserting this material between pages 411 and 412, at the end of section IV-E ("State Restrictions on Aid to Religion: Is Neutrality Constitutionally Required?").***

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CARSON v. MAKIN
141 S.Ct. 2883 (2022)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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.

I.

A.

Maine's Constitution provides that the State's legislature shall "require . . . the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools." . . . But Maine is the most rural State in the Union, and for many school districts the realities of remote geography and low population density make those commands difficult to heed. Indeed, of Maine's 260 school administrative units (SAUs), fewer than half operate a public secondary school of their own.

Maine has sought to deal with this problem in part by creating a program of tuition assistance for families that reside in such areas. Under that program, if an SAU neither operates its own public secondary school nor contracts with a particular public or private school for the education of its school-age children, the SAU must "pay the tuition . . . at the public school or the approved private school of the parent's choice at which the student is accepted." Parents who wish to take advantage of this benefit first select the school they wish their child to attend. If they select a private school that has been "approved" by the Maine Department of Education, the parents' SAU "shall pay the tuition" at the chosen school up to a specified maximum rate. * * * * *

To be "approved" to receive these payments, a private school must meet certain basic requirements under Maine's compulsory education law. The school must either be "[c]urrently accredited by a New England association of schools and colleges" or separately "approv[ed] for attendance purposes" by the Department. Schools seeking approval from the Department must meet specified curricular requirements, such as using English as the language of instruction, offering a course in "Maine history, including the Constitution of Maine . . . and Maine's cultural and ethnic heritage," and maintaining a student-teacher ratio of not more than 30 to 1.

The program imposes no geographic limitation . . . Parents may direct tuition payments to schools inside or outside the State, or even in foreign countries. In schools that qualify for the program because they are accredited, teachers need not be certified by the State, and Maine's curricular requirements do not apply. Single-sex schools are eligible.

Prior to 1981, parents could also 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*, 536 U.S. 639, 652 (2002). * * * * *

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."

B.

This case concerns two families that live in SAUs that neither maintain their own secondary schools nor contract with any nearby secondary school . . . The Carsons sent their daughter to [Bangor Christian School ("BCS")] because of the school's high academic standards and because the school's Christian worldview aligns with their sincerely held religious beliefs . . . 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 . . . 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 of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment . . . While petitioners' appeal to the First Circuit was pending, this Court decided *Espinoza v. Montana Department of Revenue*, 591 U.S. ___ (2020). *Espinoza* held that a provision of the Montana Constitution barring government aid to any school "controlled in whole or in part by any church, sect, or denomination," violated the Free Exercise Clause by prohibiting families from using otherwise available scholarship funds at the religious schools of their choosing . . . But [the First Circuit] nevertheless affirmed the District Court's grant of judgment to the commissioner.

As relevant here, the First Circuit offered two grounds to distinguish Maine's "nonsectarian" requirement from the no-aid provision at issue in *Espinoza*. First, the panel reasoned that, whereas Montana had barred schools from receiving funding "simply based on their religious identity—a status that in and of itself does not determine how a school would use the funds"—Maine bars BCS and Temple Academy from receiving funding "based on the religious use that they would make of it in instructing children." Second, the panel determined that Maine's tuition assistance program was distinct from the scholarships at issue in *Espinoza* because Maine

had sought to provide "a rough equivalent of the public school education that Maine may permissibly require to be secular but that is not otherwise accessible." * * * * *

II.

A.

The Free Exercise Clause of the First Amendment protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988). 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*, 374 U.S. 398, 404 (1963) ("It 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."); *see also Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947) (a State "cannot exclude" individuals "*because of their faith, or lack of it*, from receiving the benefits of public welfare legislation"). . . .

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*, 582 U.S. ___ (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. . . .

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." While it was true that Trinity Lutheran remained "free to continue operating as a church," it could enjoy that freedom only "at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center [was] otherwise fully qualified." *Id.*

. . . [I]n *Espinoza*, 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 . . .

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." *Espinoza*, 591 U.S., at ___ (slip op., at 9). "A State need not subsidize private education," we concluded, "[b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.,* at ___ (slip op., at 20).

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. Just like the wide range of nonprofit organizations eligible to receive playground resurfacing grants in *Trinity Lutheran*, a wide range of private schools are eligible to receive Maine tuition assistance payments here. And like the daycare center in *Trinity Lutheran*, BCS and Temple Academy are disqualified from this generally available benefit "solely because of their religious character." 582 U.S., at ___ (slip op., at 10). By

"condition[ing] the availability of benefits" in that manner, Maine's tuition assistance program—like the program in *Trinity Lutheran*—"effectively penalizes the free exercise" of religion. *Ibid.*

Our recent decision in *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." 591 U.S., at ___ (slip op., at 20). A law that operates in that manner, we held in *Espinoza*, must be subjected to "the strictest scrutiny." *Id.*, at ___–___ (slip op., at 11–12).

To satisfy strict scrutiny, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). "A law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases." 508 U.S., at 546.

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. *See Zelman*, 536 U.S., at 652–653. 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." *Espinoza*, 591 U.S., at ___ (slip op., at 18) (quoting *Trinity Lutheran*, 582 U.S., at ___); *see also Widmar v. Vincent*, 454 U.S. 263, 276 (1981) ("[T]he state interest . . . in achieving greater separation of church and State than is already ensured under the Establishment Clause . . . is limited by the Free Exercise Clause."). JUSTICE BREYER stresses the importance of "government neutrality" when it comes to religious matters, *post*, at 13, 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 antiestablishment 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.

The First Circuit attempted to distinguish our precedent by recharacterizing the nature of Maine's tuition assistance program in two ways, both of which Maine echoes before this Court. First, the panel defined the benefit at issue as the "rough equivalent of [a Maine] public school education," an education that cannot include sectarian instruction. Second, the panel defined the nature of the exclusion as one based not on a school's religious "status," as in *Trinity Lutheran* and *Espinoza*, but on religious "uses" of public funds. Neither of these formal distinctions suffices to distinguish this case from *Trinity Lutheran* or *Espinoza*, or to affect the application of the free exercise principles outlined above.

A.

The First Circuit held that the "nonsectarian" requirement was constitutional because the benefit was properly viewed not as tuition assistance payments to be used at approved private schools, but instead as funding for the "rough equivalent of the public school education that Maine

may permissibly require to be secular." As Maine puts it, "[t]he public benefit Maine is offering is a free public education."

To start with, the statute does not say anything like that. It says that an SAU without a secondary school of its own "shall pay the tuition . . . at the public school or the approved private school of the parent's choice at which the student is accepted." The benefit is *tuition* at a public *or* private school, selected by the parent, with no suggestion that the "private school" must somehow provide a "public" education.

This reading of the statute is confirmed by the program's operation. The differences between private schools eligible to receive tuition assistance under Maine's program and a Maine public school are numerous and important. To start with the most obvious, private schools are different by definition because they do not have to accept all students. Public schools generally do. Second, the free public education that Maine insists it is providing through the tuition assistance program is often *not* free. That "assistance" is available at private schools that charge several times the maximum benefit that Maine is willing to provide.

Moreover, the curriculum taught at participating private schools need not even resemble that taught in the Maine public schools. For example, Maine public schools must abide by certain "parameters for essential instruction in English language arts; mathematics; science and technology; social studies; career and education development; visual and performing arts; health, physical education and wellness; and world languages." But NEASC-accredited private schools are exempt from these requirements, and instead subject only to general "standards and indicators" governing the implementation of their own chosen curriculum. . . .

There are other distinctions, too. Participating schools need not hire state-certified teachers. And the schools can be single-sex. In short, it is simply not the case that these schools, to be eligible for state funds, must offer an education that is equivalent—roughly or otherwise—to that available in the Maine public schools. . . .

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 the free exercise principles governing any such public benefit program—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 of its own. 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."

B.

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. * * * * *

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." *Our Lady of Guadalupe School v. Morrissey-Berru*; *see also Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.

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. *See* Brief for Respondent 5 (asserting that there will be no need to probe private schools' uses of tuition assistance funds because "schools self-identify as nonsectarian" under the program and the need for any further questioning is "extremely rare"). 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 under the Free Exercise Clause is not a permission to engage in use-based discrimination.

