

**RELIGION
AND THE CONSTITUTION**
Fifth Edition

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**2026-27 SUPPLEMENT
TO THE CASEBOOK
(FIFTH EDITION)**



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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.”

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, *Dale* 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 “inva[d]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

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 after page 188, after *Fulton v. City of Philadelphia*, at the end of section II-B-1 (“The Free Exercise Clause Itself”).*

MAHMOUD v. TAYLOR

145 S. Ct. 2332 (2025)

JUSTICE ALITO delivered the opinion of the Court.

The Board of Education of Montgomery County, Maryland (Board), has introduced a variety of “LGBTQ+ inclusive” storybooks into the elementary school curriculum. These books—and associated educational instructions provided to teachers—are designed to “disrupt” children’s thinking about sexuality and gender. The Board has told parents that it will not give them notice when the books are going to be used and that their children’s attendance during those periods is mandatory. A group of parents from diverse religious backgrounds sued to enjoin those policies. They assert that the new curriculum, combined with the Board’s decision to deny opt outs, impermissibly burdens their religious exercise.

Today, we hold that the parents have shown that they are entitled to a preliminary injunction. A government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses “a very real threat of undermining” the religious beliefs and practices that the parents wish to instill. *Wisconsin v. Yoder* (1972). And a government cannot condition the benefit of free public education on parents’ acceptance of such instruction. Based on these principles, we conclude that the parents are likely to succeed in their challenge to the Board’s policies.

I.

A.

1.

With just over one million residents, Montgomery County is Maryland’s most populous county. According to a recent survey, it is also the “most religiously diverse county” in the Nation. In addition to hosting a diverse mix of Christian denominations, the county ranks in the top five in the Nation in per-capita population of Jews, Muslims, Hindus, and Buddhists. The county’s religious diversity is accompanied by strong cultural diversity as well. The county is home to several notable ethnic communities. For example, the Ethiopian community in Silver Spring is one of the largest in the country. And according to one survey, “[o]nly 56.8% of county residents speak English at home.” . . .

In recognition of the county’s religious diversity, the Board’s “Guidelines for Respecting Religious Diversity” profess a commitment to making “reasonable accommodations” for the religious “beliefs and practices” of [Montgomery County Public Schools (MCPS)] students. These accommodations take various forms. For example, according to one MCPS official, the Board “advises principals that schools should avoid scheduling tests or other major events on dozens of . . . ‘days of commemoration,’ during which MCPS expects that many students may be absent . . . or engaged in religious or cultural observances.”

This case, however, arises from the Board’s abject refusal to heed widespread and impassioned pleas for accommodation. In the years leading up to 2022, the Board apparently “determined that the books used in its existing [English & Language Arts] curriculum were not

representative of many students and families in Montgomery County because they did not include LGBTQ characters.” The Board therefore decided to introduce into the curriculum what it described as “LGBTQ+-inclusive texts.” As one email sent by MCPS principals reflects, the Board selected the books according to a “Critical Selection Repertoire” that required selectors to review potential texts and ask questions such as: “Is heteronormativity reinforced or disrupted?”; “Is cisnormativity reinforced or disrupted?”; and “Are power hierarchies that uphold the dominant culture reinforced or disrupted?”

In accordance with this “[r]epertoire” and other criteria, the Board eventually selected 13 “LGBTQ+-inclusive” texts for use in the English and Language Arts curriculum from pre-K through 12th grade. At issue in this lawsuit are the five “LGBTQ+-inclusive” storybooks that are approved for students in Kindergarten through fifth grade—in other words, for children who are generally between 5 and 11 years old. . . .

2.

The Board officially launched the “LGBTQ+-inclusive” texts into MCPS schools in the 2022–2023 school year. Shortly thereafter, parents “began contacting individual teachers, principals, or MCPS staff” about the storybooks and asking that their children be excused from classroom instruction related to them. [One parent] said that MCPS parents were “frustrated” because, in their view, “educators and administrators are going behind what [parents] are teaching their kids at home, and pushing ideas of gender ideology on their kids.” The parent felt that the Board was “implying to [children] that their religion, their belief system, and their family tradition is actually wrong.”

At the same Board meeting, one Board member responded by saying that “some of the testimony today was disturbing to me personally. Transgender, LGBTQ individuals are not an ideology, they are a reality. . . . [T]here are religions out there that teach that women should only achieve certain subservient roles in life, and MCPS would never think of not having a book in a classroom that showed a woman” in a professional role. The Board’s student member agreed with the sentiment and proclaimed that “ignorance and hate does exist within our community, but please know that every student—each of our 160,000 students in our large county—has a place in the school system.”

Initially, the Board compromised with objecting parents by notifying them when the “LGBTQ+-inclusive” storybooks would be taught and permitting their children to be excused from instruction involving the books. . . .

This compromise, however, did not last long. In March 2023, less than a year after the “LGBTQ+ inclusive” texts were introduced, the Board issued a statement declaring that “[s]tudents and families may not choose to opt out of engaging” with the storybooks and that “teachers will not send home letters to inform families when inclusive books are read in the future.” According to one MCPS official, the Board decided to change its policy because, among other things, “individual principals and teachers could not accommodate the growing number of opt out requests without causing significant disruptions to the classroom environment.” The official also stated that permitting some students to exit the classroom while the storybooks were being taught would expose other students “to social stigma and isolation.” . . .

Shortly after the Board rescinded parental opt outs, more than 1,000 parents signed a petition asking the Board to restore opt out rights. And hundreds of displeased parents, including many Muslim and Ethiopian Orthodox parents, appeared at the Board’s public meetings and implored the Board to allow opt outs. At a May 2023 meeting, one community member testified

that “thousands” of parents felt “deeply dismayed and betrayed” by the rescission of opt outs from “content that conflict[s] with their sincerely held religious beliefs.” At the same meeting, an MCPS student testified and asked the Board “to allow students like me to opt out of content and books that contain sensitive and mature topics that go against my religious beliefs.”

The Board was unmoved. After the testimony, several Board members and another MCPS official spoke up to “clarify” that the storybooks would not be used for explicit instruction on sexuality and gender, but rather as part of the “literacy curriculum.” According to a later news article, one Board member recalled that “she felt ‘kind of sorry’” for the student who testified in favor of opt outs, “and wondered to what extent she may have been ‘parroting dogma’ learned from her parents.” The Board member also expressed her view that “[i]f [parents] want their child to receive an education that strictly adheres to their religious dogma, they can send their kid to a private religious school.” The Board member went on to suggest that the objecting parents were comparable to “‘white supremacists’” who want to prevent their children from learning about civil rights and “‘xenophobes’” who object to “‘stories about immigrant families.’”

The Board continues to permit children to opt out of other school activities, including the “family life and human sexuality” unit of instruction, for which opt outs are required under Maryland law

III.

To begin, we hold that the parents are likely to succeed on their claim that the Board’s policies unconstitutionally burden their religious exercise. “[W]e have long recognized the rights of parents to direct ‘the religious upbringing’ of their children.” *Espinoza v. Montana Dept. of Revenue* (2020) (quoting *Yoder*). And we have held that those rights are violated by government policies that “substantially interfer[e] with the religious development” of children. *Id.* Such interference, we have observed, “carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent.” *Ibid.* For the reasons explained below, we conclude that such an “objective danger” is present here.

A.

We start by describing the nature of the religious practice at issue here and explaining why it is burdened by the Board’s policies.

1.

. . . The practice of educating one’s children in one’s religious beliefs, like all religious acts and practices, receives a generous measure of protection from our Constitution. “Drawing on ‘enduring American tradition,’ we have long recognized the rights of parents to direct ‘the religious upbringing’ of their children.” *Espinoza* (quoting *Yoder*). And this is not merely a right to teach religion in the confines of one’s own home. Rather, it extends to the choices that parents wish to make for their children outside the home. It protects, for example, a parent’s decision to send his or her child to a private religious school instead of a public school. *Pierce v. Society of Sisters* (1925).

Due to financial and other constraints, however, many parents “have no choice but to send their children to a public school.” *Morse v. Frederick* (2007) (Alito, J., concurring). As a result, the right of parents “to direct the religious upbringing of their” children would be an empty promise if it did not follow those children into the public school classroom. We have thus recognized limits

on the government’s ability to interfere with a student’s religious upbringing in a public school setting.

An early example comes from our decision in *West Virginia Bd. of Ed. v. Barnette* (1943). In that case, we considered a resolution adopted by the West Virginia State Board of Education that required students “to participate in the salute honoring the Nation represented by the flag.” If students failed to comply, they faced expulsion and could not be readmitted until they yielded to the State’s command. . . .

Barnette dealt with an especially egregious kind of direct coercion: a requirement that students make an affirmation contrary to their parents’ religious beliefs. But that does not mean that the protections of the First Amendment extend only to policies that compel children to depart from the religious practices of their parents. To the contrary, in *Yoder*, we held that the Free Exercise Clause protects against policies that impose more subtle forms of interference with the religious upbringing of children.

[The Court then turns to the facts of *Yoder*, where the Court held that the Amish were entitled to pull their children out of school after 8th grade despite a Wisconsin law requiring parents to send their children to public or private school until the age of 16.]

[U]nlike in *Barnette*, there was no suggestion that the compulsory-attendance law [in *Yoder*] would compel Amish children to make an affirmation that was contrary to their parents’ or their own religious beliefs. Nor was there a suggestion that Amish children would be compelled to commit some specific practice forbidden by their religion. Rather, the threat to religious exercise was premised on the fact that high school education would “expos[e] Amish children to worldly influences in terms of attitudes, goals, and values contrary to [their] beliefs” and would “substantially interfer[e] with the religious development of the Amish child.” *Yoder*.

That interference, the Court held, violated the parents’ free exercise rights. The compulsory-education law “carrie[d] with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent” because it placed Amish children into “an environment hostile to Amish beliefs,” where they would face “pressure to conform” to contrary viewpoints and lifestyles.

As our decision in *Yoder* reflects, the question whether a law “substantially interfer[es] with the religious development” of a child will always be fact-intensive. It will depend on the specific religious beliefs and practices asserted, as well as the specific nature of the educational requirement or curricular feature at issue. Educational requirements targeted toward very young children, for example, may be analyzed differently from educational requirements for high school students. A court must also consider the specific context in which the instruction or materials at issue are presented. Are they presented in a neutral manner, or are they presented in a manner that is “hostile” to religious viewpoints and designed to impose upon students a “pressure to conform”?

We now turn to the application of these principles to this case.

2.

In light of the record before us, we hold that the Board’s introduction of the “LGBTQ+-inclusive” storybooks—combined with its decision to withhold notice to parents and to forbid opt outs—substantially interferes with the religious development of their children and imposes the kind of burden on religious exercise that *Yoder* found unacceptable.

To understand why, start with the storybooks themselves. Like many books targeted at young children, the books are unmistakably normative. They are clearly designed to present certain

values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected.

Take, for example, the message sent by the books concerning same-sex marriage. Many Americans “advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.” *Obergefell v. Hodges* (2015). That group includes each of the parents in this case. The storybooks, however, are designed to present the opposite viewpoint to young, impressionable children who are likely to accept without question any moral messages conveyed by their teachers’ instruction.

For example, the book *Prince & Knight* clearly conveys the message that same-sex marriage should be accepted by all as a cause for celebration. The young reader is guided to feel distressed at the prince’s failure to find a princess, and then to celebrate when the prince meets his male partner. The book relates that “on the two men’s wedding day, the air filled with cheer and laughter, for the prince and his shining knight would live happily ever after.” Those celebrating the same-sex wedding are not just family members and close friends, but the entire kingdom. For young children, to whom this and the other storybooks are targeted, such celebration is liable to be processed as having moral connotations. If this same-sex marriage makes everyone happy and leads to joyous celebration by all, doesn’t that mean it is in every respect a good thing? High school students may understand that widespread approval of a practice does not necessarily mean that everyone should accept it, but very young children are most unlikely to appreciate that fine point.

Uncle Bobby’s Wedding, the only book that the dissent is willing to discuss in any detail, conveys the same message more subtly. The atmosphere is jubilant after Uncle Bobby and his boyfriend announce their engagement. The book’s main character, Chloe, does not share this excitement. “‘I don’t understand!’” she exclaims, “‘Why is Uncle Bobby getting married?’” The book is coy about the precise reason for Chloe’s question, but the question is used to tee up a direct message to young readers: “‘Bobby and Jamie love each other,’ said Mummy. ‘When grown-up people love each other that much, sometimes they get married.’” The book therefore presents a specific, if subtle, message about marriage. It asserts that two people can get married, regardless of whether they are of the same or the opposite sex, so long as they “‘love each other.’” That view is now accepted by a great many Americans, but it is directly contrary to the religious principles that the parents in this case wish to instill in their children.

It is significant that this book does not simply refer to same-sex marriage as an existing practice. Instead, it presents acceptance of same-sex marriage as a perspective that should be celebrated. The book’s narrative arc reaches its peak with the actual event of Uncle Bobby’s wedding, which is presented as a joyous event that is met with universal approval. And again, there are many Americans who would view the event that way, and it goes without saying that they have every right to do so. But other Americans wish to present a different moral message to their children. And their ability to present that message is undermined when the exact opposite message is positively reinforced in the public school classroom at a very young age.

Next, consider the messages sent by the storybooks on the subject of sex and gender. Many Americans, like the parents in this case, believe that biological sex reflects divine creation, that sex and gender are inseparable, and that children should be encouraged to accept their sex and to live accordingly. But the challenged storybooks encourage children to adopt a contrary viewpoint. *Intersection Allies* presents a transgender child in a sex-ambiguous bathroom and proclaims that “[a] bathroom, like all rooms, should be a safe space.” The book also includes a discussion guide that asserts that “at any point in our lives, we can choose to identify with one gender, multiple genders, or neither gender” and asks children “What pronouns fit you best?” The book and the

accompanying discussion guidance present as a settled matter a hotly contested view of sex and gender that sharply conflicts with the religious beliefs that the parents wish to instill in their children.

The book *Born Ready* presents similar ideas in an even less veiled manner. The book follows the story of Penelope, an apparently biological female who asserts “I AM a boy.” Not only does the story convey the message that Penelope is a boy simply because that is what she chooses to be, but it slyly conveys a positive message about transgender medical procedures. Penelope says the following to her mother:

“I love you, Mama, but I don’t want to be you. I want to be Papa. I don’t want tomorrow to come because tomorrow I’ll look like you. Please help me, Mama. Help me to be a boy.”

Penelope’s mother then agrees that Penelope is a boy, and Penelope exclaims: “For the first time, my insides don’t feel like fire. They feel like warm, golden love.” To young children, the moral implication of the story is that it is seriously harmful to deny a gender transition and that transitioning is a highly positive experience. The book goes so far as to present a contrary view as something to be reprimanded. When the main character’s brother says “You can’t become a boy. You have to be born one,” his mother corrects him by saying: “Not everything needs to make sense. This is about love.” The upshot is that it is hurtful, perhaps even hateful, to hold the view that gender is inextricably bound with biological sex.

These books carry with them “a very real threat of undermining” the religious beliefs that the parents wish to instill in their children. *Yoder*. Like the compulsory high school education considered in *Yoder*, these books impose upon children a set of values and beliefs that are “hostile” to their parents’ religious beliefs. *Id.* And the books exert upon children a psychological “pressure to conform” to their specific viewpoints. *Ibid.* The books therefore present the same kind of “objective danger to the free exercise of religion” that we identified in *Yoder*. *Id.*

That “objective danger” is only exacerbated by the fact that the books will be presented to young children by authority figures in elementary school classrooms. As representatives of the Board have admitted, “there is an expectation that teachers use the LGBTQ-Inclusive Books as part of instruction,” and “there will be discussion that ensues.”

The Board has left little mystery as to what that discussion might look like. The Board provided teachers with suggested responses to student questions related to the books, and the responses make it clear that instruction related to the storybooks will “substantially interfer[e]” with the parents’ ability to direct the “religious development” of their children. *Yoder*. In response to a child who states that two men “can’t get married,” teachers are encouraged to respond “[t]wo men who love each other can decide they want to get married There are so many different kinds of families and ways to be a family.” If a child says “[h]e can’t be a boy if he was born a girl,” the teacher is urged to respond “that comment is hurtful.” If a child asks “What’s transgender?”, it is suggested that the teacher answer: “When we’re born, people make a guess about our gender Sometimes they’re right and sometimes they’re wrong.”

In other contexts, we have recognized the potentially coercive nature of classroom instruction of this kind. “The State exerts great authority and coercive power through” public schools “because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.” *Edwards v. Aguillard* (1987); see also *Lee v. Weisman* (1992) (“[T]here are heightened concerns with protecting freedom of conscience from subtle coercive

pressure in the elementary and secondary public schools”). Young children, like those of petitioners, are often “impressionable” and “implicitly trus[t]” their teachers. Here, the Board requires teachers to instruct young children using storybooks that explicitly contradict their parents’ religious views, and it encourages the teachers to correct the children and accuse them of being “hurtful” when they express a degree of religious confusion. Such instruction “carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent.” *Yoder*.

B.

For these reasons, we conclude that the Board’s introduction of the “LGBTQ+-inclusive” storybooks, combined with its no-opt-out policy, burdens the parents’ right to the free exercise of religion. We now turn to the question whether that burden is constitutionally permitted.

1.

Under our precedents, the government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable. *Smith* (1990). Thus, in most circumstances, two questions remain after a burden on religious exercise is found. First, a court must ask if the burdensome policy is neutral and generally applicable. Second, if the first question can be answered in the negative, a court will proceed to ask whether the policy can survive strict scrutiny. Under that standard, the government must demonstrate that “its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.” *Kennedy v. Bremerton School Dist.* (2022).

Here, the character of the burden requires us to proceed differently. When the burden imposed is of the same character as that imposed in *Yoder*, we need not ask whether the law at issue is neutral or generally applicable before proceeding to strict scrutiny. That much is clear from our decisions in *Yoder* and *Smith*.

In *Yoder*, the Court rejected the contention that the case could be “disposed of on the grounds that Wisconsin’s requirement . . . applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion.” Instead, the Court bypassed those issues and proceeded to subject the law to close judicial scrutiny, asking whether the State’s interest “in its system of compulsory education [was] so compelling that even the established religious practices of the Amish must give way.” *Id.*

Then, in *Smith*, we recognized *Yoder* as an exception to the general rule that governments may burden religious exercise pursuant to neutral and generally applicable laws. Specifically, we described *Yoder* as a case “in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action.” *Smith*. And we explained that the general rule did not apply in *Yoder* because of the special character of the burden in that case. Thus, when a law imposes a burden of the same character as that in *Yoder*, strict scrutiny is appropriate regardless of whether the law is neutral or generally applicable.

As we have explained, the burden in this case is of the exact same character as the burden in *Yoder*. The Board’s policies, like the compulsory-attendance requirement in *Yoder*, “substantially interfer[e] with the religious development” of the parents’ children. And those policies pose “a very real threat of undermining” the religious beliefs and practices that the parents wish to instill in their children. *Ibid.* We therefore proceed to consider whether the policies can survive strict scrutiny.

2.

To survive strict scrutiny, a government must demonstrate that its policy “advances ‘interests of the highest order’ and is narrowly tailored to achieve those interests.” *Fulton v. Philadelphia* (2021) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993)). In its filings before us, the Board asserts that its curriculum and no-opt-out policy serve its compelling interest in “maintaining a school environment that is safe and conducive to learning for all students.” It relies on the statements of an MCPS official who testified that permitting opt outs would result in “significant disruptions to the classroom environment” and would expose certain students to “social stigma and isolation.”

We do not doubt that, as a general matter, schools have a “compelling interest in having an undisrupted school session conducive to the students’ learning.” *Grayned v. City of Rockford* (1972). But the Board’s conduct undermines its assertion that its no-opt-out policy is necessary to serve that interest. As we have noted, the Board continues to permit opt outs in a variety of other circumstances, including for “noncurricular” activities and the “Family Life and Human Sexuality” unit of instruction, for which opt outs are required under Maryland law. . . .

This robust “system of exceptions” undermines the Board’s contention that the provision of opt outs to religious parents would be infeasible or unworkable. *Fulton*. . . .

The Board also suggests that permitting opt outs from the “LGBTQ+-inclusive” storybooks would be especially unworkable because, when it permitted such opt outs in the past, they resulted in “unsustainably high numbers of absent students.” But again, the Board’s concern is self-inflicted. The Board is doubtless aware of the presence in Montgomery County of substantial religious communities whose members hold traditional views on marriage, sex, and gender. When it comes to instruction that would burden the religious exercise of parents, the Board cannot escape its obligations under the Free Exercise Clause by crafting a curriculum that is so burdensome that a substantial number of parents elect to opt out. There is no *de maximis* exception to the Free Exercise Clause.

Nor can the Board’s policies be justified by its asserted interest in protecting students from “social stigma and isolation.” In Maryland, the “Family Life and Human Sexuality” unit of instruction includes discussions about sexuality and gender. Yet the Board has not suggested that the legally-required provision of opt outs from that curriculum has resulted in stigma or isolation. Even if it did, the Board cannot purport to rescue one group of students from stigma and isolation by stigmatizing and isolating another. A classroom environment that is welcoming to all students is something to be commended, but such an environment cannot be achieved through hostility toward the religious beliefs of students and their parents.

We acknowledge that “courts are not school boards or legislatures, and are ill-equipped to determine the ‘necessity’ of discrete aspects of a State’s program of compulsory education.” *Yoder*. It must be emphasized that what the parents seek here is not the right to micromanage the public school curriculum, but rather to have their children opt out of a particular educational requirement that burdens their well-established right “to direct ‘the religious upbringing’ of their children.” *Espinoza* (quoting *Yoder*). We express no view on the educational value of the Board’s proposed curriculum, other than to state that it places an unconstitutional burden on the parents’ religious exercise if it is imposed with no opportunity for opt outs. Providing such an opportunity would give the parents no substantive control over the curriculum itself. . . .

IV.

The Board’s introduction of the “LGBTQ+-inclusive” storybooks, along with its decision to withhold opt outs, places an unconstitutional burden on the parents’ rights to the free exercise of their religion. The parents have therefore shown that they are likely to succeed in their free exercise claims. They have likewise shown entitlement to a preliminary injunction pending the completion of this lawsuit. In the absence of an injunction, the parents will continue to be put to a choice: either risk their child’s exposure to burdensome instruction, or pay substantial sums for alternative educational services. . . . The petitioners should receive preliminary relief while this lawsuit proceeds. See *Winter*. Specifically, until all appellate review in this case is completed, the Board should be ordered to notify them in advance whenever one of the books in question or any other similar book is to be used in any way and to allow them to have their children excused from that instruction.

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

Public schools, this Court has said, are “‘at once the symbol of our democracy and the most pervasive means for promoting our common destiny.’” *Edwards v. Aguillard* (1987). They offer to children of all faiths and backgrounds an education and an opportunity to practice living in our multicultural society. That experience is critical to our Nation’s civic vitality. Yet it will become a mere memory if children must be insulated from exposure to ideas and concepts that may conflict with their parents’ religious beliefs.

Today’s ruling ushers in that new reality. Casting aside longstanding precedent, the Court invents a constitutional right to avoid exposure to “subtle” themes “contrary to the religious principles” that parents wish to instill in their children. Exposing students to the “message” that LGBTQ people exist, and that their loved ones may celebrate their marriages and life events, the majority says, is enough to trigger the most demanding form of judicial scrutiny. That novel rule is squarely foreclosed by our precedent and offers no limiting principle. Given the great diversity of religious beliefs in this country, countless interactions that occur every day in public schools might expose children to messages that conflict with a parent’s religious beliefs. If that is sufficient to trigger strict scrutiny, then little is not.

The result will be chaos for this Nation’s public schools. Requiring schools to provide advance notice and the chance to opt out of every lesson plan or story time that might implicate a parent’s religious beliefs will impose impossible administrative burdens on schools. The harm will not be borne by educators alone: Children will suffer too. Classroom disruptions and absences may well inflict long-lasting harm on students’ learning and development. Worse yet, the majority closes its eyes to the inevitable chilling effects of its ruling. Many school districts, and particularly the most resource strapped, cannot afford to engage in costly litigation over opt-out rights or to divert resources to tracking and managing student absences. Schools may instead censor their curricula, stripping material that risks generating religious objections. The Court’s ruling, in effect, thus hands a subset of parents the right to veto curricular choices long left to locally elected school boards. Because I cannot countenance the Court’s contortion of our precedent and the untold harms that will follow, I dissent.

II.

A.

[T]his Court has made clear that mere exposure to objectionable ideas does not give rise to a free exercise claim. That makes sense: Simply being exposed to beliefs contrary to your own does not “prohibi[t]” the “free exercise” of your religion. Amdt. 1. Nor does mere “[o]ffense . . .

equate to coercion.” *Kennedy v. Bremerton School Dist.* (2022). The Constitution thus does not “guarantee citizens a right entirely to avoid ideas with which they disagree.” *Id.* Indeed, “[i]t would betray its own principles if it did,” for “no robust democracy insulates its citizens from views that they might find novel or even inflammatory.” *Elk Grove Unified School Dist. v. Newdow* (2004) (O’Connor, J., concurring in judgment).

There is no public school exception to these principles. This Court’s decision in *West Virginia Bd. of Ed. v. Barnette* (1943), is instructive. There, the Court held that “compelling” students who adhere to the Jehovah’s Witnesses faith to salute the flag, in contravention of their religious beliefs, violated the First Amendment. *Id.* Yet the Court distinguished the “compulsion of students to declare a belief” from simply exposing students to ideas that might conflict with their religious tenets. *Id.* For instance, the Court recognized that schools could “acquain[t students] with the flag salute so that they may be informed as to what it is or even what it means.” *Ibid.* No problem arose, either, the Court observed, from having objecting students “remain passive during a flag salute ritual,” while watching the rest of the class engage in it. *Id.* What the State could not do, however, is “compel the flag salute and pledge,” when those actions required students to “declare a belief” contrary to their own religious views. *Id.*

So too, in *Kennedy v. Bremerton School Dist.*, . . . the Court rejected the argument that the exposure of children to a school coach’s religious prayer violated the Establishment Clause. Even though hearing and watching an authority figure engage in a denominational prayer with classmates at a school-sponsored event could, of course, undermine parents’ efforts to instill different religious beliefs in their children, a majority of this Court concluded that no cognizable “coercion” had occurred, and so no Establishment Clause violation inhered in the coach’s conduct. *Id.*

In sum, never, in the context of public schools or elsewhere, has this Court held that mere exposure to concepts inconsistent with one’s religious beliefs could give rise to a First Amendment claim.

B.

These well-established principles, previously recognized and respected by this Court, resolve this case. [E]ach of the three sets of parent-plaintiffs premised their objections on, in essence, “expos[ure]” to material that conflicts with their religious beliefs. Yet for the reasons just explained, the effects of mere exposure to material with which one disagrees does not and should not give rise to a free exercise claim.

Nor have petitioners shown that MCPS’s policies coerced them to give up or violate their religious beliefs. *See Barnette*. To the contrary, MCPS explicitly prohibits teachers from asking students to give up or change their views regarding gender and sexuality, whether religious or not. . . . Recall, too, that MCPS exclusively uses the challenged Storybooks to teach students literacy in English language class. . . . It is possible, of course, that such instruction may introduce students to concepts or views objectionable to their faiths. Being “merely made acquainted with” these themes, however, does not give rise to a cognizable free exercise burden. *Barnette*.

III.

Rather than follow this Court’s unambiguous precedent, the majority rescues petitioners’ exposure theory by simply renaming it. Petitioners’ free exercise rights are burdened by the Storybooks, the majority claims, because they “carry with them ‘a very real threat of undermining’ the religious beliefs that the parents wish to instill in their children.” *Ante*. In other words, reading

books like *Uncle Bobby's Wedding* is sufficient, in the majority's view, because of the "threat" those books pose to the religious upbringing of petitioners' children. *Ibid*.

That is simply exposure by another name.

From where does the majority derive its novel "threat" test? *Yoder*, the majority claims, established it over half a century ago, unbeknownst to any court of appeals in the Nation (and until today, this Court as well). The flaws in the majority's reasoning are legion. The Court's reading of *Yoder* is not simply incorrect; it is definitively foreclosed by precedent. The majority's novel test, moreover, imposes no meaningful limits on the types of school decisions subject to strict scrutiny, as the Court's own application of its test confirms. Today's ruling thus promises to wreak havoc on our Nation's public schools and the courts tasked with resolving this new font of litigation. . . .