Maine and the dissents invoke *Locke v. Davey*, 540 U.S. 712 (2004), in support of the argument that the State may preclude parents from designating a religious school to receive tuition assistance payments. . . . Our opinions in *Trinity Lutheran* and *Espinoza*, however, have already explained why *Locke* can be of no help to Maine here. Both precedents emphasized, as did *Locke* itself, that the funding in *Locke* was intended to be used "to prepare for the ministry." Funds could be and were used for theology courses; only pursuing a "vocational religious" *degree* was excluded.

*Locke*'s reasoning expressly turned on what it identified as the "historic and substantial state interest" against using "taxpayer funds to support church leaders." But as we explained at length in *Espinoza*, "it is clear that there is no 'historic and substantial' tradition against aiding [private religious] schools comparable to the tradition against state-supported clergy invoked by *Locke*." *Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits. * * * * *

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. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

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 antiestablishment 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.

A.

The First Amendment's two Religion Clauses together provide that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Each Clause, linguistically speaking, is "cast in absolute terms." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970). . . The apparently absolutist nature of these two prohibitions means that either Clause, "if expanded to a logical extreme, would tend to clash with the other." *Id.*, at 668–669. Because of this, we have said, the two Clauses "are frequently in tension," *Locke v. Davey*, 540 U.S. 712, 718 (2004), and "often exert conflicting pressures" on government action, *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005).

On the one hand, the Free Exercise Clause "'protect[s] religious observers against unequal treatment.'" *Trinity Lutheran*. We have said that, in the education context, this means that States generally cannot "ba[r] religious schools from public benefits solely because of the religious character of the schools." *Espinoza v. Montana Dept. of Revenue*.

On the other hand, the Establishment Clause "commands a separation of church and state." *Cutter.* A State cannot act to "aid one religion, aid all religions, or prefer one religion over another." *Everson*. This means that a State cannot use "its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals." *McCollum.* Nor may a State "adopt programs or practices in its public schools . . . which 'aid or oppose' any religion." *Epperson* . . .

The Religion Clauses thus created a compromise in the form of religious freedom. They aspired to create a "benevolent neutrality"—one which would "permit religious exercise to exist without sponsorship and without interference." *Walz*, 397 U.S., at 669. "[T]he basic purpose of these provisions" was "to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Ibid.* This religious freedom in effect meant that people "were entitled to worship God in their own way and to teach their children" in that way. C. Radcliffe, The Law & Its Compass 71 (1960). . . .

And in applying these Clauses, we have often said that "there is room for play in the joints" between them. *Walz*, 397 U.S., at 669. . . This includes choosing not to fund certain religious activity where States have strong, establishment-related reasons for not doing so. See, *e.g.*, *Locke*. And, States have freedom to make this choice even when the Establishment Clause does not itself prohibit the State from funding that activity. * * * * *

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." *Zelman*. 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."

The majority also asserts that "[t]he 'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case." *Ante*, at 9. Not so. The state-funded program at issue in *Trinity Lutheran* provided payment for resurfacing school playgrounds to make them safer for children. Any Establishment Clause concerns arising from providing money to religious schools for the creation of safer play yards are readily distinguishable from those raised by providing money to religious schools through the program at issue here—a tuition program designed to ensure that all children receive their constitutionally guaranteed right to a free public education. After all, cities and States normally pay for police forces, fire protection, paved streets, municipal transport, and hosts of other services that benefit churches as well as secular organizations. But paying the salary of a religious teacher as part of a public school tuition program is a different matter.

In addition, schools were excluded from the playground resurfacing program at issue in *Trinity Lutheran* because of the mere fact that they were "owned or controlled by a church, sect, or other religious entity." Schools were thus disqualified from receiving playground funds "solely because of their religious character," not because of the "religious uses of [the] funding" they would receive. Here, by contrast, a school's "'affiliation or association with a church or religious institution . . . is not dispositive'" of its ability to receive tuition funds. Instead, Maine chooses not to fund only those schools that "promot[e] the faith or belief system with which [the schools are] associated and/or presen[t] the [academic] material taught through the lens of this faith'"—*i.e.*, schools that will use public money for religious purposes. Maine thus excludes schools from its tuition program not because of the schools' religious character but because the schools will use the funds to teach and promote religious ideals.

For similar reasons, *Espinoza* does not resolve the present case. In *Espinoza*, Montana created "a scholarship program for students attending private schools." But the State prohibited families from using the scholarship at any private school "'owned or controlled in whole or in part by any church, religious sect, or denomination.'" As in *Trinity Lutheran*, Montana denied funds to schools based "expressly on religious status and not religious use"; "[t]o be eligible" for scholarship funds, a school had to "divorce itself from any religious control or affiliation." Here, again, Maine denies tuition money to schools not because of their religious affiliation, but because they will use state funds to promote religious views.

These distinctions are important. The very point of the Establishment Clause is to prevent the government from sponsoring religious activity itself, thereby favoring one religion over another or favoring religion over nonreligion. . . . State funding of religious activity risks the very social conflict based upon religion that the Religion Clauses were designed to prevent. And, unlike

the circumstances present in *Trinity Lutheran* and *Espinoza*, it is religious activity, not religious labels, that lies at the heart of this case. * * * * *

III.

A.

Under Maine law, an "approved" private school must be "nonsectarian." . . . To determine whether a school is sectarian, the "'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 not dispositive'" of sectarian status.

The two private religious schools at issue. . . are affiliated with a church or religious organization. And they also teach students to accept particular religious beliefs and to engage in particular religious practices. * * * * *

The differences between this kind of education and a purely civic, public education are important. "The religious education and formation of students is the very reason for the existence of most private religious schools." *Our Lady of Guadalupe School v. Morrissey-Berru*,. "[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith," we have said, "are responsibilities that lie at the very core of the mission of a private religious school." *Id*. Indeed, we have recognized that the "connection that religious institutions draw between their central purpose and educating the young in the faith" is so "close" that teachers employed at such schools act as "ministers" for purposes of the First Amendment. *Id.*; *see also Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

By contrast, public schools, including those in Maine, seek first and foremost to provide a primarily civic education. . . To play that role effectively, public schools are religiously neutral, neither disparaging nor promoting any one particular system of religious beliefs. We accordingly have, as explained above, consistently required public school education to be free from religious affiliation or indoctrination.

Maine legislators who endorsed the State's nonsectarian requirement recognized these differences between public and religious education. They did not want Maine taxpayers to finance, through a tuition program designed to ensure the provision of free public education, schools that would use state money for teaching religious practices. . .

Underlying these views is the belief that the Establishment Clause seeks government neutrality. And the legislators thought that government payment for this kind of religious education would be antithetical to the religiously neutral education that the Establishment Clause requires in public schools. Maine's nonsectarian requirement, they believed, furthered the State's antiestablishment interests in not promoting religion in its public school system; the requirement prevented public funds—funds allocated to ensure that all children receive their constitutional right to a free public education—from being given to schools that would use the funds to promote religion.

In the majority's view, the fact that private individuals, not Maine itself, choose to spend the State's money on religious education saves Maine's program from Establishment Clause condemnation. But that fact, as I have said, simply *permits* Maine to route funds to religious schools. It does not *require* Maine to spend its money in that way. . . .

B.

In my view, Maine's nonsectarian requirement is also 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. . . .

Nor do the schools want Maine in this role. Bangor Christian asserted that it would only consider accepting public funds if it "did not have to make any changes in how it operates." Temple Academy similarly stated that it would only accept state money if it had "in writing that the school would not have to alter its admissions standards, hiring standards, or curriculum." The nonsectarian requirement ensures that Maine is not pitted against private religious schools in these battles over curriculum or operations, thereby avoiding the social strife resulting from this state-versus-religion confrontation. By invalidating the nonsectarian requirement, the majority today subjects the State, the schools, and the people of Maine to social conflict of a kind that they, and the Religion Clauses, sought to prevent. * * * * *

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. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___ (2017). [Justice Sotomayor reiterates the arguments she made in her *Trinity Lutheran* dissent.]

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*. * * * * *

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*, 582 U.S., at ___ (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.

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## NOTES AND QUESTIONS

1. ***Carson v. Makin* and the Purposes of the Religion Clauses.** The majority relies heavily on very recent precedent, with little reference to the historic purposes of free exercise and disestablishment. What, in your opinion, is the best way for the state to organize financial support for education? If establishment is the use of state power to enforce uniformity in matters of religious belief, what's the best way of implementing disestablishment in that area? Or does disestablishment mean something else?