C.

One thing is clear, however: The damage to America's public education system will be profound. . . . Consider, first, the difficulties of providing adequate advance notice. There are more than 370 distinct religious groups in this country, and as the majority points out, Montgomery County is the "most religiously diverse county" in the Nation. Under the majority's test, school administrators will have to become experts in a wide range of religious doctrines in order to predict, in advance, whether a parent may object to a particular text, lesson plan, or school activity as contrary to their religious beliefs. . . .

Managing opt outs will impose even greater administrative burdens. . . . Establishing a new constitutional right to opt out of any instruction that involves themes contrary to anyone's religious beliefs will create a nightmare for school administrators tasked with fielding, tracking, and operationalizing highly individualized and vaguely defined requests for particular students, as this Board learned.

Opt outs will not just affect classroom instruction, either. Teachers will need to adjust homework assignments to exclude objectionable material and develop bespoke exams for students subject to different opt-out preferences. Schools will have to divert resources and staff to supervising students during opt-out periods, too, which could become a significant drain on funding and staffing that is already stretched thin.

Worse yet, the majority's new rule will have serious chilling effects on public school curricula. Few school districts will be able to afford costly litigation over opt-out rights or to divert resources to administering impracticable notice and opt-out systems for individual students. The foreseeable result is that some school districts may strip their curricula of content that risks generating religious objections. . . . Next to go could be teaching on evolution, the work of female scientist Marie Curie, or the history of vaccines. . . .

The Court today subverts Maryland's functioning democratic process, whistling past decades of precedent that recognizes the primacy and importance of local decisionmaking in this area of law . . .

Today's ruling threatens the very essence of public education. The Court, in effect, constitutionalizes a parental veto power over curricular choices long left to the democratic process and local administrators. That decision guts our free exercise precedent and strikes at the core premise of public schools: that children may come together to learn not the teachings of a particular faith, but a range of concepts and views that reflect our entire society. Exposure to new ideas has always been a vital part of that project, until now.

The reverberations of the Court's error will be felt, I fear, for generations. Unable to condone that grave misjudgment, I dissent.

NOTES AND QUESTIONS

1. ***Does Purpose Matter?*** Does it matter, to the majority or the dissent, that the school district chose these texts, in part, for the purpose of “disrupting” the students’ views on sexuality and gender, and in full realization that those views are often grounded in religion? If it could be shown that texts were chosen not because of their ideological content but because of their pedagogical value, would there be an opt-out right?

2. ***The Nature of the Right.*** Whose right is it—the parents or the child’s? Does it matter?

3. ***Symmetry.*** Is this right symmetrical? If there were a school district that chose texts inculcating the ideas that same-sex marriage is sinful and that human sexuality is binary, would parents with contrary beliefs—for example, parents who are a same-sex couple—have a constitutional right to opt out? If so, would this right be based on the Free Exercise Clause, or something else? If not, how can the result be squared with the First Amendment principle of viewpoint neutrality (see, e.g., *Lamb’s Chapel*, p. 588)?

Consider this analogy: Under the Establishment Clause, parents have the constitutional right to object to curriculum that inculcates religious beliefs. Is *Mahmoud* simply the flip side? *Mahmoud* gives religious parents a constitutional right to object to curriculum that inculcates anti-religious beliefs. In that sense, might one conceive of *Mahmoud* in conjunction with *Schempp* and *Engel* as standing for a kind of broad anti-establishment right—the right not to have coercive governmental institutions adopt practices with the purpose or effect of inculcating or undermining beliefs about religion? Yet can this really hold? After all, even the most secular instruction could end up being contrary to someone’s religious beliefs, right? Some religious people believe the sun goes around the earth. Should they have a right to opt out of astronomy class, on the theory that otherwise the state would be undermining their faith?

4. ***The Risks of Anarchy.*** Is the dissent correct that the decision will have “profound” disruptive effects on public education? In Maryland, parents already have the statutory right to opt out of objectionable elements of the sex education curriculum, and this right often has been extended to other areas of study. How disruptive has it been?

5. ***The Role of Public Schools.*** What is the proper role of public schools in a diverse society? Apart from judicially enforceable constitutional rights, is there anything wrong with a democratically elected school board using its control over curriculum to promote what the majority (or at least the politically powerful) think is the best view on controversial topics? In *Barnette*, Justice Jackson wrote that “[p]robably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.” Does that apply here? If so, what are the implications for constitutional doctrine?

6. *Is Neutrality Possible?* Does the school district have a point that texts that make no mention of same-sex couples or trans people communicate a message of exclusion, and the only way to counteract that is to include texts of this sort? Is it possible that no neutral course of study is even theoretically available? What would follow from such a conclusion?

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

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”).

Precisely because work and religion both play a significant role in many peoples’ lives, disputes will inevitably arise over how 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:

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 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 "affect 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.

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 after page 257, at the end of section II-C (“The Establishment Clause: Is Accommodation Unconstitutional?”).

CATHOLIC CHARITIES BUREAU, INC. v.
WISCONSIN LABOR & INDUSTRY REVIEW COMMISSION
145 S. Ct. 1583 (2025)

JUSTICE SOTOMAYOR delivered the opinion of a unanimous Court.

I.
A.

Wisconsin has long operated an unemployment compensation program that seeks to mitigate and “more fairly” distribute the “economic burdens resulting from unemployment.” Wis. Stat. § 108.01(2). To achieve that goal, Wisconsin law requires most employers to make regular contributions to the State’s unemployment fund through payroll taxes . . .

Wisconsin’s regime contains an exemption for religious employers. The exemption applies to any “church or convention or association of churches,” without further qualification, and to services provided “[b]y a duly ordained, commissioned or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by such order.” As relevant here, the exemption also covers nonprofit organizations “operated, supervised, controlled, or principally supported by a church or convention or association of churches,” but only if they are “operated primarily for religious purposes.”

Wisconsin is not alone in exempting religious organizations from unemployment compensation taxes. The Federal Unemployment Tax Act, 26 U.S.C. § 3301 *et seq.*, contains a textually parallel religious-employer exemption. Since Congress enacted that law in 1970, over 40 States have adopted similar exemptions.

B.

Catholic Charities Bureau, Inc. (Bureau), is a nonprofit organization that serves as the social ministry arm of the Roman Catholic Diocese of Superior, Wisconsin. The Bureau’s stated mission is to “carry on the redeeming work of our Lord.” In aid of that mission, the Bureau “provid[es] services to the poor and disadvantaged” and seeks to “be an effective sign of the charity of Christ.” It does not distinguish on the basis of race, sex, or religion in reference to clients served, staff employed and board members appointed.

The Bureau oversees several separately incorporated entities [which] provide a range of charitable services to local communities across Wisconsin [like helping] individuals with disabilities secure employment and [providing] daily living services to Wisconsinites with developmental or mental health disabilities . . . The Roman Catholic Diocese of Superior exercises control over both the Bureau and its subentities. The bishop of the Diocese serves as the Bureau’s president and appoints its membership, which in turn oversees the Bureau to ensure that it fulfills its mission in compliance with the Principles of Catholic social teaching.

Employees of the Bureau and its subentities are not required to adhere to any particular religious faith, and the same is true for the recipients of their charitable services. Participants in petitioners’ charitable programs do not receive religious training or orientation, and neither the Bureau nor its subentities tries to inculcate participants with the Catholic faith. That rule,

petitioners explain, reflects religious doctrine prohibiting Catholic bodies from “misusing works of charity for purposes of proselytism.” Brief for Petitioners 10 (quoting Directory for the Pastoral Ministry of Bishops “Apostolorum Successores” ¶196 (2004)). According to petitioners, Catholic teachings distinguish between “evangelization,” which involves “sharing one’s faith,” and “proselytization,” which seeks to “influence” or “coerc[e]” others into accepting one’s religious views. The former is permitted, and the latter is not, petitioners say.

C.

[The Wisconsin Supreme Court concluded that Catholic Charities was not eligible for the religious exemption here.] The dispositive question . . . was whether petitioners are “operated primarily for religious purposes.” The court interpreted that statutory phrase to require judicial inquiry into not only an organization’s “motivations” but also its “activities.” To determine whether an organization’s activities are “‘primarily’ religious in nature,” the court held, courts should “focu[s] on whether an organization participated in worship services, religious outreach, ceremony, or religious education.” *Id.*, at 34–35 (citing *United States v. Dykema*, 666 F.2d 1096, 1100 (CA7 1981)). According to the court, that analysis would identify “[t]ypical activities of an organization operated for religious purposes,” while avoiding “any subjective inquiry with respect to religious truth.”

Applying that standard, the court held that petitioners’ activities are “secular in nature,” not religious. Petitioners “neither attempt to imbue program participants with the Catholic faith nor supply any religious materials to program participants or employees,” the court observed. “Both employment with the organizations and services offered by the organizations are open to all participants regardless of religion,” and the charitable services offered by the subentities could “be provided by organizations of either religious or secular motivations.” Based on that record, the court held that petitioners “are not operated primarily for religious purposes within the meaning of Wis. Stat. § 108.02(15)(h)(2).” . . .

We granted certiorari to decide whether the Wisconsin Supreme Court’s interpretation of § 108.02(15)(h)(2), as applied to petitioners, violates the First Amendment.

II.

A.

“The clearest command of the Establishment Clause” is that the government may not “officially prefe[r]” one religious denomination over another. *Larson v. Valente* (1982). This principle of denominational neutrality bars States from passing laws that “aid or oppose” particular religions, *Epperson v. Arkansas* (1968), or interfere in the “competition between sects,” *Zorach v. Clauson* (1952). The Establishment Clause’s “prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause,” too. *Larson*. That is because the “fullest realization of true religious liberty requires that government” refrain from “favoritism among sects.” *Id.* Government actions that favor certain religions, the Court has warned, convey to members of other faiths that “‘they are outsiders, not full members of the political community.’” *Santa Fe* (2000).

To guard against that serious harm, this Court in *Larson v. Valente*, set a demanding standard for the government to justify differential treatment across religions on denominational lines. When a state law establishes a denominational preference, courts must “treat the law as suspect” and apply “strict scrutiny in adjudging its constitutionality.” *Larson*. The government

bears the burden to show that the relevant law, or application thereof, is “closely fitted to further a compelling governmental interest.”

A law that differentiates between religions along theological lines is textbook denominational discrimination. Take, for instance, a law that treats “a religious service of Jehovah’s Witnesses ... differently than a religious service of other sects” because the former is “less ritualistic, more unorthodox, [and] less formal.” *Fowler v. Rhode Island* (1953). Or consider an exemption that applies only to religious organizations that perform baptisms, engage in monotheistic worship, or hold services on Sunday. Such laws establish a preference for certain religions based on the content of their religious doctrine, namely, how they worship, hold services, or initiate members and whether they engage in those practices at all. Such official differentiation on theological lines is fundamentally foreign to our constitutional order, for “[t]he law knows no heresy, and is committed to the support of no dogma.” *Watson v. Jones* (1872).

This case involves that paradigmatic form of denominational discrimination. In determining whether petitioners qualified for the tax exemption under § 108.02(15)(h)(2), the Wisconsin Supreme Court acknowledged that petitioners are controlled by a church, the Roman Catholic Diocese of Superior, thereby satisfying one of the exemption’s two criteria. The court’s inquiry instead turned on whether petitioners are “operated primarily for religious purposes.” On that criterion, the court recognized that petitioners’ charitable works are religiously motivated. The court nevertheless deemed petitioners ineligible for the exemption under § 108.02(15)(h)(2) because they do not “attempt to imbue program participants with the Catholic faith,” “supply any religious materials to program participants or employees,” or limit their charitable services to members of the Catholic Church. Put simply, petitioners could qualify for the exemption while providing their current charitable services if they engaged in proselytization or limited their services to fellow Catholics.

Petitioners’ Catholic faith, however, bars them from satisfying those criteria. Catholic teaching, petitioners say, forbids “‘misus[ing] works of charity for purposes of proselytism.’” Brief for Petitioners 10 (quoting Directory for the Pastoral Ministry of Bishops “Apostolorum Successores” ¶196). It also requires provision of charitable services “without making distinctions ‘by race, sex, or religion.’” Brief for Petitioners 7 (quoting App. to Pet. for Cert. 431a). Many religions apparently impose similar rules prohibiting proselytization or religious differentiation in the provision of charitable services. See Brief for Religious Liberty Scholars as Amici Curiae 12–13 (discussing beliefs in Judaism, Islam, Sikhism, and Hinduism).

Wisconsin’s exemption, as interpreted by its Supreme Court, thus grants a denominational preference by explicitly differentiating between religions based on theological practices. Indeed, petitioners’ eligibility for the exemption ultimately turns on inherently religious choices (namely, whether to proselytize or serve only co-religionists), not “‘secular criteria’” that “happen to have a ‘disparate impact’ upon different religious organizations.” Much like a law exempting only those religious organizations that perform baptisms or worship on Sundays, an exemption that requires proselytization or exclusive service of co-religionists establishes a preference for certain religions based on the commands of their religious doctrine.

B.

The State does not dispute that the government may not prefer one religion over another. Instead, the State argues that, when it comes to “[r]eligious accommodations” afforded by the government, courts should ask whether the accommodation’s eligibility criteria are the product of “invidious discrimination” to determine if strict scrutiny applies. This Court’s decision in *Gillette*

v. United States (1971), the State contends, lends support to this rule. As the State would have it, *Gillette* stands for the premise that whenever a religious “accommodation’s line serves ‘considerations of a pragmatic nature’ having ‘nothing to do with a design to foster or favor any sect, religion, or cluster of religions,’ the Establishment Clause is not offended.” Brief for Respondents 36.

The inquiry set forth in *Gillette*, however, is inapposite. There, this Court rejected an Establishment Clause challenge to a provision of the Military Selective Service Act of 1967, which afforded a “conscientious objector” status to any person who, “by reason of religious training and belief,” was “conscientiously opposed to participation in war in any form.” Importantly, that exemption “focused on individual conscientious belief, not on sectarian affiliation.” Conscientious objector status was thus “available on an equal basis” to members of all religions under the Military Selective Service Act, as this Court later explained in *Larson*, 456 U.S., at 247 n.23 (discussing *Gillette*). “[O]n its face,” the statute “simply d[id] not discriminate on the basis of religious affiliation.” *Gillette*.