One view, reflected generally in the dissent, holds that public schools are religiously "neutral" because they are secular, and any departure from the public-school curriculum in the direction of adding religion is "sectarian." Under this view, the most neutral course is to fund public schools and non-religious private schools. Another view is that schools by their nature impart some set of beliefs in addition to the skills and education they provide, and that

secularism is a point of view like any other. Under this view, the most neutral course is to provide equal funding to all educationally qualified schools, leaving the choice of belief system to individual decision. (Does the majority's position in *Carson* rest on this view?)

Whatever one thinks about public schools, isn't it true that nonreligious private schools may well teach from an explicit belief system? (Think, for example, of Waldorf schools, which rest on an explicit humanistic spiritual philosophy. See, e.g., FAQs About Waldorf, https://www.waldorfeducation.org/waldorf-education/faqs-about-waldorf.) What is the argument for funding *some* private alternatives but not religious ones?

Do public schools have a distinct quality of neutrality as compared with private schools? Are public schools neutral toward belief systems? Are there other arguments for funding only public schools?

The dissent ultimately argues, in light of precedents like *Zelman*, for "play in the joints"—allowing states to choose to include religious schools or to exclude them. What is the argument for that position?

**2. The Status-Use Distinction**. The majority asserts that the decision here follows from its prior decisions in *Trinity Lutheran* and *Espinoza*. But *Trinity Lutheran* seems readily distinguishable, does it not? There, the State's funds were earmarked for an expense (playground resurfacing) that has no ideological content whatsoever, neither religious nor nonreligious. In this respect the aid resembled that in *Everson* (reimbursement for bus rides). In *Espinoza*, however, the state aid could be spent on anything, including religious components of the instruction. (It is thus more like the tuition subsidies struck down in *Nyquist* but upheld in *Witters* and *Zelman*.) In this sense, *Carson* seems much closer to *Espinoza* than *Trinity Lutheran*.

In *Carson*, Maine tried to distinguish *Espinoza* with the status-use distinction. Maine argued that the schools were denied funding in *Espinoza* because they were owned and controlled by a religious organization (religious status). By contrast, Maine said it was denying schools funding because they included religious instruction as part of their activities (religious use). What happened to the status/use distinction? Was it abandoned here in *Carson* or back in *Espinoza?* Did it ever make any sense? Are there any schools that are "religious" (in status) but engage in no religious activities?

**3. Tension Between the Clauses**. Justice Breyer states that "[t]he Religion Clauses thus created a compromise in the form of religious freedom." Is that true? Does disestablishment, properly understood, actually conflict with free exercise? Recall the historical materials in Chapter 2. The same people (typically the more intense religious sects, supported by Enlightenment statesmen like Madison and Jefferson) supported *both* disestablishment *and* free exercise. When did the idea that the two clauses are in tension, or represent a "compromise" between conflicting purposes, first arise?

**4. Questions Going Forward.** Justice Breyer poses a series of questions about the reach and implications of the majority opinion. Think about each question. What would be your answer?

- 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?

**5. Disestablishment and Religious Strife**. Justice Breyer also stresses that a purpose of the Religion Clauses is to prevent or reduce "religious strife." Why does excluding religious schools from Maine's program reduce strife more than including them? He explains that "[i]t may appear to some that the State favors a particular religion over others, or favors religion over nonreligion." Who would think that, given the structure of the program? Why isn't it more likely that "some" might think the State is disfavoring religion if it excludes religious schools from a program otherwise open to private as well as public schools?

Justice Breyer also points out that there could be "religious strife" over the State's enforcement of rules about curricular content. That seems true. But isn't it equally (or more) true of accreditation requirements? If a religious school does not want state interference with its curriculum, it can decline to participate in Maine's funding program (as Justice Breyer points out). But if it does not comply with accreditation requirements, it will not be able to operate at all (or at least, its students will not satisfy the state's compulsory education law). The reason accreditation does not (usually) lead to religious strife is that accreditation criteria are mostly focused on objective questions such as curricular coverage, and do not attempt to prevent schools from imparting a point of view. What requirements, in addition to the bare requirement of accreditation, do you think a school should have to have in order to qualify for Maine's funding program? If a religious school has religious objections to those, what kinds of claims might it raise? The next section (IV-F, "Generally Applicable Conditions on Government Aid"), examines such questions in detail.

**6. Religious Charter Schools.** As an education reform in recent decades, most states have created the option of the charter school: "a tuition-free school of choice that is publicly funded but independently run," typically by a nonprofit organization, and is given greater discretion in curriculum and other operations than regular public schools receive. Arianna Prothero, *What Are Charter Schools?*, Ed. Week, Aug. 9, 2018, https://www.edweek.org/policy-politics/what-are-charter-schools/2018/08. Despite their independent governance and less regulated status, charter schools usually are designated as public schools in formal legal terms.

Questions have arisen recently about "religious charter schools," especially in light of the *Trinity Lutheran*–*Carson* line of decisions. Can a state approve a charter school operated by a religious organization? Indeed, *must* it approve a religion-operated school on the same terms as it approves charter schools operated by nonreligious nonprofits? After *Carson*, must the state approve such a school even if it teaches religious doctrine in its classes? Or are charter schools still state institutions subject to the Establishment Clause and to other constitutional limits that govern public schools? What purpose does it serve to treat schools that are deregulated and governed by private organizations as "public" rather than "private" schools? *See* Peltier v. Charter Day School, 37 F. 4th 104 (4th Cir. 2022) (en banc) (holding that charter school's sex-based dress code, requiring female students to wear skirts, violated equal protection); *cert. denied*, 2023 WL 4163208 (June 29, 2023). *See also* Complaint in OKPLAC, Inc. v. Statewide Virtual Charter School Board, CV 2023-1857 (Okla. Cty. Dist. Ct. July 31, 2023),

https://www.aclu.org/cases/okplac-inc-v-statewide-virtual-charter-school-board?document=Complaint-OKPLAC-Inc-v-Statewide-Virtual-Charter-School-Board#legal-documents (raising state constitutional and charter-law statutory challenges to state's approval of an online charter school that would be governed by Catholic dioceses and allegedly would discriminate on religious grounds "in admissions, discipline, and employment").

***Considering inserting after the Bob Jones case (on p. 431) at the end of section IV-F.***

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**5. The Respect for Marriage Act.** How is the application of *Bob Jones* and "compelling interest" analysis affected (if at all) by the federal Respect for Marriage Act, Pub. L. 117-228, enacted in December 2022? The Act requires states to give legal recognition to marriages recognized in other states without regard to "the sex, race, ethnicity, or national origin" of the two spouses involved. (Similarly, the Act makes a same-sex marriage. valid for federal-law purposes [Social Security benefits, federal taxes, etc.] if the marriage "was valid in the state it was entered into.") These provisions protect same-sex marriages in the event the Supreme Court overrules its decision in Obergefell v. Hodges, 576 U.S. 644 (2015).

Simultaneously, the Act provides, in two sections, that it must not "be construed to diminish or abrogate [any religious organization's] religious liberty or conscience protection" or to "deny or alter any benefit, status, or right" of anyone else. And it further includes congressional findings (quoting *Obergefell*) that "beliefs about the role of gender in marriage"—including, logically, the belief that marriage is male-female only—are "based on decent and honorable religious or philosophical premises" and "are due proper respect." These provisions, it's been argued, protect religious organizations not only directly, but also indirectly—by "recogniz[ing] that religious belief in an exclusively traditional view of marriage is not akin to the racism that the *Bob Jones* Court found anathema to national policy" and therefore does not implicate the same compelling interest that *Bob Jones* found outweighed religious organizations' freedom. Douglas Laycock, Thomas Berg, Carl Esbeck, and Robin Fretwell Wilson, *The Respect for Marriage Act: Living Together Despite our Deepest Differences*, U. ILL. L. REV. (forthcoming), ms. at 6-7, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4394618. Do you agree?

***Consider inserting this material after Santa Fe v. Doe (on p. 619), at the end of section V-C ("The Line Between Government Speech and Private Speech").***

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KENNEDY v. BREMERTON SCHOOL DISTRICT
142 S.Ct. 2407 (2022)

JUSTICE GORSUCH delivered the opinion of the Court.

Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied. Still, the Bremerton School District disciplined him anyway. It did so because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy's religious beliefs. That reasoning was misguided. Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.

I.

A.

Joseph Kennedy began working as a football coach at Bremerton High School in 2008 after nearly two decades of service in the Marine Corps. Like many other football players and coaches across the country, Mr. Kennedy made it a practice to give "thanks through prayer on the playing field" at the conclusion of each game. . . Mr. Kennedy offered his prayers after the players and coaches had shaken hands, by taking a knee at the 50-yard line and praying "quiet[ly]" for "approximately 30 seconds."

Initially, Mr. Kennedy prayed on his own. But over time, some players asked whether they could pray alongside him. Mr. Kennedy responded by saying, "'This is a free country. You can do what you want.'" The number of players who joined Mr. Kennedy eventually grew to include most of the team, at least after some games. Sometimes team members invited opposing players to join. Other times Mr. Kennedy still prayed alone. Eventually, Mr. Kennedy began incorporating short motivational speeches with his prayer when others were present. Separately, the team at times engaged in pregame or postgame prayers in the locker room. It seems this practice was a "school tradition" that predated Mr. Kennedy's tenure. Mr. Kennedy explained that he "never told any student that it was important they participate in any religious activity." In particular, he "never pressured or encouraged any student to join" his postgame midfield prayers.

For over seven years, no one complained to the Bremerton School District (District) about these practices. It seems the District's superintendent first learned of them only in September 2015, after an employee from another school commented positively on the school's practices to Bremerton's principal. At that point, the District reacted quickly. On September 17, the superintendent sent Mr. Kennedy a letter. In it, the superintendent identified "two problematic practices" in which Mr. Kennedy had engaged. First, Mr. Kennedy had provided "inspirational

talk[s]" that included "overtly religious references" likely constituting "prayer" with the students "at midfield following the completion of. . . game[s]." Second, he had led "students and coaching staff in a prayer" in the locker-room tradition that "predated [his] involvement with the program."

The District explained that it sought to establish "clear parameters" "going forward." It instructed Mr. Kennedy to avoid any motivational "talks with students" that "include[d] religious expression, including prayer," and to avoid "suggest[ing], encourag[ing] (or discourag[ing]), or supervis[ing]" any prayers of students, which students remained free to "engage in." The District also explained that any religious activity on Mr. Kennedy's part must be "nondemonstrative (i.e., not outwardly discernible as religious activity)" if "students are also engaged in religious conduct" in order to "avoid the perception of endorsement." In offering these directives, the District appealed to what it called a "direct tension between" the "Establishment Clause" and "a school employee's [right to] free[ly] exercise" his religion. To resolve that "tension," the District explained, an employee's free exercise rights "must yield so far as necessary to avoid school endorsement of religious activities."

After receiving the District's September 17 letter, Mr.Kennedy ended the tradition, predating him, of offering locker-room prayers. He also ended his practice of incorporating religious references or prayer into his postgame motivational talks to his team on the field. . . .

On October 14, through counsel, Mr. Kennedy sent a letter to school officials informing them that, because of his "sincerely-held religious beliefs," he felt "compelled" to offer a "post-game personal prayer" of thanks at midfield. He asked the District to allow him to continue that "private religious expression" alone. Consistent with the District's policy, Mr. Kennedy explained that he "neither requests, encourages, nor discourages students from participating in" these prayers. Mr. Kennedy emphasized that he sought only the opportunity to "wai[t] until the game is over and the players have left the field and then wal[k] to mid-field to say a short, private, personal prayer." He "told everybody" that it would be acceptable to him to pray "when the kids went away from [him]." He later clarified that this meant he was even willing to say his "prayer while the players were walking to the locker room" or "bus," and then catch up with his team. . .

On October 16, shortly before the game that day, the District responded with another letter. The District acknowledged that Mr. Kennedy "ha[d] complied" with the "directives" in its September 17 letter. Yet instead of accommodating Mr. Kennedy's request to offer a brief prayer on the field while students were busy with other activities—whether heading to the locker room, boarding the bus, or perhaps singing the school fight song—the District issued an ultimatum. It forbade Mr. Kennedy from engaging in "any overt actions" that could "appea[r] to a reasonable observer to endorse . . . prayer . . . while he is on duty as a District-paid coach." The District did so because it judged that anything less would lead it to violate the Establishment Clause.

B.

After receiving this letter, Mr. Kennedy offered a brief prayer following the October 16 game. When he bowed his head at midfield after the game, "most [Bremerton] players were . . . engaged in the traditional singing of the school fight song to the audience." Though Mr. Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer. This event spurred media coverage of Mr. Kennedy's dilemma and a public response from the District. The District placed robocalls to parents to inform them that public access to the field is forbidden; it posted signs and made announcements at games saying the same thing; and it had the Bremerton Police secure the field in future games. . . .

On October 23, shortly before that evening's game, the District wrote Mr. Kennedy again. It expressed "appreciation" for his "efforts to comply" with the District's directives, including avoiding "on-the-job prayer with players in the . . . football program, both in the locker room prior to games as well as on the field immediately following games." The letter also admitted that, during Mr. Kennedy's recent October 16 postgame prayer, his students were otherwise engaged and not praying with him, and that his prayer was "fleeting." Still, the District explained that a "reasonable observer" could think government endorsement of religion had occurred when a "District employee, on the field only by virtue of his employment with the District, still on duty" engaged in "overtly religious conduct." The District thus made clear that the only option it would offer Mr. Kennedy was to allow him to pray after a game in a "private location" behind closed doors and "not observable to students or the public."

After the October 23 game ended, Mr. Kennedy knelt at the 50-yard line, where "no one joined him," and bowed his head for a "brief, quiet prayer." The superintendent informed the District's board that this prayer "moved closer to what we want," but nevertheless remained "unconstitutional." After the final relevant football game on October 26, Mr. Kennedy again knelt alone to offer a brief prayer as the players engaged in postgame traditions. While he was praying, other adults gathered around him on the field. Later, Mr. Kennedy rejoined his players for a postgame talk, after they had finished singing the school fight song.

C.

Shortly after the October 26 game, the District placed Mr. Kennedy on paid administrative leave and prohibited him from "participat[ing], in any capacity, in . . . football program activities." In a letter explaining the reasons for this disciplinary action, the superintendent criticized Mr. Kennedy for engaging in "public and demonstrative religious conduct while still on duty as an assistant coach" by offering a prayer following the games on October 16, 23, and 26. The letter did not allege that Mr. Kennedy performed these prayers with students, and it acknowledged that his prayers took place while students were engaged in unrelated postgame activities. Additionally, the letter faulted Mr. Kennedy for not being willing to pray behind closed doors . . .

While Mr. Kennedy received "uniformly positive evaluations" every other year of his coaching career, after the 2015 season ended in November, the District gave him a poor performance evaluation. The evaluation advised against rehiring Mr. Kennedy on the grounds that he "'failed to follow district policy'" regarding religious expression and "'failed to supervise student-athletes after games.'" Mr. Kennedy did not return for the next season.

III.

Now before us, Mr. Kennedy renews his argument that the District's conduct violated both the Free Exercise and Free Speech Clauses of the First Amendment. These Clauses work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. See*, e.g., Widmar v. Vincent*, 454 U.S. 263, 269, n. 6 (1981); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995). * * * [The Court turns to free exercise first.]

A.

Under this Court's precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." Should a

plaintiff make a showing like that, this Court will find a First Amendment violation unless the government can satisfy "strict scrutiny" by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Lukumi*, 508 U.S., at 546.

That Mr. Kennedy has discharged his burdens is effectively undisputed. [The District did not dispute that Kennedy's speech was a sincerely motivated religious exercise, nor that its directives to Kennedy were specifically targeted to religious speech.]

The District's challenged policies also fail the general applicability test. The District's performance evaluation after the 2015 football season advised against rehiring Mr. Kennedy on the ground that he "failed to supervise student-athletes after games." But, in fact, this was a bespoke requirement specifically addressed to Mr. Kennedy's religious exercise. The District permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls. Thus, any sort of postgame supervisory requirement was not applied in an evenhanded, across-the-board way. Again recognizing as much, the District conceded before the Ninth Circuit that its challenged directives were not "generally applicable."

When it comes to Mr. Kennedy's free speech claim, our precedents remind us that the First Amendment's protections extend to "teachers and students," neither of whom "shed their constitutional rights to freedom of speech or ex- pression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969); see also *Lane v. Franks*, 573 U.S. 228, 231 (2014). Of course, none of this means the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish. In addition to being private citizens, teachers and coaches are also government employees paid in part to speak on the government's behalf and convey its intended messages. [The Court's summary of rules applicable to free speech by government employees is omitted. That framework is set forth in *Pickering v. Board of Ed. of Township High School Dist*., 391 U.S. 563 (1968), and *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006.]

* * * At the first step of the *Pickering–Garcetti* inquiry, the parties' disagreement thus turns out to center on one question alone: Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District? * * *

[I]t seems clear to us that Mr. Kennedy has demonstrated that his speech was private speech, not government speech. When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy's prayers did not "ow[e their] existence" to Mr. Kennedy's responsibilities as a public employee. *Garcetti*, 547 U.S., at 421.

The timing and circumstances of Mr. Kennedy's prayers confirm the point. During the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands. We find it unlikely that Mr. Kennedy was fulfilling a responsibility imposed by his employment by praying during a period in which the District has acknowledged that its coaching staff was free to engage in all manner of private speech. That Mr. Kennedy offered his prayers when students were engaged in other activities like singing the school fight song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen. Nor is it dispositive that Mr. Kennedy's prayers took place "within the office"

environment—here, on the field of play. Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy's speech and the circumstances surrounding it point to the conclusion that he did not.

In reaching its contrary conclusion, the Ninth Circuit stressed that, as a coach, Mr. Kennedy served as a role model "clothed with the mantle of one who imparts knowledge and wisdom." The court emphasized that Mr. Kennedy remained on duty after games. Before us, the District presses the same arguments. And no doubt they have a point. Teachers and coaches often serve as vital role models. But this argument commits the error of positing an "excessively broad job descriptio[n]" by treating everything teachers and coaches say in the workplace as government speech subject to government control. *Garcetti*, 547 U.S., at 424. On this understanding, a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria. Likewise, this argument ignores the District Court's conclusion (and the District's concession) that Mr. Kennedy's actual job description left time for a private moment after the game to call home, check a text, socialize, or engage in any manner of secular activities. Others working for the District were free to engage briefly in personal speech and activity. That Mr. Kennedy chose to use the same time to pray does not transform his speech into government speech. To hold differently would be to treat religious expression as second-class speech and eviscerate this Court's repeated promise that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S., at 506 . . .

IV.

Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District. Under the Free Exercise Clause, a government entity normally must satisfy at least "strict scrutiny," showing that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end. *See Lukumi*, 508 U.S., at 533; n. 1, supra. A similar standard generally obtains under the Free Speech Clause. *See Reed*, 576 U.S., at 171. The District, however, asks us to apply to Mr. Kennedy's claims the more lenient second-step *Pickering–Garcetti* test, or alternatively intermediate scrutiny. See Brief for Respondent 44–48. Ultimately, however, it does not matter which standard we apply. The District cannot sustain its burden under any of them.[3]

A.

[T]he District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause. On its account, Mr. Kennedy's prayers might have been protected by the Free Exercise and Free Speech Clauses. But his rights were in "direct tension" with the competing demands of the Establishment Clause. To resolve that clash, the District reasoned, Mr. Kennedy's rights had to "yield." The Ninth Circuit pursued this same line of thinking, insisting that the District's interest in avoiding an Establishment Clause violation "'trump[ed]'" Mr. Kennedy's rights to religious exercise and free speech.

[3] It seems, too, that it is only here where our disagreement with the dissent begins in earnest. We do not understand our colleagues to contest that Mr. Kennedy has met his burdens under either the Free Exercise or Free Speech Clause, but only to suggest the District has carried its own burden "to establish that its policy prohibiting Kennedy's public prayers was the least restrictive means of furthering a compelling state interest." Post, at 22 (opinion of SOTOMAYOR, J.).

But how could that be? It is true that this Court and others often refer to the "Establishment Clause," the "Free Exercise Clause," and the "Free Speech Clause" as separate units. But the three Clauses appear in the same sentence of the same Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." Amdt. 1. A natural reading of that sentence would seem to suggest the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail over the others.

The District arrived at a different understanding this way. It began with the premise that the Establishment Clause is offended whenever a "reasonable observer" could conclude that the government has "endorse[d]" religion. The District then took the view that a "reasonable observer" could think it "endorsed Kennedy's religious activity by not stopping the practice." . . . Because a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed Mr. Kennedy's message, the District felt it had to act, even if that meant suppressing otherwise protected First Amendment activities. In this way, the District effectively created its own "vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other," placed itself in the middle, and then chose its preferred way out of its self-imposed trap. See *Pinette*, 515 U.S., at 768 (plurality opinion); *Shurtleff v. Boston*, 596 U.S., – (2022) (GORSUCH, J., concurring in judgment) (slip op., at 4–5).

To defend its approach, the District relied on *Lemon* and its progeny. In upholding the District's actions, the Ninth Circuit followed the same course. And, to be sure, in *Lemon* this Court attempted a "grand unified theory" for assessing Establishment Clause claims. *American Legion v. American Humanist Assn*., 588 U.S., (2019) (plurality opinion) (slip op., at 24). That approach called for an examination of a law's purposes, effects, and potential for entanglement with religion. In time, the approach also came to involve estimations about whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion. *See, e.g., County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989).What the District and the Ninth Circuit overlooked, however, is that the "shortcomings" associated with this "ambitiou[s]," abstract, and ahistorical approach to the Establishment Clause became so "apparent" that this Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion*, 588 U.S., at ____-____(plurality opinion) (slip op., at 12–13); see also *Town of Greece v. Galloway*, 572 U.S. 565, 575–577 (2014). The Court has explained that these tests "invited chaos" in lower courts, led to "differing results" in materially identical cases, and created a "mine-field" for legislators. *Pinette*, 515 U.S., at 768–769, n. 3 (plurality opinion) (emphasis deleted). This Court has since made plain, too, that the Establishment Clause does not include anything like a "modified heckler's veto, in which . . . religious activity can be proscribed" based on "'perceptions'" or "'discomfort.'" *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001) (emphasis deleted). An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech. *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion). Nor does the Clause "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious." *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (BREYER, J., concurring in judgment). In fact, just this Term the Court unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test. See *Shurtleff*, 596 U.S., at ____ –____ (slip op., at 1–2); *id.,* at __ (ALITO, J., concurring in judgment) (slip op., at 1); *id*., at __ (opinion of GORSUCH, J.) (slip op., at 1, 4–5).

In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "'reference to historical practices and understandings.'" *Town of Greece*, 572 U.S., at 576; *see also American Legion*, 588 U.S., at _____-_____ (plurality opinion) (slip op., at 25). "'[T]he line'" that courts and governments "must draw between the permissible and the impermissible" has to "'accor[d ] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" *Town of Greece*, 572 U.S., at 577 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)). An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some "'exception'" within the "Court's Establishment Clause jurisprudence." 572 U.S., at 575; see *American Legion*, 588 U.S., at ____-____ (plurality opinion) (slip op., at 25); *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961) (analyzing certain historical elements of religious establishments); *McGowan v. Maryland*, 366 U.S. 420, 437–440 (1961) (analyzing Sunday closing laws by looking to their "place . . . in the First Amendment's history"); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 680 (1970) (analyzing the "history and uninterrupted practice" of church tax exemptions). The District and the Ninth Circuit erred by failing to heed this guidance.

B.

Perhaps sensing that the primary theory it pursued below rests on a mistaken understanding of the Establishment Clause, the District offers a backup argument in this Court. It still contends that its Establishment Clause concerns trump Mr. Kennedy's free exercise and free speech rights. But the District now seeks to supply different reasoning for that result. Now, it says, it was justified in suppressing Mr. Kennedy's religious activity because otherwise it would have been guilty of coercing students to pray. And, the District says, coercing worship amounts to an Establishment Clause violation on anyone's account of the Clause's original meaning.