The same is not true here. The Wisconsin Supreme Court’s interpretation of § 108.02(h)(15)(2) facially differentiates among religions based on theological choices. After all, an exemption provided only to organizations that engage in proselytization or serve only co-religionists is not, on its face, “available on an equal basis” to all denominations. That type of “explicit” distinction between religious practices is what this Court has deemed subject to strict scrutiny, including in the context of religious exemptions.

Next, the State disputes the premise that petitioners were denied coverage “because they do not proselytize or serve only Catholics” in the course of performing charitable work. Brief for Respondents 37. The State insists that, instead, the Wisconsin Supreme Court excluded petitioners because they had “identified no distinctively religious activity that would create difficulty in resolving unemployment disputes.” When pressed at argument as to what would qualify as such “distinctively religious activity” in the context of providing charitable services, however, the State clarified that it meant “activities that express and inculcate religious doctrine: worship, proselytization, religious education.” Tr. of Oral Arg. 81.

That understanding of the Wisconsin Supreme Court’s ruling, even if assumed correct, cannot save the statute from strict scrutiny. Decisions about whether to “express and inculcate religious doctrine” through worship, proselytization, or religious education when performing charitable work are, again, fundamentally theological choices driven by the content of different religious doctrines. A statute that excludes religious organizations from an accommodation on such grounds facially favors some denominations over others.

III.

Because § 108.02(15)(h)(2) “grants denominational preferences of the sort consistently and firmly deprecated in our precedents,” it “must be invalidated unless it is justified by a compelling governmental interest” and is “closely fitted to further that interest.” *Larson*. The State bears the burden of clearing that high bar, and it has failed to do so here.

Wisconsin justifies its law by reference to two principal interests. First, it argues that the law serves a compelling state interest in “ensuring unemployment coverage for its citizens.” Brief for Respondents 44. Yet the State fails to explain how the theological lines drawn by § 108.02(15)(h)(2) are narrowly tailored to advance that asserted interest, particularly as applied to petitioners . . . Wisconsin does not suggest that organizations like Catholic Charities, which decline

to proselytize and choose to serve all-comers, are more likely to leave their employees without unemployment benefits. Nor could it: The record is devoid of such evidence.

Second, the State argues that the Wisconsin Supreme Court's interpretation of § 108.02(15)(h)(2) is "narrowly tailored to avoid entangling the state with employment decisions touching on religious faith and doctrine." Brief for Respondents 44. When an organization's employees "express an[d] inculcate religious doctrine through worship, proselytization, and religious education," the State explains, "misconduct disputes could often force the state to decide whether employees complied with religious doctrine." Tr. of Oral Arg. 72. Yet the State again fails to demonstrate that § 108.02(15)(h)(2) is "closely fitted to further" that anti-entanglement interest. Larson. To the extent the State seeks to avoid opining on employee compliance with religious teachings, it does not explain why it declined to craft an exemption limited to employees who are in fact tasked with inculcating religious doctrine. Instead, the exemption here functions at an organizational level, covering both the janitor and the priest in equal measure . . .

It is fundamental to our constitutional order that the government maintain neutrality between religion and religion. There may be hard calls to make in policing that rule, but this is not one. When the government distinguishes among religions based on theological differences in their provision of services, it imposes a denominational preference that must satisfy the highest level of judicial scrutiny. Because Wisconsin has transgressed that principle without the tailoring necessary to survive such scrutiny, the judgment of the Wisconsin Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

NOTES AND QUESTIONS

1. **"Theological" Criteria.** The Court here says that the Wisconsin Supreme Court's interpretation of this religious exemption is unconstitutional because it "explicitly differentiat[es] between religions based on theological practices." But what's a "theological practice"? Is something a "theological practice" simply because a religious group believes it to be so? Say a religious group has a theological objection to incorporating as a non-profit organization, and loses some benefit because they fail to do so? Is that unconstitutional?

Relatedly, what should happen in this case on remand? Say the Wisconsin Supreme Court issues an opinion that does not mention proselytization or serving co-religionists. Instead, the Wisconsin Supreme Court denies Catholic Charities a religious exemption on the ground that organizations doing humanitarian and charitable work simply do not qualify. Would that be unconstitutional?

2. **The Reach of Catholic Charities.** Remember that Title VII, a federal law, generally forbids discrimination in employment. Back in *Spencer v. World Vision* (p. 221), we examined Section 702 of Title VII—a religious exemption from Title VII for "religious corporations." *Spencer v. World Vision* asked whether World Vision was a "religious corporation" within the meaning of Section 702.

On p. 223, you see *Spencer v. World Vision* block quoting a nine-part test used by the Third Circuit to decide whether organizations are "religious corporations" within the meaning of the statute. To be sure, this nine-part test may be unique to the Third Circuit, but most other circuits have similar tests. Here are the nine factors:

(1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.

How do these criteria look now, after *Catholic Charities*? You could imagine a religious group that refuses, on theological grounds, to pray during certain activities (#7) or engage in religious instruction in certain activities (#8)—or one that refuses to limit membership to coreligionists (#9). Can those be the basis for a conclusion that an organization is not religious enough to be considered a “religious organization” for purposes of Section 702? Does that make these factors unconstitutional? If so, how should courts rework their definition of “religious corporations” to stay within the constitutional lines?

3. ***Levelling Up or Levelling Down?*** Say Wisconsin responds to this Supreme Court decision by simply deleting the religious exemption altogether. Catholic Charities probably couldn't do anything about that, because Catholic Charities apparently has no religious objection to paying into Wisconsin's unemployment system and thus could not show any “substantial burden” on their religious exercise within the meaning of RFRA, a state RFRA, or the old *Sherbert/Yoder* standard. Doesn't this illustrate a risk of decisions like *Catholic Charities*? Legislative exemptions have to be neutral, but if that's too hard to do, maybe legislatures won't adopt religious exemptions at all.

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?”).

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.” *McCullum*. 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 "decisi[on]" 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.

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). These questions reached the U.S. Supreme Court in the case from Oklahoma that follows.

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?”). You will likely want to add it after Carson v. Makin, also in this supplement.

DRUMMOND EX REL. STATE V.
OKLAHOMA STATEWIDE VIRTUAL CHARTER SCH. BD.,
2024 OK 53, 2024 WL 3155937 (Okla.)

WINCHESTER, J.

Petitioner Gentner Drummond, Attorney General for the State of Oklahoma . . . seeks a writ of mandamus directing Respondents Oklahoma Statewide Virtual Charter School Board . . . to rescind the Charter School Board’s contract with Intervenor St. Isidore of Seville Catholic Virtual School on grounds that the contract violates state and federal law . . . We grant the extraordinary and declaratory relief sought by the State.

The Oklahoma Legislature has a constitutional duty to establish a system of free public schools. In 1999, the Legislature enacted the Oklahoma Charter Schools Act to help carry out this duty. Under the Act, a charter school is a public school, sponsored by an entity such as a school district, technology center, regional institution of higher education, federally recognized tribe, or the State Board of Education. Charter schools use innovative methods and forms of accountability, provide academic choices for students and parents, and offer different professional opportunities for teachers and administrators. However, the Act requires that all charter schools be nonsectarian in their programs, admission policies, and other operations.

The Archdiocese of Oklahoma City and the Diocese of Tulsa applied to the Charter School Board to establish St. Isidore, a religious virtual charter school. St. Isidore does not dispute that it is a religious institution. Its purpose is “[t]o create, establish, and operate” the school as a Catholic school . . . St. Isidore has two members, the Archbishop of the Archdiocese of Oklahoma City and the Bishop of the Diocese of Tulsa. A Board of Directors (between 5 and 15 members) will direct and manage the school; not more than two non-Catholics may serve on the board.

A Virtual Charter School Authorization and Oversight Manual provides the model template for a virtual charter school contract. However, the Charter School Board can negotiate contract terms that add to or vary from the model contract, if the terms comply with “applicable state, federal, local, and/or tribal law.”

The St. Isidore Contract varies significantly from the model contract. The St. Isidore Contract recognizes that certain rights, exemptions, or entitlements apply to St. Isidore as a religious organization under state and federal law, including the “ministerial exception” and aspects of the “church autonomy doctrine.” The St. Isidore Contract does not contain the model contract section titled “Prohibition of religious affiliation,” which provides that, except as permitted by applicable law, a charter school “shall be nonsectarian in its programs.” Instead, the St. Isidore Contract states that St. Isidore has the right to freely exercise its religious beliefs and practices consistent with its religious protections. Under the model contract, a charter school must warrant “that it is not affiliated with a nonpublic sectarian school or religious institution.” In the St. Isidore Contract, St. Isidore warrants that it is affiliated with a nonpublic sectarian school or religious institution . . .

The question before this Court is whether the St. Isidore Contract violates state and federal law and is unconstitutional. We hold that the St. Isidore Contract violates the Oklahoma Constitution, the Act, and the federal Establishment Clause.

[The Court first holds the contract violates Article 2, Section 5 of the Oklahoma Constitution, which requires that “[n]o public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.” The Court then holds that the contract also violates Article 1, Section 5 of the Oklahoma Constitution, which says: “Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control.”]

[Turning to federal law, the Court concludes that the St. Isidore Contract violates the Establishment Clause. “Because it is a governmental entity and a state actor,” the Court says, “St. Isidore cannot ignore the mandates of the Establishment Clause, yet a central component of St. Isidore’s educational philosophy is to establish and operate the school as a Catholic school.” The Court then concludes that this is consistent with the federal Free Exercise Clause, as “[t]he Free Exercise Trilogy [*Trinity Lutheran*, *Espinoza*, and *Carson v. Makin*] cases do not apply to the governmental action in this case [as] St. Isidore is a state-created school [and thus is] unlike the private entities in the Free Exercise Trilogy cases.”]

[The crucial part of the Court’s analysis is its discussion about whether St. Isidore should be considered a public or private school. This happens in several places in the Court’s opinion, but principally in its discussion of Article 1, Section 5, of the Oklahoma Constitution. Here are the key passages:]

The [Oklahoma Charter Schools] Act expressly states that a “charter school” means a “public school” established by contract with a school district or other governmental entity. The Oklahoma School Code defines “public school” as “all free schools supported by public taxation.” Charter schools must “be equally free and open to all students as traditional public schools.” They must not “charge tuition or fees.” Oklahoma charter schools fall within the definition of a public school.

Charter schools are also “subject to the same academic standards and expectations as existing public schools.” Charter schools must comply with the same rules that govern public schools on school-year length, bus transportation, student testing, student suspension, and financial reporting and auditing. A charter school must also comply with all “laws relating to the education of children with disabilities in the same manner as a school district.”

Charter schools receive state “funding in accordance with statutory requirements and guidelines for existing public schools.” The employees of charter schools are eligible for the same State retirement benefits that Oklahoma provides teachers at other public schools and the insurance programs available to the employees of the charter schools’ governmental sponsors.

The Charter School Board is subject to the same conflict of interest and continuing education requirements as a local school board. The Charter School Board exercises significant ongoing oversight and evaluation of all sponsored virtual charter schools through data collection, site visits, audits, attendance at the school’s governing board meetings, performance reports, and external school reviews. The Charter School Board has the power to place the school on probation if it finds deficiencies and ultimately close the school if it fails to resolve its deficiencies.

Charter schools, like other governmental entities, must “comply with the Oklahoma Open Meeting Act and the Oklahoma Open Records Act.” Each public charter school operates as its own

“local education agency” and is covered under the Oklahoma Governmental Tort Claims Act as its own “school district.”

The Legislature created Oklahoma charter schools, and Oklahoma law treats them as public schools and governmental bodies. They have many of the same privileges, responsibilities, and legal requirements that govern traditional public schools. They are creatures of state law and may only operate under the authority granted to them by their charters with the State. St. Isidore will be acting as a surrogate of the State in providing free public education as any other state-sponsored charter school. Therefore, St. Isidore, a public charter school, is a governmental entity and state actor.

The Charter School Board and St. Isidore claim that St. Isidore is not a state actor by the legislative designation of public school. Their argument still fails because a private actor may nonetheless be deemed a state actor whenever there is a close nexus between the State and the challenged action that private behavior may be treated as that of the State.

The U.S. Supreme Court has applied five “state actor” tests over the years, i.e., the “significant encouragement” test, the “willful participant in joint activity” test, the government “control” test, the “entwinement” test, and the “public function” test . . .

St. Isidore is a state actor under at least two tests—the entwinement and public function tests. First, under the entwinement test, the U.S. Supreme Court has stated that “a nominally private entity is a state actor ... when it is “entwined with governmental policies,” or when the government is “entwined in its management or control.” As set forth above, Oklahoma charter schools are entwined with the State. Governmental entities serve as sponsors for the charter schools. As its sponsor, the Charter School Board will provide oversight of the operation for St. Isidore, monitor its performance and legal compliance, and decide whether to renew or revoke St. Isidore’s charter. As a state-created entity, charter schools also receive many of the same legal protections and benefits as their government sponsor. The State’s entwinement expands to the internal operations and affairs of the charter schools.

Second, under the “public function” test, it is sufficient to show that “the private entity performs a traditional, exclusive public function.” The provision of education may not be a traditionally exclusive public function, but the Oklahoma Constitutional provision for free public education is exclusively a public function. Even more, a private entity is a state actor when the government has outsourced one of its constitutional obligations to the entity.

The Charter School Board and St. Isidore rely primarily on *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), to support that Oklahoma charter schools are not state actors. The U.S. Supreme Court in *Rendell-Baker* held that a private school for troubled youths was not a state actor for purposes of employment-related claims. The state regulated the school and provided substantial governmental funding. The school obtained most of its students through referrals from public schools. However, the key difference between *Rendell-Baker* and this case is Oklahoma charter schools are public schools created through governmental action, not private like in *Rendell-Baker*.

A recent Fourth Circuit Court of Appeals case, *Peltier v. Charter Day School, Inc.*, 37 F.4th 104 (4th Cir. 2022) is instructive. The *en banc* Fourth Circuit concluded that a charter school operator was a state actor for purposes of the students’ equal protection claim, challenging a dress code requirement that females wear skirts. The students in *Peltier* argued that the charter school qualified as a state actor because the operation of schools, designated by North Carolina law as public, performed an exclusively public function. And by statute, the state had delegated its duty, in part, to charter school operators to fulfill the state’s constitutional duty to provide free, universal schools.