As it turns out, however, there is a pretty obvious reason why the Ninth Circuit did not adopt this theory in proceedings below: The evidence cannot sustain it. To be sure, this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, "make a religious observance compulsory." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Government "may not coerce anyone to attend church," *ibid*., nor may it force citizens to engage in "a formal religious exercise," *Lee v. Weisman*, 505 U.S. 577, 589 (1992). No doubt, too, coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.***

The District did not discipline Mr. Kennedy for engaging in prayer while presenting locker-room speeches to students. That tradition predated Mr. Kennedy at the school. And he willingly ended it, as the District has acknowledged. He also willingly ended his practice of postgame religious talks with his team. The only prayer Mr. Kennedy sought to continue was the kind he had "started out doing" at the beginning of his tenure—the prayer he gave alone. He made clear that he could pray "while the kids were doing the fight song" and "take a knee by [him]self and give thanks and continue on." Mr. Kennedy even considered it "acceptable" to say his "prayer while the players were walking to the locker room" or "bus," and then catch up with his team. In short, Mr. Kennedy did not seek to direct any prayers to students or require anyone else to participate. His plan was to wait to pray until athletes were occupied, and he "told everybody" that's what he wished "to do." It was for three prayers of this sort alone in October 2015 that the District suspended him. * * *

The District responds that, as a coach, Mr. Kennedy "wielded enormous authority and influence over the students," and students might have felt compelled to pray alongside him. To

support this argument, the District submits that, after Mr. Kennedy's suspension, a few parents told District employees that their sons had "participated in the team prayers only because they did not wish to separate themselves from the team."

This reply fails too. Not only does the District rely on hearsay to advance it. For all we can tell, the concerns the District says it heard from parents were occasioned by the locker-room prayers that predated Mr. Kennedy's tenure or his postgame religious talks, all of which he discontinued at the District's request. There is no indication in the record that anyone expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension. Nor is there any record evidence that students felt pressured to participate in these prayers. To the contrary, and as we have seen, not a single Bremerton student joined Mr. Kennedy's quiet prayers following the three October 2015 games for which he was disciplined. On October 16, those students who joined Mr. Kennedy were "'from the opposing team,'" and thus could not have "reasonably fear[ed]" that he would decrease their "playing time" or destroy their "opportunities" if they did not "participate." As for the other two relevant games, "no one joined" Mr. Kennedy on October 23. And only a few members of the public participated on October 26.

The absence of evidence of coercion in this record leaves the District to its final redoubt. Here, the District suggests that any visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law— impermissibly coercive on students. In essence, the District asks us to adopt the view that the only acceptable government role models for students are those who eschew any visible religious expression. *See also* post, at 16–17 (SOTOMAYOR, J., dissenting). If the argument sounds familiar, it should. Really, it is just another way of repackaging the District's earlier submission that government may script everything a teacher or coach says in the workplace. The only added twist here is the District's suggestion not only that it may prohibit teachers from engaging in any demonstrative religious activity, but that it must do so in order to conform to the Constitution.

Such a rule would be a sure sign that our Establishment Clause jurisprudence had gone off the rails. In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District's rule, a school would be required to do so. It is a rule that would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it. It is a rule, too, that would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been "part of learning how to live in a pluralistic society." *Lee*, 505 U.S., at 590. We are aware of no historically sound understanding of the Establishment Clause that begins to "mak[e] it necessary for government to be hostile to religion" in this way. *Zorach*, 343 U.S., at 314. ****

C.

In the end, the District's case hinges on the need to generate conflict between an individual's rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties—and then develop some explanation why one of these Clauses in the First Amendment should "'trum[p]'" the other two. But the project falters badly. Not only does the District fail to offer a sound reason to prefer one constitutional guarantee over another. It cannot even show that they are at odds. In truth, there is no conflict between the constitutional commands

before us. There is only the "mere shadow" of a conflict, a false choice premised on a misconstruction of the Establishment Clause. *Schempp*, 374 U.S., at 308 (Goldberg, J., concurring). And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights.

V.

Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. Mr. Kennedy is entitled to summary judgment on his First Amendment claims. The judgment of the Court of Appeals is reversed.

[Concurring opinions by Justices Thomas and Alito are omitted.]

JUSTICE SOTOMAYOR, with whom JUSTICES BREYER and KAGAN join, dissenting.

This case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event. The Constitution does not authorize, let alone require, public schools to embrace this conduct. Since *Engel v. Vitale*, 370 U.S. 421 (1962), this Court consistently has recognized that school officials leading prayer is constitutionally impermissible. Official led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment.

The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion. *See Carson v. Makin*, 596 U.S. ____-____ (2022) (Breyer, J., dissenting) (slip op., at 1). ****

To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts. The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion. Under the Court's analysis, presumably this would be a different case if the District had cited Kennedy's repeated disruptions of school programming and violations of school policy regarding public access to the field as grounds for suspending him. As the District did not articulate those grounds, the Court assesses only the District's Establishment Clause concerns. It errs by assessing them divorced from the context and history of Kennedy's prayer practice.

Today's decision goes beyond merely misreading the record. The Court overrules *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and calls into question decades of subsequent precedents that it deems "offshoot[s]" of that decision. In the process, the Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such

questions with a new "history and tradition" test. In addition, while the Court reaffirms that the Establishment Clause prohibits the government from coercing participation in religious exercise, it applies a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities. This decision does a disservice to schools and the young citizens they serve, as well as to our Nation's longstanding commitment to the separation of church and state. I respectfully dissent. * * * * *

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## NOTES AND QUESTIONS

1. **Disagreements About the Facts.** The majority and the dissent rely on vastly different accounts of the facts. To be precise, they do not actually disagree about what happened; they disagree about what facts are legally pertinent to the case. The majority focuses exclusively on the events of October 16, 23, and 26, 2015—the events identified by the District as precipitating Kennedy's dismissal as coach. The majority thus does not take as relevant Kennedy's earlier practice of praying with his students both before the game in the locker room and after the game on the field. (Note that Kennedy agreed to stop doing those only a few weeks earlier, after receiving the District's September 17, 2015, letter.)

Was the Court right to ignore that history? If the District's fear is that students may feel pressured into praying with Kennedy, isn't the previous history highly relevant to understanding the social context? (Note that, as the majority acknowledges, the previous practice of team prayers itself began when Kennedy prayed alone at midfield and "some players asked whether they could pray alongside him." Will that process repeat itself?) How do you square the Court's approach here with that in *Santa Fe* (p. 612), where the Court took earlier versions of a policy (which were more constitutionally problematic) as highly relevant to the constitutionality of the final one? *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) ("[T]he evolution of the current policy ... indicates that the District intended to preserve the practice of prayer before football games.").

In light of that massive disagreement over the relevant facts, how should we (and the lower courts) interpret the holding of the case? How would the majority apply its "history and tradition" test to the facts as recounted in the dissent? How would the dissenters apply the endorsement test to the facts as recounted in the majority?

2. **Broad or Narrow?** The decision has been greeted—with pleasure in some circles and despondency in others—as greatly relaxing the constitutional constraints on public school teachers, and government officials more broadly, to engage in religious expression in the course of their official duties. How accurate is that assessment? Does the Court overrule *Lee* and *Santa Fe*? Does the Court give any indication it will? Also what about the concessions Kennedy made—namely how he (1) agreed to dispense with pre-game prayers with the team in the locker room, a practice that had apparently gone on for many years at Bremerton High School (and apparently many others) without challenge, (2) agreed to eliminate all religious references from his motivational talks to the team, and (3) agreed to conduct his 50-yard-line prayers "quietly," after his team had left the field and were occupied doing other things. Kennedy thus limited his religious exercise to a time when other coaches and officials were permitted to engage in personal, non-duty activities and he could not be observed by his students. Should those restrictions be understood as part of the holding of the case? If so, just how relaxed are the new constitutional standards?