Relying on *Rendell-Baker*, the charter school argued that it was merely a private entity fulfilling a contract with the state like the Charter School Board and St. Isidore contend in this case. The school argued that the state did not require a student to attend any specific charter school, and the state had not delegated to charter schools the responsibility to educate North Carolina students.

The statutory framework of North Carolina is much like Oklahoma’s Act, and charter schools may only operate under the authority granted to them by their charters with the state. Within its statutes, North Carolina also designated its charter schools as public. The *Peltier* Court noted that rejecting the state’s designation of such schools as public institutions would infringe on North Carolina’s sovereign prerogative, undermining fundamental principles of federalism.

Applying the “public function” test, the *Peltier* Court concluded that the charter school operated in furtherance of the state’s constitutional obligation to provide free, universal education to its residents. The court rejected the argument that charter schools were an “alternative method” of education—such as private schools or home schooling—because that position ignored the universal and free nature of the public school system. In operating a school that is part of the North Carolina public school system, the charter school performed a function traditionally and exclusively reserved to the state . . .

As in *Peltier*, Oklahoma fulfilled its constitutional duty, in part, with the passage of the Act, which sets the procedure for the creation and funding of public charter schools. Oklahoma exercised its sovereign prerogative to treat these state-created and state-funded schools as public institutions that perform the traditionally exclusive government function of operating the State’s free public schools. St. Isidore will implement a religious curriculum and activities that directly impact the school’s core education function, and thus, the constitutional responsibility that Oklahoma delegated to the charter schools. Just as in *Peltier*, St. Isidore is a public charter school and a state actor . . .

The St. Isidore Contract violates state and federal law and is unconstitutional. By writ of mandamus, we direct the Charter School Board to rescind its contract with St. Isidore.

KUEHN, J., DISSENTING

I dissent to the Majority’s opinion. St. Isidore would not become a “state actor” merely by contracting with the State to provide a choice in educational opportunities . . . To the contrary: Excluding private entities from contracting for functions, based solely on religious affiliation, would violate the Free Exercise Clause of the First Amendment to the United States Constitution.

[The dissent first argues that the St. Isidore contract does not violate the Article 2, Section 5, of the Oklahoma Constitution, because the Oklahoma Supreme Court has upheld money that goes to religious organizations as part of religion-neutral government programs where groups are paid for services they provide. The dissent continues:]

St. Isidore’s operation of a charter school would [also] not violate the Establishment Clause. There is no Establishment Clause issue if the action in question is not “state action.” Petitioner’s argument—and the Majority’s analysis—depend on labeling all charter schools as “public schools,” which is equivalent to “state actors.” . . .

A private entity, such as a religious organization, may be deemed a state actor if it performs a function traditionally considered the exclusive realm of the state. But the Majority concedes that education is not a “traditionally exclusive public function.” It may be the State’s prerogative to

create a new, hybrid class of educational institutions called “charter schools,” but that is not the same as claiming that education itself has traditionally been the exclusive prerogative of the State.

Nor can charter schools be considered state actors simply because the State regulates them. It hardly needs to be said that regulation alone does not transform a private entity into a public one. Even an “extensive and detailed” regulatory scheme does not automatically transform an entity into a state actor. The Charter Schools Act can place relevant requirements on prospective charter-school operators without thereby turning them into arms of the state. Ironically, one of the aims of the Act is to place *fewer* regulations on charter schools compared to traditional schools.¹ It is undisputed that, aside from its religious affiliation, St. Isidore meets the requirements for operating a charter school.

Petitioner claims the Legislature made the analysis “easy” by labeling charter schools as public schools. To the contrary, the analysis is easy because the realities belie such labeling. Regardless of how the State chooses to label charter schools, the Charter Schools Act is clearly an invitation for private entities to contract to provide educational choices. “[T]he definition of a particular program can always be manipulated to subsume the challenged condition,” and allowing the State to “recast” a condition on funding in this manner would result in “the First Amendment ... reduced to a simple semantic exercise.” *Carson v. Makin* (citations omitted) . . .

Contracting to provide educational alternatives is not the same as a wholesale outsourcing of a government function. The virtual charter school St. Isidore seeks to undertake would simply be a choice for students and parents. It would not be the only virtual charter school. It would not be the only charter school. But most important, it would not supplant any state-mandated sectarian public school.

Petitioner’s brief ends with an analogy that demonstrates the flaw in his argument:

[I]f the State decided to allocate public funds for private entities to beef up security, the State would of course be precluded from preventing the Catholic Church and other sectarian organizations from receiving those funds. However, if the State decided to start authorizing private entities to take over operations of the Oklahoma Highway Patrol, it would violate the Establishment Clause for the State to authorize a “Catholic Church Highway Patrol.”

The logical flaw is that, unlike law enforcement, enrollment in a charter school is fundamentally a choice for parents to make. St. Isidore would not be “taking over” any function that is traditionally the exclusive realm of the State. It would exist alongside state-mandated secular options.

By choice, the State created a new type of educational entity — the charter school. By design, the very purpose of the Charter Schools Act is to allow private entities to experiment with innovative curricula and teaching methods, and to give students and parents “additional academic choices.” The State is not required to partner with private entities to provide common education. But if it does, it cannot close the door to an otherwise qualified entity simply because it is sectarian. *Espinoza*. Contracting with private entities to provide such educational choices does not violate Article 2, § 5 of the Oklahoma Constitution . . .

The latter part of the First Amendment, known as the “Free Exercise Clause,” protects those who practice religion from laws that “impose special disabilities on the basis of ... religious status.” *Trinity Lutheran*. Specifically, laws that disqualify otherwise eligible recipients from a

¹ Charter schools are exempt from statutes and rules relating to schools, boards of education, and school districts. They are not required to hire teachers with state teaching certificates.

public benefit, based solely on their religious character, impose “a penalty on the free exercise of religion that triggers the most exacting scrutiny.” To pass constitutional muster under the so-called “strict scrutiny” test, the State must advance a compelling interest that justifies the action in question. The State’s interests must be of the “highest order,” and the means used must be narrowly tailored in pursuit of those interests.

Espinoza v. Montana Dept. of Revenue, decided quite recently, involved a very similar tension between the Free Exercise Clause and a “no aid” provision in the Montana Constitution. The issue in *Espinoza* was whether students who received a state-funded scholarship to be used at private schools could use those funds at sectarian schools. Shortly after creation of the scholarship program, the Montana Department of Revenue promulgated a rule that, for purposes of the program, purported to redefine “qualified education provider” to exclude sectarian schools. The Department explained that the rule was necessary to reconcile the scholarship program with the “no aid” provision of the state’s constitution.

When parents sued for the right to apply scholarship funds to attend a sectarian school, the Montana Supreme Court approved of the exclusion as consistent with the state constitutional command to give “no aid” to sectarian schools via public funds. The United States Supreme Court reversed. The question presented was “whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana’s no-aid provision to bar religious schools from the scholarship program.” Because the scholarship program discriminated on the basis of religion, it was subjected to the strictest scrutiny. The Court found unconvincing the Department of Revenue’s claim that such an interpretation of the “no aid” provision actually promoted religious liberty. And as for the argument that diverting public funds to sectarian schools served to rob public schools of funds, the Court simply noted that any such effect was a direct consequence of the scholarship program as a whole — not to the fact that sectarian schools could take part.

Similarly, the only compelling interest advanced by Petitioner in the instant case, to justify barring a religious organization from operating a charter school, is the “no aid” provision in our own Constitution. But as demonstrated above . . . that provision is not violated here. Contracting with a private entity that has religious affiliations, by itself, does not establish a State religion, nor does it favor one religion over another. Allowing St. Isidore to operate a charter school does not give it any preference over any other qualified entity, sectarian or otherwise.

I find nothing in the State or Federal Constitutions barring sectarian organizations, such as St. Isidore, from applying to operate charter schools. To the extent Section 3-136(A)(2) of the Charter Schools Act bars such organizations from even applying to operate a charter school, I would find it inconsistent with the Free Exercise Clause of the First Amendment. By reaching the opposite conclusion, the Majority’s decision is destined for the same fate as the Montana Supreme Court’s opinion in *Espinoza*.

NOTES AND QUESTIONS

1. What Makes a Public School Public? The central question in *Drummond* is whether St. Isidore’s is a public or private school. If it is private, there’s no Establishment Clause problem (under *Zelman*) and the Court’s recent Free Exercise cases (*Trinity Lutheran*, *Espinoza*, *Carson*) presumably entitle it to the same governmental funding received by secular charter schools. But if it’s public, the Establishment Clause kicks in and all Free Exercise claims disappear.

So why exactly does the Court consider St. Isidore to be “public”? It could be because St. Isidore will be funded by the government. But is that enough? The government funds private entities all the time, and that doesn’t usually turn them into governmental actors. Think about *Zelman*. Or think about *Rendell-Baker v. Kohn*, where a private school received more than 90% of its funding from the state but was still not considered a state actor. Does it matter that the charter school, like a traditional public school, cannot charge any tuition or fees to its students?

Or St. Isidore could be a state actor because, as a charter school, it will be heavily regulated by the government. But aren’t private schools, in general, heavily regulated by the state? The government puts limits on what private schools teach, who they can hire, where they can build facilities, and all kinds of other things. And charter schools are typically less regulated than traditional public schools.

Or St. Isidore could be a state actor because it is run by the government. But is this factually true? St. Isidore is run by a private board, and its rules require a majority of that board to be Catholic. It operates under a contract with the government, but so do many private entities that receive government funding.

Or is the key thing then that Oklahoma, in its Charter Schools Act, originally declared that charter schools were public schools? Should that label control? If it does control, what happens if Oklahoma changes its mind and amends the Charter Schools Act to declare that charter schools are really private schools? If legislatures want the possibility of religious charter schools, is that all they have to do to satisfy the Constitution?

2. Endnote to *Drummond*. The Supreme Court granted certiorari in *Drummond*. But Justice Barrett was recused, and the Supreme Court ended up splitting 4-4. As is typical for this kind of situation, the Supreme Court affirmed the Oklahoma Supreme Court’s judgment in a one-sentence opinion. Such a decision does not have precedential value, meaning that the issue is still open. Who do you think was the fourth vote for Oklahoma here, assuming Justices Kagan, Sotomayor, and Jackson all took that side?

Consider inserting this material on p. 412 after Carson v. Makin. If you like, it could replace all the material in IV-F (“Generally Applicable Conditions on Government Aid”).

ST. MARY CATHOLIC PARISH IN LITTLETON V. ROY
154 F.4th 752 (10th Cir. 2025)

Before PHILLIPS, ROSSMAN, and FEDERICO, Circuit Judges.

FEDERICO, Circuit Judge.

In 2020, Colorado voters approved a proposition that created a dedicated source of public funding for voluntary, universal preschool in the state. Following this vote, Colorado passed legislation and established a Universal Preschool Program (UPK). Appellants are the Archdiocese of Denver, two Catholic parishes, and two parents of preschool-age children, challenging a section of UPK that requires all preschools receiving state funds to sign a nondiscrimination agreement. They argue that this requirement violates their rights under the First Amendment to the United States Constitution and seek an injunction preventing the nondiscrimination requirement from being applied to them.

I.

A.

In 2020, Colorado voters passed proposition EE to provide state funding for UPK. The Colorado General Assembly then implemented UPK by passing the Early Childhood Act (the Act). The purposes of this law are to “provide children in Colorado access to voluntary, high-quality, universal preschool services free of charge” and to “establish quality standards for publicly funded preschool providers that promote children's early learning and development, school readiness, and healthy beginnings.” The Act, along with additional legislation passed the next year, established a “[m]ixed delivery system” where a variety of different kinds of preschools, public and private, would be supported by state funds. The implementation of the law was given to the executive director of the newly created Colorado Department of Early Childhood (the Department).

To meet the goals of the Act, the General Assembly tasked the executive director of the Department with prescribing uniform quality standards for all preschools funded through UPK. These standards would govern the minimum number of teaching hours, classroom sizes, teacher qualifications, and so forth. The legislature stated that, at a minimum, these quality standards must include a nondiscrimination requirement for all participating schools. Under the nondiscrimination requirement, each preschool must “provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family.” This requirement was also codified as a final regulation by the Department.

Colorado preschools are not required to participate in UPK. But those that wish to participate in UPK and receive state funds are required to sign an agreement stating that they will adhere to the Act's quality standards, including the nondiscrimination requirement. These standards are absolute. UPK only has discretion to grant waivers “for a limited time” to preschools

that do not meet its standards, so long as those schools are actively “working toward compliance with the quality standards” and the unmet standard does not relate to “health and safety[.]”

Starting in 2022, preschools began registering with UPK to receive state funds. Families enroll their children in UPK preschools through an online portal. Families can select up to five registered preschools on Colorado's UPK website and then rank them in order of preference. An algorithm then matches families with one of their ranked choices. Initially, some participating preschools thought this kind of ranking system was too haphazard because schools had no control over which students they were matched with. In response, the Department added a function where preschools can set different preferences in how the algorithm matches them with students (hereinafter the preference system). This preference system was designed to help match preschools with specific groups of students that they are designed to serve. For instance, preschools can prefer to be matched with students in a way that is consistent with school district boundaries. Preschools are allowed to decline to enroll children they are matched with who do not fit their enrollment preference, although their choice to decline a student is subject to Department review.

When the preference system was first codified in the Code of Colorado Regulations, it listed ten different preferences that could be selected:

[The ten enrollment preferences included, among other things, preferences for members of a congregation, disabled students with IEPs, Head Start participants, siblings, children of employees, and certain other programmatic preferences.]

The final preference is a catchall, allowing for individual preschools to request a new matching preference from the Department. Preschools that seek a specific preference under the catchall preference can request it through a separate online form. However, the catchall preference has several restrictions:

Participating preschool providers seeking to utilize this preference, must ensure:

- a. That the specific community, competencies or interests, relationship, public assistance benefit, or activity being required of children and/or families who attend, is a requirement of all participating children and/or families.
- b. That implementation of requiring the specific community, competencies or interests, relationship, public assistance benefit, or activity does not conflict with any other provision of the Colorado Universal Preschool Program statutes at sections 26.5-4-201 through 26.5-4-211, C.R.S., nor with any other applicable law or regulation.
- c. Examples of approved preferences include, but are not limited to: participating preschool providers who require a focus in a certain knowledge area (such as science, technology, engineering, and math (“STEM”)); providers who serve families with a family member who works or attends school at a specific site(s) or location(s); providers who serve families within a specific geographical catchment area; providers who require a certain amount of volunteering or participation by the participating family; providers who require certain vaccinations for the health and safety of its staff and students; and providers who serve families who are receiving a specific public assistance benefit(s) such as housing assistance.

Finally, after listing these preferences, Colorado regulations state that “[i]n utilizing these programmatic preferences, eligible preschool providers must still comply with [the nondiscrimination provision].”

B.

Plaintiffs are two catholic parishes, St. Mary Catholic Parish and St. Bernadette Catholic Parish, and their associated preschools, St. Mary's Catholic Preschool and Wellspring Catholic Academy, the Archdiocese of Denver, along with Daniel Sheley and Lisa Sheley, parents who hope to enroll their children in a UPK-eligible preschool. St. Mary's Catholic Preschool and Wellspring Catholic Academy are a part of the Catholic Church under the authority of the Archdiocese, which oversees thirty-six Catholic preschools in Colorado. These schools are expected to “adhere[] to Catholic faith, morals, [and] the building up of Catholic culture within the school[.]” Likewise, teachers, staff, and the parents of children at these schools are required to sign a “Statement of Community Beliefs” broadly affirming that they will live in accordance with the teachings of the Catholic Church.

Plaintiffs (hereinafter collectively referred to as “the Parish Preschools”) hold a sincere belief that Catholic teaching requires them to consider the sexual orientation and gender identity of a student and their parents before admitting them to a Catholic school. The Archdiocese does not recognize same-sex relationships or transgender status, and it states that enrolling a child of same-sex parents in a Catholic school is “likely to lead to intractable conflicts.” The Parish Preschools do not categorically ban the children of same-sex parents, but Wellspring has declined to admit an elementary school student in the past for this reason. Regardless, the Parish Preschools state that their beliefs are incompatible with the part of the nondiscrimination requirement stating that schools must “provide eligible children an equal opportunity to enroll and receive preschool services regardless of ... sexual orientation [or] gender identity ... as such characteristics and circumstances apply to the child or the child's family.”

Soon after UPK was passed, the Parish Preschools and others expressed concerns about the nondiscrimination requirement. During UPK's development, the Department organized working groups with different preschool providers to solicit input at regular meetings. Among these was a working group for faith-based preschool providers, which included representatives from religious groups, interfaith groups, and faith-based preschools. One of the preferences in the preference system – a preference for faith-based providers to enroll members of their congregation (the congregation preference) – was created as a result of conversations with this working group. St. Mary's participated in the faith-based working group and raised concerns about the nondiscrimination requirement.

In 2023, the Archdiocese of Denver instructed its preschools not to register with UPK so that they would not have to agree to the nondiscrimination requirement. However, the Archdiocese did permit several preschools affiliated with Catholic Charities and aimed at low-income families to participate in UPK. The Archdiocese and several other faith groups sent a letter to Governor Jared Polis requesting “exemptions for faith-based religious providers” from the nondiscrimination requirement. Lisa Roy, executive Director of the Department, sent a reply, informing the Archdiocese that the Department could not create an exemption from the nondiscrimination requirement because it is enshrined in state law. But she reassured the Archdiocese that “faith-based providers can reserve all or a portion of their seats for their members, and decline a match from a family that is not part of the congregation.”

The Parish Preschools then sued Director Roy and Dawn Odean, Director of Colorado's Universal Preschool Program . . . for infringing upon their rights under the First Amendment as applied to the states through the Fourteenth Amendment . . . In January 2024, the district court held a three-day bench trial to determine whether to grant injunctive relief, including hearing testimony from both expert and fact witnesses. [Ultimately, the district court ruled for the state.]

III.

“For a party to obtain a permanent injunction, it must prove: ‘(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest.’ ” *Prairie Band Potawatomi Nation v. Wagnon* (10th Cir. 2007). The parties do not discuss the latter three factors on appeal. As such, we confine our analysis to a consideration of the merits of the Parish Preschools’ First Amendment claims . . .

IV.

A.

The Supreme Court has held that when a state offers subsidies for private education, it cannot categorically withhold those funds from religious institutions. This principle comes from three cases: *Carson v. Makin* (2022), *Espinoza v. Montana Dep’t of Revenue* (2020), and *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017). These cases form an independent line of precedent in the Supreme Court’s Free Exercise case law, and the Parish Preschools allege that they control the outcome here. We disagree . . .

This case is different from these three cases. The Department did not exclude faith-based preschools from participating in UPK. Indeed, they welcomed and actively solicited their participation. The only relevant limitation on any preschool’s participation is the nondiscrimination requirement, which applies to all preschools regardless of whether they are religious or secular. Thus, the inclusion of religious schools as welcome participants in Colorado’s UPK program distinguishes this case from Supreme Court decisions where the plaintiffs were excluded from participation based upon their religious exercise and status.

The Parish Preschools attempt to blur this distinction by equating the nondiscrimination requirement with a restriction on public funds being used for religious purposes, arguing that both limit their religious exercise.¹ But the *Carson* line of cases addressed laws that targeted “religious status” and “religious use” on the explicit basis that they were religious and not secular.

Colorado is not attempting to prohibit funds from being used for religious purposes. Unlike in *Carson*, preschools funded through UPK may use those funds to educate students on matters of faith. The restrictions imposed by the nondiscrimination requirement universally cover enrollment policies and conduct, but they are not a targeted burden on religious use. The Parish Preschools allege, of course, that this universal restriction nonetheless infringes upon their ability to exercise their religious beliefs. But when a particular religious practice is alleged to be infringed

¹ The Parish Preschools’ logic would mean that whenever a state conditions school funding on any activity, courts would have to ask if that activity is secular or religious to ensure the condition does not violate *Carson*. But so long as a plaintiff is sincere, beliefs that are commonly described as secular can warrant religious status under the law. See *Welsh v. United States* (1970) (“If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience . . . those beliefs certainly occupy in the life of that individual ‘a place parallel to that filled by God’ in traditionally religious persons.”). In practice, the Parish Preschools’ interpretation would mean that *Carson* prevents states from placing almost any condition on school funds.

incidentally, rather than religious status or use being specifically targeted, the Supreme Court requires that the law at issue be neutral and generally applicable. We turn to this inquiry next.

B.

The Free Exercise Clause does not prevent individuals from being subject to a “valid and neutral law of general applicability” that incidentally conflicts with their religion. *Smith*. While the Constitution protects religious freedom, courts have long recognized the simple reality that the government must be able to enforce the law equally against everyone, no matter an individual's beliefs, lest we “permit every citizen to become a law unto himself.” *Smith* (quoting *Reynolds v. United States* (1878)). Thus, we ask if the law is neutral and generally applicable to assess if the law is holding everyone to the same standard, regardless of their religion . . .

Our question, then, is whether the nondiscrimination requirement is a neutral law of general applicability. “Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.” *Fulton v. City of Philadelphia, Pennsylvania* (2021). “A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing ‘a mechanism for individualized exemptions,’” or if it “prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.” *Id.* We now examine each of these standards in turn.

1.

Neutrality is, essentially, a question of intent. A law is neutral so long as its object is something other than the infringement or restriction of religious practices. Did Colorado implement the nondiscrimination requirement to try and suppress religious views or conduct?

First, we look at the nondiscrimination requirement itself. “A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993). The nondiscrimination requirement does not. Rather, it applies to all preschools and does not mention religion except to prohibit discrimination based on religious affiliation.

But a lack of neutrality is not always obvious . . . While the nondiscrimination requirement appears neutral, the Parish Preschools argue that the Department has taken actions that “evidence religious hostility.” Examining the record, however, we find no support for this claim.

The Parish Preschools first accuse the Department of a lack of neutrality because they “compared [the Parish Preschools] to 1970s segregation academies in the South and characterized [the Parish Preschools’] millennia-old religious beliefs as stigmatization and bullying.” But the only reference to segregation academies occurs in the context of legal arguments citing *Runyon v. McCrary* (1976). *Runyon* is relevant to the Parish Preschools’ free association argument, and the comparison is a purely legal one. As for bullying and stigmatization, the Department appears to raise these issues only to demonstrate the reasoning behind the nondiscrimination requirement and their concerns about admissions policies that violate the requirement.

Second, the Parish Preschools argue there is evidence of religious hostility because the Department has “repeatedly recalibrated their policies in a manifest attempt to gerrymander around [the Parish Preschools’] claims” including by “tweaking the scope of the congregation preference[.]” If anything, the congregation preference shows the opposite. The Department created the congregation preference to address the concerns of the working group it convened with faith-based preschools. One of those preschools was St. Mary's itself. When faith groups raised

concerns about the nondiscrimination requirement, Director Roy tried to use the congregation preference to assuage those concerns and ensure the participation of faith-based preschools. In doing so, she was clear that “faith-based providers can, and are encouraged to, participate in the UPK program.”

After the Parish Preschools sued and the district court enjoined the use of the congregation preference, it was dropped from state regulations. But far from suggesting a “gerrymander” around their claims, this shows that the Department has consistently sought to follow the letter of the nondiscrimination requirement as enshrined in state law.

Nothing about this case – neither the nondiscrimination requirement nor the record of its implementation – looks anything like the clear religious suppression displayed in *Church of Lukumi Babalu Aye*. It does not even resemble the general undercurrent of animus the Supreme Court highlighted in *Masterpiece Cakeshop*. Rather, the record indicates that the Colorado General Assembly passed, and the Department implemented, the nondiscrimination requirement to prevent discrimination on any grounds, secular or religious. And in implementing UPK, the Department made every effort to encourage faith-based preschools to participate (short of violating state law by granting exceptions to the nondiscrimination requirement).

2.

While neutrality is a question of a law's intent, general applicability is a question of a law's structure and implementation. “[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason.” *Smith*. The Parish Preschools identify two alleged systems of individual exemptions: the catchall preference and the temporary waiver provision.

At first blush, the catchall preference looks a bit like a system of individual exemptions. Rather than simply providing an option for preschools to prefer being matched with certain categories of students, it allows preschools to request a unique preference through an online form, with the Department deciding whether to approve it. As such, the catchall preference is an individualized addition to the list of preferences. But the preference system is merely a way of adjusting the algorithm that the UPK website uses to match preschools with students. It does not give preschools the authority to reject certain classes of students if doing so would contravene state law. And the regulation itself notes that “eligible preschool providers must still comply with” the nondiscrimination provision. So, the catchall preference is not a system of individualized exemptions from the nondiscrimination requirement, which is what counts . . .

The Parish Preschools frame this as mere doublespeak: the Department facially insisting that they will comply with the nondiscrimination requirement while still blatantly discriminating through the preference system. This argument hinges in part on the testimony of Director Odean. She was asked on direct examination whether, hypothetically, a preschool could request a preference for “gender-nonconforming children,” “children of color from historically underserved areas[.]” or the children of parents that are part of “the LGBTQ community” because these groups are part of a “specific community[.]”² Odean testified that these preferences could be given, but

² The Parish Preschools call this a “categorical exception” for “sexual orientation, gender identity, and race[.]” They argue that this “categorical exception” is comparable to their requested religious exception because it “undermines the government's interest” similarly. But Odean's testimony on this point concerned the catchall preference, which (if it overrode state law) would be an individual exemption, not a categorical one. The real question raised by Director Odean's testimony on this point is whether the Department has created a system of

only “[a]s long as there wasn't discrimination that was aligned to the [non]discrimination provision[.]” While these preferences would certainly seem to violate the nondiscrimination requirement, Director Odean clarified that these hypotheticals had never been considered by the Department. She also did not have sole discretion over these preferences: they would not be granted without consulting others at the Department, including counsel.

We do not interpret Director Odean's testimony to imply that the Department was using the catchall preference to violate the nondiscrimination requirement. If anything, Director Odean's insistence that the Department follow the nondiscrimination requirement when considering a requested catchall preference suggests the opposite: that the statutory nondiscrimination requirement is a hard limit. This not a situation where one part of the law renders another “a nullity.” Rather, this is a common situation where an agency regulation is limited by state law.

In practice, we can see that the Department has followed state law on nondiscrimination. The record shows that the Department has approved individual preferences under the catchall preference seventeen times. These include admissions preferences such as “teen parents/students in [a] building that will need to be placed together[.]” “fully [v]accinated [c]hildren[.]” and “families who live in the Blue Lake Subdivision.” None of these approved preferences concern sexual orientation or gender identity or otherwise implicate the nondiscrimination provision in admissions. Finding a system of individual exemptions would require that we invert a clear reading of the Department's regulations based not on their language or operation, but a series of hypotheticals posed unexpectedly to one witness at trial.

Likewise, as evidence of compliance, we can look at the fate of the congregation preference. The Department added this preference to accommodate faith-based providers. However, once the district court determined that this preference was incompatible with the nondiscrimination requirement, it was removed. The Department has tried repeatedly to accommodate faith-based providers, but when it comes to the nondiscrimination provision, it can make no exceptions because the provision is required by statute.

Simply put, the nondiscrimination requirement is a matter of state law, and any regulations must comply with that law. By challenging the provider agreement, the Parish Preschools are challenging state law itself as infringing on their right to free exercise. But because state law gives no room to the Department to make exceptions, it stays generally applicable, and thus does not implicate the Free Exercise Clause.

3.

Finally, the Parish Preschools argue that there are categorical secular exceptions to the nondiscrimination requirement that “undermine[] the government's asserted interests in a similar way” to the religious exception that they have been denied. The Parish Preschools’ claim that the preference system allows for discrimination based on disability and income level, thus undermining the government's interest in nondiscrimination for secular reasons. Specifically, they point to two preferences: one for “[p]articipating preschool providers reserving placements for a student(s) with an Individualized Education Program (IEP) to ensure conformity with obligations incurred pursuant to the Individuals with Disabilities Education Act ... or the Exceptional Children's Education Act” (the IEP preference) and one preferring “Head Start programs’ adhering to any applicable federal law requirements including eligibility requirements” (the Head Start preference). The Parish Preschools argue that allowing preschools to prefer enrolling children

individual (not categorical) exemptions to the prohibition on discriminating based on sexual orientation and gender identity. It has not, and thus the law is still generally applicable.

placed in IEPs and Head Start programs denies other students an “equal opportunity to enroll and receive preschool services regardless of ... income level[] or disability[.]”