3. **The Question of Line-Drawing.**

**(a) The Majority.** Related to the last note, where does the majority draw the line? If Kennedy's visible prayers immediately after the game are private speech, could he shout or amplify the prayers so that the crowd (including students) could hear them? What if Kennedy engaged in a racist or homophobic rant? The Court gives several reasons for its conclusion that Kennedy's speech was private, not governmental. Are they persuasive? The Court says Kennedy "did not speak pursuant to a government policy," did not "convey a government-created message," and was not "engag[ing] in any other speech the District paid him to produce." The majority doesn't appear to claim that the District's opposition to Kennedy's prayers is sufficient to make the speech private—and in any event, it couldn't claim that, right? (Kennedy couldn't pray with his players in the locker room before the game and then use the District's opposition to prove the prayer was private, right?) The Court also stresses how coaches were free after the game to engage in other kinds of private speech, like "checking sports scores on their phones." What about a teacher who prays in the classroom before her students right before class starts? If she's allowed to check her phone then, could she claim her prayer is protected? Finally, the Court says this: "That Kennedy offered his prayers when students were engaged in other activities like singing the school fight song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen." What happens if the fight song is delayed or cancelled? Or what if most of the students just decide to pray with Kennedy instead? Does Kennedy have to stop praying? Does the Court intend this as a limit or not? What is the line here?

Finally, a more theoretical point: the Court says both that this speech is private and that it's not coercive. What's the relationship between those points? That is, if this speech is really private, why does the Court care about coercion? The Establishment Clause does not apply to private parties trying to coerce each other religiously, right? Or does the fact that it's not coercive make it seem more private? (If that's what the Court is saying, does it make sense?)

**(b) The Dissent.** At the same time, where would the dissenters draw the line? If their theory of constitutional violation is that because a coach or teacher like Kennedy is a respected role model, even his personal religious activities are indirectly coercive (or are a forbidden "endorsement"), does this extend to wearing religious dress, such as hijabs, yarmulkes, or religious jewelry; to reading scripture silently when in view of the students; or even to attending religious worship services when this is known to the students? After all, the endorsement or indirectly coercive effect of Coach Kennedy's actions were a product of (1) his status and position as coach and/or teacher, and (2) the students' awareness of his religious beliefs. Where, if anywhere, does the theory stop?

Can the questions in (a) and (b) be answered by drawing a line, during official school time, between a teacher's activities that tend to invite students to participate with the teacher and those that do not? Perhaps that line would distinguish the teacher's acts that are personal from those that utilize her office (and are also likely to be coercive).

**4. Hypothetical**: Assume that some students have formed a chapter of the Fellowship of Christian Athletes at Bremerton High School, as is their right (see pp. 591-96). Assume further that student clubs must have a faculty sponsor and that most clubs' faculty sponsor is a teacher who shares the clubs' interests and enthusiasms. Assume further that serving as a club sponsor is considered part of a teacher's job duties. Under the majority opinion, could Coach Kennedy serve as faculty sponsor for the Fellowship of Christian Athletes club? Under the dissenters' view, should he be permitted to do so? (Note that the Equal Access Act, which protects a group's right

to form and meet, provides that protection only if a teacher's involvement is limited to a "non-participatory capacity" (p. 592). Is that provision constitutional after *Kennedy*?)

**5. The Fate of *Lemon* and the Endorsement Test**. Justice Sotomayor's dissent says that the Court overrules the *Lemon* test "entirely and in all contexts." Does it? The majority opinion states that "this Court long ago abandoned *Lemon* and its endorsement test offshoot." That appears to be a claim about what the Court has done in the past, not a statement of a new holding. The Court cites two cases in support of its statement that the Court "long ago abandoned *Lemon*," but neither of them explicitly overruled the test. If the Court intended to do so in *Kennedy*, why not say the magic words, "the *Lemon* test is overruled" or "is no longer good law"? See note 1 at 530-31. Now that the dissenters have declared that the test was overruled, is it officially overruled?

**6. Original Meaning, Historical Practice, and Teacher Prayer**. The majority states that "[i]n place of *Lemon* and the endorsement test," courts should employ an "analysis focused on original meaning and history." As a practical matter, how would that work in a case like this? There were no public schools at the founding, nor were there football games, nor were there coaches who prayed at the end of games. The majority says not a word about when such prayers started to occur, or what the history has been. Moreover, we do know that teachers led students in prayer in public schools until *Engel* and *Schempp*, and maybe longer—but the Court majority is not calling for a return to that history and practice. (For good reason.) How, then, is a lower court supposed to follow the Court's instruction to decide such a case according to original meaning and history?

**7. The Ten Commandments in Public Schools**. In the wake of *Kennedy v. Bremerton*, Texas has considered adopting legislation requiring public schools to post Ten Commandments displays. S.B. 1515, such a bill, passed the Texas Senate but failed to pass the Texas House. A piece of new legislation, S.B. 9, introduced in June 2023, requires all "public elementary [and] secondary school[s]" to "display in a conspicuous place in each classroom . . . a durable poster or framed copy of the Ten Commandments" that must "be at least 16 inches wide and 20 inches tall" and "include[s] the text of the Ten Commandments . . . in a size and typeface that is legible to a person with average vision from anywhere in the classroom." If a school does not have such a poster or framed copy of its own, it must accept privately donated versions. *See* Bill Analysis, S.B. 9 (as of 6/6/2003), https://capitol.texas.gov/tlodocs/881/analysis/html/SB00009I.htm.

Is this inconsistent with *Kennedy v. Bremerton*? Also keep in mind the Supreme Court's rules about religious displays coming out of the Court's decision in *American Legion* (p. 520), which upheld a WWI-era memorial cross on government land. Also know that, before *American Legion*, there was *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), which had struck down (under the *Lemon* test) Kentucky law requiring the posting of Ten Commandments displays in public classrooms. *American Legion* does not cite or mention *Stone v. Graham*. Neither does *Kennedy v. Bremerton*. What does that mean for Texas's proposed legislation?

***Consider inserting this material after United States v. Seeger on p. 685, or in place or in addition to Spencer v. World Vision (p. 221).***

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YU PRIDE ALLIANCE V. YESHIVA UNIVERSITY
2022 WL 2158381 (N.Y. Sup. Ct, Trial Div., 2022)

HON. LYNN R. KOTLER.

[In this case,] Yeshiva refuses to formally recognize plaintiff YU Pride Alliance, an LGBTQ student organization. [The Alliance and several students sued Yeshiva under New York state's Civil and Human Rights Law (NYCHRL). The parties filed cross-motions for summary judgment.]

***Is Yeshiva a Religious Corporation under Admin Code § 8-102?***

This motion turns on whether Yeshiva is a religious corporation within the meaning of the NYCHRL. At first blush, the answer to this question may seem obvious given Yeshiva is an educational institution with a proud and rich Jewish heritage and a self-described mission to combine "the spirit of Torah" with strong secular studies. However, the court must examine the precise language of the NYCHRL exemption which Yeshiva relies on, Admin Code § 8-102, as well as the legislative intent, and determine whether Yeshiva is a religious corporation exempt under the statute as the legislature intended.

Plaintiffs have sued Yeshiva as a "place or provider of public accommodation" pursuant to Admin Code § 8-107(4) and (20). [The statute prohibits discrimination based on sexual orientation, among other things, by any provider "of goods, services, facilities, accommodations, advantages or privileges of any kind." But the statute also provides that "place or provider of public accommodation"]

> does not include any club which proves that it is in its nature distinctly private…. *For the purposes of this definition, … a religious corporation incorporated under the education law or the religious corporation law is deemed to be in its nature distinctly private.* [Emphasis by the court.]

The NYCHRL expressly excludes "a religious corporation incorporated under the education law" from application of the NYCHRL prohibition of discrimination by places or providers of public accommodation. Yeshiva asserts that it is a religious corporation incorporated under the education law. If that is the case, then plaintiffs do not have a claim under the NYCHRL against Yeshiva for failure to officially recognize YU Pride Alliance.

There is no dispute that Yeshiva is incorporated under the education law. Thus, the court must determine whether Yeshiva is a religious corporation as defendants contend. This court finds that it is not. Defendants' position conflicts with the fact that Yeshiva's own Amendment to its Charter adopted December 15, 1967, provides as follows:

> 1. This corporation, incorporated [originally in 1897], is hereby continued as an *educational corporation under the Education Law* of the State of New York....

9. Yeshiva University is and continues to be organized and operated *exclusively for educational purposes...* [Emphases added by the court.]

Defendants would have this court look beyond its own organizing documents and examine its functions and attributes to determine that it is a "religious" corporation as that term is used in the Section 8-102 exemption . . .