There are several reasons why this claim fails. First, we are not persuaded that the IEP and Head Start preferences amount to a violation of the nondiscrimination requirement. The Department interprets the nondiscrimination requirement to prevent preschools from denying admissions to children because they are disabled or from a low-income family. It does not, however, protect children without disabilities or children from high-income families. Disability and income level are treated differently from other protected classes in light of the Colorado General Assembly's substantive goals in implementing UPK. The General Assembly specifically declared its intention to try and expand the number of disabled and low-income students attending preschool. Other provisions of the law state that “a child with disabilities must be offered preschool services” in accordance with their IEP and that low-income children may be entitled to additional hours of preschool.

These provisions do not speak in general terms about ignoring disability status or income level. They specifically concern children who have a disability or are low-income. And the IEP and Head Start preferences were developed to help preschools comply with federal laws that specifically protect disabled and low-income children. The Supreme Court has long advised that the state must consider disability and income level to make social policy, and so these categories are distinct from other protected classes and do not trigger heightened scrutiny. It is farcical to say that non-disabled children are being discriminated against by being denied special education designed for disabled students,³ or that high-income students are being discriminated against by preschools participating in Head Start. Given the unique nature of these protections, preferences for IEPs and Head Start are not exceptions to the nondiscrimination requirement.

Even assuming, arguendo, that the Parish Preschools are correct, and these preferences constitute discrimination based on disability and income level, that does not necessarily remove the general applicability of the nondiscrimination requirement as it relates to sexual orientation and gender identity. These different aspects of the nondiscrimination requirement are only relevant if they are comparable. The state may not treat “comparable secular activity more favorably than religious exercise.” *Tandon v. Newsom* (2021).

The Parish Preschools broadly characterize Colorado's interest as being “equal access” for all students. The Department agrees that “[e]ach of the eight equal-opportunity requirements seeks to remove barriers to access experienced by children with different protected characteristics.” But not all barriers are the same. The real question is if the Parish Preschools’ requested relief “undermines the government's asserted interests in a similar way” as the IEP and Head Start preferences.

Nothing about the IEP preference or the Head Start preference undermines the government's asserted interest in ensuring equal access to preschools. The district court found, based on expert testimony, that there were “specific barriers” to preschool access faced by the children of same sex and transgender couples. As the district court stated, “all discrimination is not the same.” That is certainly the case when comparing discrimination based on sexual orientation and gender identity with discrimination based on disability and income level. Allowing some schools to ignore the nondiscrimination requirement with respect to sexual orientation and

³ When Director Odean was asked whether any schools had exercised a preference to only serve children with specific disabilities, she testified that “[w]e have school district-based providers that have specific programs for specific needs that are aligned to their federal mandate” but that these providers “serve all children, but they might have a specific location that's resourced for a special classroom.”

gender identity would undermine the government's interest in erasing barriers to equal access caused by social stigma in a way that the IEP and Head Start preferences simply do not.

V.

Colorado's UPK program went to great effort to be welcoming and inclusive of faith-based preschools' participation. The nondiscrimination requirement exists in harmony with the First Amendment and does not violate the Parish Preschools' First Amendment rights.

NOTES AND QUESTIONS

1. Supreme Court Review. After the Tenth Circuit's decision, the Supreme Court granted certiorari and will hear this case during its October Term 2026. The following are the two Questions Presented:

- (1) Whether proving a lack of general applicability under *Employment Division v. Smith* requires showing unfettered discretion or categorical exemptions for identical secular conduct.
- (2) Whether *Carson v. Makin* displaces the rule of *Employment Division v. Smith* only when the government explicitly excludes religious people and institutions.

How did the Tenth Circuit answer these questions? What are the counterarguments? And what is the significance of these questions—can you think of other scenarios where the answers to them will be important?

2. Neutrality and General Applicability. Plaintiffs here claimed a lack of neutrality and general applicability, which the Tenth Circuit rejected. What do you think of the plaintiffs' evidence of non-neutrality? And which aspect of Colorado's program would you emphasize most if you were arguing against general applicability: the catchall preference, Director Odean's testimony, or the IEP and Head Start preferences? Why?

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

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”).

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 expression 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. Claiborn*, 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 . . .

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 2024, Louisiana passed H.B. 71, which requires each public school system in Louisiana to "display the Ten Commandments in each classroom in each school under its jurisdiction." The Ten Commandments "shall be displayed on a poster or framed document that is at least eleven inches by fourteen inches," and the "text of the Ten Commandments shall be the central focus of the poster or framed document and shall be printed in a large, easily readable font." The statute itself provides the text of the Ten Commandments, which is "identical to the text of the Ten Commandments monument that was upheld by the Supreme Court of the United States in *Van Orden v. Perry*, 545 U.S. 677, 688 (2005)." The Ten Commandments displays are not to be purchased with state funds. Instead, schools are to either accept donated displays or purchase displays with donated funds. If they so choose, schools may also display the Mayflower Compact, the Declaration of Independence, and the Northwest Ordinance, along with the Ten Commandments. Finally, the Ten Commandments are to be displayed with the following statement:

The History of the Ten Commandments in American Public Education

The Ten Commandments were a prominent part of American public education for almost three centuries. Around the year 1688, *The New England Primer* became the first published American textbook and was the equivalent of a first grade reader. *The New England Primer* was used in public schools throughout the United States for more than one hundred fifty years to teach Americans to read and contained more than forty questions about the Ten Commandments.

The Ten Commandments were also included in public school textbooks published by educator William McGuffey, a noted university president and professor. A version of his famous *McGuffey Readers* was written in the early 1800s and became one of the most popular textbooks in the history of American education, selling more than one hundred million copies. Copies of the *McGuffey Readers* are still available today.

The Ten Commandments also appeared in textbooks published by Noah Webster in which were widely used in American public schools along with America's first comprehensive dictionary that Webster also published. His textbook, *The American Spelling Book*, contained the Ten Commandments and sold more than one hundred million copies for use by public school children all across the nation and was still available for use in American public schools in the year 1975.

Is this inconsistent with *Kennedy v. Bremerton*? Is it inconsistent with the Court's decision back 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*.

The Fifth Circuit invalidated Louisiana's statute in *Roake v. Brumley*, 141 F.4th 614 (5th Cir. 2025). The Court saw no other possible path, given *Stone v. Graham*—"Stone v. Graham is controlling," the Court said, and "[u]nder *Stone*, H.B. 71 is plainly unconstitutional." *Id.* at 645. But should the Supreme Court overrule *Stone v. Graham*? Also note that similar developments are happening in other places. Texas has now passed a similar law, putting the Ten Commandments in public school classrooms as of September 1, 2025.

Consider inserting this material after Kennedy v. Bremerton School District, also in this supplement, at the end of section V-C (“The Line Between Government Speech and Private Speech?”).

NATHAN V. ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT
173 F.4th 576 (5th Cir. 2026)

EN BANC.

DUNCAN, Circuit Judge.

I. Background

In June 2025, the Texas Legislature enacted S.B. 10, which requires public elementary and secondary schools to display in each classroom a “durable poster or framed copy of the Ten Commandments.” The poster or copy must measure “at least 16 inches wide and 20 inches tall,” use an easily readable typeface, and be “display[ed] in a conspicuous place.” The display must include only the following text:

The Ten Commandments
I AM the LORD thy God.
Thou shalt have no other gods before me.
Thou shalt not make to thyself any graven images.
Thou shalt not take the Name of the Lord thy God in vain.
Remember the Sabbath day, to keep it holy. Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
Thou shalt not kill.
Thou shalt not commit adultery.
Thou shalt not steal.
Thou shalt not bear false witness against thy neighbor.
Thou shalt not covet thy neighbor’s house.
Thou shalt not covet thy neighbor’s wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor’s.

Texas schools can acquire the displays in two ways. First, they must accept compliant, privately donated displays that “do not contain any additional content.” Second, they “may, but [are] not required to,” purchase compliant displays “using district funds.” S.B. 10 was set to go into effect on September 1, 2025.

Shortly after S.B. 10’s passage, parents of various religious backgrounds (“Plaintiffs”) sued several Texas school districts (“Defendants”) on behalf of themselves and their minor children . . . After finding Plaintiffs met the preliminary-injunction standard, the court enjoined S.B. 10’s implementation . . .

IV. Establishment

[The Court first considers whether this case is controlled by *Stone v. Graham* (1981), which struck down a Kentucky statute requiring Ten Commandments displays in all public school classrooms. The Court explains that the three-part test of *Lemon v. Kurtzman* (1971), was recognized as overruled in *Kennedy v. Bremerton* (2022).]

Plaintiffs contend *Stone* and its secular-purpose test are still good law, notwithstanding *Lemon*'s abrogation. We disagree.

First, Plaintiffs argue the Supreme Court has not overruled *Stone* by name. The Supreme Court's prerogative to overrule its own precedent is a principle we scrupulously honor. But Plaintiffs misunderstand how the principle applies here. *Stone* does not merely rest on reasons rejected in some other line of decisions; instead, it is part of *Lemon*'s "progeny" that the Supreme Court has affirmatively "abandoned" and "abrogated." *Kennedy*. With *Lemon* gone, there is nothing left of *Stone* to apply . . .

If Plaintiffs' view prevailed, we would be applying *Lemon*'s dead letter far into the future. For instance, *Kennedy* involved a coach's prayer after a football game. Presumably, all would concede that *Lemon* no longer applies in football-game-prayer cases. What about other cases? *Lemon* applied far and wide. *Kennedy* did not tick off every one of those cases and denounce their use of *Lemon*. Must we keep applying the abrogated *Lemon* test in each one until the Supreme Court tells us not to? To ask the question is to answer it . . . In short, there is no plausible way to read *Kennedy* as somehow preserving *Lemon* for certain cases . . .

In addition to discarding the *Lemon* test, *Kennedy* instructed courts how to analyze Establishment Clause claims going forward.

The Clause "must be interpreted by reference to historical practices and understandings," using an interpretation that "faithfully reflects the understanding of the Founding Fathers" and "focuses on original meaning and history." The analysis looks to the historical "hallmarks of religious establishments," such as legal compulsion to "attend church" or "engage in a formal religious exercise." *Kennedy*. As two sister circuits have explained, *Kennedy*'s analysis distills to this inquiry: Have plaintiffs proven a set of facts that would have historically been understood as an establishment of religion?

In the following sections, we flesh out the historical analysis *Kennedy* demands. We then apply it to S.B. 10.

1. The Text of the Establishment Clause

The First Amendment states in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

The key phrase—"an establishment of religion"—was readily understandable to founding-era citizens. The reason is simple. At the time, establishments were "a familiar institution." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107 (2003) [hereinafter McConnell, Establishment]. Someone on the streets of 1789 Boston, reading that phrase, would have instantly thought of the Church of England, the colonial established churches, or the current state establishments—in other words, a polity's official church or religion . . .

At one level, then, the Clause's text is straightforward. It bars Congress from enacting laws regarding a legal institution well known in the founding era. That sets the parameters of our inquiry. If a modern law is challenged under the Establishment Clause, courts must test that law against what the founding generation would have regarded as an establishment of religion. That is a familiar task. Courts often decide whether modern practices fall within the original public

meaning of constitutional phrases—for instance, “search and seizure,” “keep and bear arms,” “Recess of the Senate,” or “Officers of the United States.” Admittedly, though, our task in this case has added complexity. Like certain phrases in the Constitution, an “establishment of religion” denotes a relic of the past: the last state establishment was dismantled in 1833. Accordingly, in the following sections we consider historical evidence from the founding era to fill out the contours of the phrase “establishment of religion.”

[The Court discusses established churches in England, the early American colonies, and the later American states.]

The leading scholar in the area—whose work on this precise point the Supreme Court has relied on—has categorized the evidence into elements or “hallmarks” of founding-era establishments. Those include (1) government control over religious doctrine, governance, and church personnel; (2) compulsory church attendance; (3) compelled financial support, especially in the form of land grants and religious taxes; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for civil functions; and (6) restriction of political participation to members of the established church. *See McConnell, Establishment*. Other scholars have drawn similar conclusions from the historical record, and Supreme Court decisions have relied on such indicia to define an establishment.

To be sure, these elements are only helpful analytical signposts. The lodestar for applying the Clause remains what the Supreme Court held in *Kennedy*—namely, that a challenged law must be measured against the standard of founding-era religious establishments.

Defendants argue Plaintiffs failed to show that S.B. 10’s displays would have historically been understood as an establishment of religion. We agree.

1. S.B. 10 looks nothing like a founding-era establishment.

At the outset, we note that S.B. 10 plainly lacks the features of founding-era establishments. For example, whereas establishments commonly punished dissenters through fines, taxes, and legal disabilities, S.B. 10 does none of those things. If students disagree with the Commandments or ignore them or laugh at them, S.B. 10 imposes neither penalty nor sanction, formal or informal. And S.B. 10 obviously does not regulate what any religious institution teaches, how it worships, or whom it employs—as establishments often did.

Nor does S.B. 10 compel financial support for religious institutions. True, S.B. 10 permits using public funds to procure displays. But it neither requires such funding nor compels anyone to pay for the displays. This is again a far cry from historic religious establishments, which typically relied on forced exaction of religious taxes to support churches and clergy.

2. S.B. 10 does not coerce religious exercise or observance.

Plaintiffs’ principal argument is that S.B. 10 resembles historic establishments because it is coercive. Specifically, they claim that displaying scripture in a classroom—especially scripture phrased as “commandments”—is inherently coercive to children who are required by law to attend school. While we do not doubt the sincerity of Plaintiffs’ objections to the displays, we disagree that merely displaying religious text in a classroom coerces students in the way that founding-era establishments coerced dissenters. The two are worlds apart.

Kennedy explained that the “coercion” characteristic of establishments consisted of forcing people to “attend church” or “engage in ‘a formal religious exercise.’” Today, the state would erect something like an establishment if, for example, it mandated schoolchildren recite scripted prayers or join in corporate worship.