A Religious Corporations Law corporation is a corporation created for religious purposes (RCL § 2). RCL § 2 further defines incorporated and unincorporated churches, clergyman and ministers and funeral entities. Both types of churches are defined as enabling people to meet for divine worship or other religious observances. Two Second Department [state appellate] cases have also defined corporations as religious when the certificate of incorporation specifies religious purposes such as "a place of worship" (*Temple-Ashram v. Satyanandji*, 84 AD3d 1158 [2d Dept 2011]) and "to provide religious services and services to senior citizens" (*Agudist Council of Greater N.Y. v. Imperial Sales Co.*, 158 AD2d 683 [2d Dept 1990]).

Yeshiva's organizing documents do not expressly indicate that Yeshiva has a religious purpose. Rather, Yeshiva organized itself as an "educational corporation" and for educational purposes, exclusively. Defense counsel's arguments about the implications of this court's ruling are overblown. Every school with a religious affiliation or association is not necessarily affected by this court's determination that Yeshiva is not exempt from the NYCHRL. Rather, the inquiry must focus on the purpose of the institution, which is typically expressed in a corporation's organizing documents. There may be schools organized under the education law that have stated a religious purpose so that they are exempt from the NYCHRL under Section 8-102. Since Yeshiva has not done so, the court does not need to reach this issue.

Indeed, defendants concede that Yeshiva's amended charter represented a departure from its initial charter which stated an exclusively religious purpose, to wit, "to promote the study of Talmud". Then, in 1967, Yeshiva amended its charter to state that it "is and continues to be organized and operated exclusively for educational purposes". The court rejects defendants' contention that Yeshiva's amended charter confirmed "that the original religious education purposes carried through." Yeshiva itself broadened the scope of education it was to provide; pursuant to the amended charter Yeshiva was now authorized by the State of New York to confer [18 different undergraduate or graduate degrees, six of which reference "Hebrew" or "religious" content in their title.] The court finds that Yeshiva's educational function, evidenced by its ability to now confer many secular multi-disciplinary degrees, thus became Yeshiva's primary purpose. Even if Yeshiva still "promote[d] the study of Talmud", that does not necessarily make Yeshiva a religious corporation as that term was intended by the City Council when it enacted Section 8-102.

Faculty members, law professors even, within Yeshiva's own community recognize that Yeshiva is not a religious corporation and is subject to the NYCHRL. [Citing a letter to Yeshiva's president from professors at the university's Cardozo Law School.]

Further, Yeshiva itself has long acknowledged that it was subject to the NYCHRL. A 1995 fact sheet about gay student organizations at Yeshiva prepared by Yeshiva as per a September 5, 1995 letter from David M. Rosen, Director of Yeshiva's Department of Public Relations, provides in pertinent part as follows: …

4. Given the strong prohibition against homosexual behavior in Jewish law, why does YU permit gay groups on campus?

> Yeshiva University is subject to the human rights ordinance of the City of New York, which provides protected status to homosexuals. Under this law, YU cannot ban gay student clubs. It must make facilities available to them in the same manner as it does for other student groups.

At oral argument, defense counsel proffered "Yeshiva would be happy to stipulate to adding a more direct statement of religious purpose in its charter if plaintiffs would agree to dismiss the case." This assertion concedes the point. Yeshiva's charter is not merely form over substance. Its corporate purpose is the basis for licensure and receipt of grants and other public funding. As plaintiffs learned during the course of limited discovery, Yeshiva submitted various forms to governmental agencies which belie its contention in this action that it is a religious corporation. In 2018, Yeshiva reported [to the state that it was an "educational institution"] rather than an "organization [] incorporated under the religious corporations law…." Yeshiva's Director of Tax & Compliance, Alan Kruger, testified that Yeshiva registered as an educational corporation and not a religious corporation because "it would be difficult" to produce documents showing entitlement to the latter exemption.

In a [2021] letter requesting New York State capital construction funding [Yeshiva's director of government relations] identified Yeshiva as a "501[c][3] not-for-profit institution of higher learning...", not a religious corporation. How Yeshiva represents itself is not merely "form over substance" as defense counsel argues . . . Yeshiva is either a religious corporation in all manners or it is not….

Even if the court were to adopt Yeshiva's religious function test, the court would reach the same result. Plaintiffs' counsel correctly characterizes defendants' argument on this point: defendants want this court to find that Yeshiva is a religious corporation in the same manner an ordinary person would describe themselves as a religious person. There is no doubt that Yeshiva has an inherent and integral religious character which defines it and sets it apart from other schools and universities of higher education. However, Yeshiva must fit within the term "religious corporation" as the legislature intended the term to mean in the NYCHRL. Yeshiva is a university which provides educational instruction, first and foremost. Yeshiva's religious character evidenced by required religious studies, observation of Orthodox Jewish law, students' participation in religious services, etc. are all secondary to Yeshiva's primary purpose. "[A] religious corporation should be one formed primarily for religious purposes; exercising some ecclesiastical control over its members, having some distinct form of worship and some method of discipline for violation thereof" (*Naarim v. Kunda* (NY Sup Ct, Kings Co 2005)). Defense counsel's assertion that "[y]ou cannot step onto the campus or into a batei midrash without recognizing that this is a sacred space for students who are studying there" undercuts defendants' argument. The record shows that the purpose students attend Yeshiva is to obtain an education, not for religious worship or some other function which is religious at its core. Thus, religion is necessarily secondary to education at Yeshiva….

Accordingly, the court finds that Yeshiva is not a "religious corporation" as the term is used in Admin Code § 8-102. Defendants' motion on this point is denied and plaintiffs' cross-motion for partial summary judgment is granted to the extent that the court finds that the defendant Yeshiva is not a "religious corporation" [under the statutory exclusion].

[The court also rejected Yeshiva's First Amendment arguments, finding that the New York law was "neutral and generally applicable" under the Free Exercise Clause and did not force Yeshiva to endorse the Alliance's views in violation of the Free Speech Clause.]

NOTES AND QUESTIONS

**1. Statutory Details.** The scope of any specific statutory accommodation turns, of course, on the statute's details. The court reads the "religious corporation" exemption in New York's public-accommodations law narrowly, distinguishing such entities from "educational corporations" with religious elements or inspiration. At various points, the court relies on the fact that Yeshiva is formally incorporated and has described itself as an educational corporation, not a religious corporation. Does that ignore the fact that the text says an exempted "religious corporation" may be "incorporated *under the education law or* the religious corporation law" (emphasis added)?

**2. Formal Corporate Categorization.** If Yeshiva changes the statements in its corporate charter and other official documents to make them more explicitly religious, could it regain its eligibility for the exemption? The court notes that the statement of corporate purpose matters because it's "the basis for licensure and receipt of grants and other public funding." From that we might infer that Yeshiva described itself as "educational," and downplayed its religious elements, in part because the latter might have excluded it from otherwise available state funding (the opinion mentions capital-construction funding). But as you'll see in Part IV, the Court has increasingly forbidden the state to exclude institutions from funding for services they provide on the ground that they have a religious identity or that they offer religious instruction along with the services. *Trinity Lutheran Church v. Comer* (p. 397); *Espinoza v. Montana Dept. of Revenue* (p. 408); *Carson v. Makin* (online update). Should a court hold Yeshiva's self-description as "educational" against it if the funding criterion that helped push it to adopt that description was, apparently, unconstitutional?

**3. "Primary Religious Purpose."** Apart from whether the court's holding properly interprets the state statute, does it constitute sound religious-freedom policy? The court rules against Yeshiva because students attend it "to obtain an education, not for religious worship or some other function which is religious at its core." Why isn't educating students from a religious perspective also "religious at its core"? (As you'll see, the Court has long recognized how private religious schools play a central role in "educating young people in their faith." *Our Lady of Guadalupe School v. Morrissey-Berru* (p. 290); *NLRB v. Catholic Bishop* (p. 293).) Would the logic of *Yeshiva* exclude every religious school from the exemption, even schools in which all subjects are taught explicitly from the perspective of the sponsoring faith? Would it exclude even a seminary or divinity school (since students still attend them "to obtain an education")?

On the other hand, if Yeshiva were protected, would the exemption extend to large numbers of schools with nominal religious ties or elements? How far should the exemption extend, as a matter of religious-freedom first principles?