The problem for Plaintiffs' coercion argument, however, is that S.B. 10 does not compel any student to engage in formal religious exercise. The law does not require students to recite the Ten Commandments as an act of worship, or to affirm them at all. Nor does it mandate students pray, adopt any faith, or engage in any other "unmistakably religious exercises" like "devotional reading and recitation of the Holy Bible." *Abington* (Goldberg, J., concurring). The law requires only that the Commandments be displayed on the classroom wall. The mere fact that the displays use religious language does not convert them into a call to prayer . . .

Moreover, Plaintiffs have not identified a shred of founding-era evidence equating the government's use of religious text, displays, or symbols with an establishment of religion. To the contrary, it appears that no one "ever claimed at the founding that the display of religious symbols was a form of religious establishment." Chapman & McConnell, *Agreeing to Disagree*. Indeed, it would be a shock to discover that the Establishment Clause is implicated merely by the government's use of religious language, imagery, or symbols.

In our country, religious placenames dot the landscape and religious mottos, symbols, and flags adorn countless public buildings. Our national anthem contains the line, "In God is our trust," a version of which is our national motto and appears on our currency. The Ten Commandments themselves feature in displays in the Supreme Court, the Capitol, the Jefferson Building, the National Archives, the Department of Justice, the Ronald Reagan Building, the House of Representatives, and the courthouse housing the D.C. Circuit and the District Court for the District of Columbia. The fanciful notion that these uses of public religious language or symbolism have anything to do with a founding-era establishment cannot be taken seriously.

Plaintiffs bore the burden of showing that the S.B. 10 displays would have been understood as a founding-era establishment. They failed to do so . . .

3. S.B. 10 does not commit "denominational discrimination."

Alternatively, Plaintiffs argue that S.B. 10 violates the Establishment Clause because it engages in "denominational discrimination" by adopting what they call the "Protestant version" of the Ten Commandments. We reject this argument for several reasons.

To begin with, S.B. 10 adopts the same text of the Ten Commandments as in *Van Orden v. Perry* (2005). *Van Orden* upheld the constitutionality of a Ten Commandments monument outside the Texas Capitol. In fact, the *Van Orden* challengers made precisely the same argument as today's Plaintiffs: namely, that the Texas monument "adopt[ed] the Protestant version of the Ten Commandments." Petitioner's Reply Brief at 8–10 in *Van Orden*, 545 U.S. 677 (No. 03-1500). Yet this argument had no impact on the decision, and a majority of the Court did not even mention it.

[And the principle against denominational discrimination] has no application to government use of religious language or symbolism. Nor could it. Consider the cities of Corpus Christi, San Francisco, Los Angeles, San Diego, Santa Fe, San Jose, St. Augustine, and Sacramento, to name just a few. Do those names represent "denominational discrimination"? Or take our national motto. Does it show "favoritism" for monotheism over polytheism?

You get the point. If the rule against "denominational favoritism" applies in this area, all religious language and symbolism will have to be scoured from public life. While some constitutions have achieved this feat, ours is not one of them.

4. Plaintiffs' "tradition" argument is meritless.

Finally, Plaintiffs offer their own historical argument. They contend S.B. 10 violates the Establishment Clause because there is insufficient evidence of a tradition of public schools using the Ten Commandments or displaying them in a classroom. In support, they largely rely on the conclusions of their “expert” witness. We reject this argument.

Plaintiffs derive this tradition argument from cases about “legislative prayer”—*i.e.*, prayers by chaplains or ministers before government bodies. As those cases explain, such prayer “has long been understood as compatible with the Establishment Clause” because it was “practiced by Congress since the framing of the Constitution.” . . .

From those cases, Plaintiffs would distill a broad test: if a practice does not fit within some historical tradition, it violates the Establishment Clause. That does not follow. The legislative prayer cases teach only that the Establishment Clause cannot be read to sweep away a longstanding religious practice publicly approved by those who wrote the First Amendment. They do not stand for the *opposite* proposition—namely, that any modern practice *not* supported by a founding-era tradition *does* violate the Establishment Clause. No precedent supports that bizarre view.

In sum, we conclude that S.B. 10 bears none of the hallmarks of a founding-era establishment of religion and therefore does not facially violate the Establishment Clause.

V. Free Exercise

We turn to the district court’s ruling that S.B. 10 facially violates the Free Exercise Clause

...

The parties agree that a key precedent is the recent decision in *Mahmoud v. Taylor* . . . [But] measured against *Mahmoud*, S.B. 10 falls far short of transgressing the Free Exercise Clause. The Texas law creates no religious curriculum designed to shape children’s beliefs or subvert their parents’ teaching. Teachers are not required or encouraged to offer religious reflections on the Ten Commandments. Nor are they told to proselytize students who ask about the displays or disagree with the Commandments. Nor are they given lesson plans instructing that certain students (say, atheist, nontheist, polytheist, or agnostic students) are to be told their beliefs are “hurtful” or “hateful.”

This means the core of a free-exercise violation—a substantial burden on religious belief or practice—is missing. In *Mahmoud*, that burden was glaring: “instruction” challenging religiously formed beliefs about sex was “presented to young children by authority figures in elementary school classrooms.” S.B. 10 does nothing like that. No religious curriculum, no theistic lesson plans. All the law requires is a poster on a classroom wall. To be sure, Plaintiffs disagree with the poster’s content, but that disagreement alone does not transform S.B. 10 into religious coercion—and certainly not into the compulsory sex re-education program invalidated in *Mahmoud*.

Plaintiffs nonetheless insist S.B. 10 is *worse* than the regime in *Mahmoud* because it supposedly subjects children to “scripture nearly every hour they are in school.” We disagree. Plaintiffs’ hyperbolic argument ignores *Mahmoud*. The Court emphasized that the indoctrination there went “far beyond mere exposure” to objectionable ideas—the school board “specifically encouraged teachers to reinforce th[e] [books’] viewpoint and to reprimand any children who disagree.” Again, we have nothing like that here. S.B. 10 neither requires nor authorizes the correction of anyone’s beliefs.

Plaintiffs’ premise appears to be that any “religious” or “scriptural” content in the display is, by definition, coercive for free exercise purposes. That is not the law. The proper inquiry is whether the display religiously coerces a child or undermines parental rights to direct a child’s

religious upbringing. But no case suggests that the mere presence of religious language in a school display is *ipso facto* religious coercion.

RAMIREZ, Circuit Judge, dissenting.

No Supreme Court decision has overturned *Stone*. It is well-established that it is the “[Supreme] Court’s prerogative alone to overrule one of its precedents.” *Bosse v. Oklahoma* (2016) . . . “If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls.” *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.* (1989). Inferior courts also “should [not] conclude [the Supreme Court’s] more recent cases have, by implication, overruled an earlier precedent.” *Agostini v. Felton* (1997).

Despite the fact that no Supreme Court decision has expressly overturned *Stone*, Defendants assert that it is no longer good law because [of] *Kennedy v. Bremerton School District* (2022) . . . Although *Kennedy* “abandoned *Lemon* and its endorsement test offshoot,” it did not cite, much less purport to “abandon” or overturn, *Stone*—despite the opportunity to do so. This court must follow Supreme Court precedent even if that “precedent ... appears to rest on reasons rejected in some other line of decisions.” *Rodriguez de Quijas*, 490 U.S. at 484, 109 S.Ct. 1917. As a result, this court is bound by *Stone* regardless of whether it applied *Lemon*—i.e., “appears to rest on reasons rejected in” *Kennedy*—because *Stone* “has direct application in” this case.

Stone is dispositive. But even if it was not, S.B. 10 independently violates the Establishment Clause under *Kennedy*.

Defendants assert that, under *Kennedy*, there “are six identified ‘hallmarks’ of religious establishments that the Establishment Clause was adopted to prohibit,” and if a challenged practice does not “resemble” one of these hallmarks, there is no constitutional violation. Plaintiffs assert that *Kennedy* only held that the Establishment Clause prohibits religious coercion, and that it did not adopt six particular hallmarks.

Kennedy made clear that “the Establishment Clause must be interpreted by ‘reference to historical practices and understandings’” and that the analysis must “focus[] on original meaning and history.” Under that history-based approach, the Court held “coercion ... was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.”

Kennedy specifically placed “coercion along the[] lines” of that found in *Lee* among those “foremost hallmarks.” *Lee*, which undisputedly remains binding, concerned an Establishment Clause challenge to a school district policy that “permitted” principals to “invite” clergy members to recite prayers at graduations. Attendance at graduation was “voluntary” and not “a condition for receipt of [a] diploma.” Participation in the “prayer” was also a “choice” for attendees. In the context of a school graduation—which the Court found is “analogous to the classroom setting” and carries a “heightened” risk of “subtle coercive pressure”—*Lee* concluded the policy inflicted “public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the [prayers].” “This pressure, though subtle and indirect, [could] be as real as any overt compulsion.” The policy, therefore, “put school-age children who objected” to the prayers “in an untenable position.” They were placed “in the dilemma of participating [in the prayers], with all that implies, or protesting.” *Lee* held “the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position,” because the “government may not coerce anyone to support or participate in religion or

its exercise.” In short, the Supreme Court’s “decisions ... require [this court] to distinguish the public school context” when evaluating Establishment Clause claims.

Defendants assert that *Kennedy* adopted an exclusive “hallmarks” test based on Justice Gorsuch’s concurrence in *Shurtleff v. City of Boston* (2022), and that S.B. 10 is constitutional because it does not implicate any of these specific hallmarks.

In a footnote, *Kennedy* cited, among other opinions and authorities, a portion of Justice Gorsuch’s *Shurtleff* concurrence “discussing coercion and certain other historical hallmarks of an established religion.” *Kennedy*. The hallmarks discussed by Justice Gorsuch are: the government (1) “exerted control over the doctrine and personnel of the established church”; (2) “mandated attendance in the established church and punished people for failing to participate”; (3) “punished dissenting churches and individuals for their religious exercise”; (4) “restricted political participation by dissenters”; (5) “provided financial support for the established church, often in a way that preferred the established denomination over other churches”; and (6) “used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.”

The Supreme Court, however, did not directly quote or apply the six specific hallmarks outlined in the non-binding *Shurtleff* opinion, much less adopt them as the exclusive Establishment Clause test. Instead, the Court cited the *Shurtleff* concurrence only to help illustrate that “coercion ... was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.” *Kennedy* . . .

Here, S.B. 10 requires the permanent display of the Ten Commandments in all public-school classrooms. These displays—required to be visible to students “from anywhere in the classroom”—are not passive. The Supreme Court has already explained that if they “are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.” *Stone*. To argue otherwise ignores the unique context of placing religious scripture in public-school classrooms where, “given the impressionability of the young, government must exercise particular care in separating church and state.” *Van Orden* (Breyer, J., concurring in the judgment). It also ignores the self-evident nature of the Ten Commandments: they “command” the reader to follow certain directives. Those directives are largely religious in nature. Impressionable schoolchildren, who are subject to the State of Texas’s “great authority and coercive power” and who often “emulate[e] [their] teachers as role models,” *Edwards v. Aguillard* (1987) , will undoubtedly read these Commandments and feel—at the least—“subtle coercive pressure” to venerate or obey them. *Lee*.

The “subtle coercive pressure” Texas students will feel is precisely the type that *Lee* identified and that *Kennedy* labeled “problematic[]” under the Establishment Clause. *Kennedy*. And S.B. 10 implicates a far greater risk of putting students “who object[]” to the Ten Commandments “in an untenable position.” Unlike *Lee*, which concerned prayer only at a graduation ceremony that students were not required to attend or participate in, students’ attendance at school is mandatory, and they will be subjected to religious scripture *all day every day*—with no educational function. As “commandments,” that religious scripture is also inherently coercive, more so than the “nonsectarian” invocations and benedictions in *Lee* that focused on “inclusiveness and sensitivity.” . . .

The coercive impact of S.B. 10 is also in no way mitigated by the fact that Texas students will *read* the scripture rather than *hear* it. To argue otherwise is to suggest that the students in *Schempp* and *Lee* could simply cover their ears during the prayer recitations to avoid a constitutional issue. But just as *Schempp* held that a school-prayer statute violated the

Establishment Clause notwithstanding students' ability to "absent" themselves, and just as *Lee* acknowledged that, despite the *appearance* of voluntariness, "participation in the state-sponsored religious activity [was] in a fair and real sense obligatory," S.B. 10 is not absolved of coercive effect simply because the displays are silent and students can supposedly look away. Importantly, forced recitation of religious scripture is not the mark of an Establishment Clause violation. It is whether the challenged state action carries the "risk" of "coerc[ing] anyone to support or participate in religion or its exercise." *Lee*. It does not matter whether this threatened coercion is "overt."

Because Plaintiffs "will be induce[d] to read, meditate upon, [and] perhaps to venerate and obey, the Commandments," *Stone*, which implicates a "foremost hallmark[] of religious establishment," *Kennedy*, S.B. 10 facially violates the Establishment Clause.

[The dissent turns to the Free Exercise claim and *Mahmoud v. Taylor*.]

S.B. 10 requires the permanent display of religious scripture in every classroom. The displays implore specific *religious* directives—e.g., "[t]hou shalt have no other gods before me"—that, as in *Mahmoud*, are "clearly designed to present certain values and beliefs as things to be celebrated and certain contrary values and beliefs as things to be rejected." The displays also "carry with them a very real threat of undermining the religious beliefs that the parents wish to instill in their children" because they "impose upon children a set of values and beliefs that are hostile to their parents'." *Mahmoud*. And, as *commandments*, the displays clearly "exert upon children a psychological pressure to conform to [the displays'] specific viewpoints." As a result, the displays mandated by S.B. 10 substantially burden Plaintiffs' religious exercise because they "interfere with [the] student[s'] religious upbringing[s]."

This burden is not diminished simply because S.B. 10 does not require the Ten Commandments to be integrated into the curriculum. Significantly, the books in *Mahmoud* were not overtly religious—they were about "sexuality and gender." As a result, their mere presence on a shelf *could not* reasonably conflict with the plaintiffs' sincerely held religious beliefs—the issue was necessarily how the books were integrated into instruction. By contrast, the Ten Commandments are plainly religious, and their contents are—by their very nature—plainly instructive. As the Supreme Court put it, "[i]f the posted copies of the Ten Commandments are to have *any effect at all*, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." *Stone*. In any event, "[w]hether or not a requirement or curriculum could be characterized as 'exposure' is not the touchstone for determining whether" a Free Exercise Clause violation has occurred. "The question ... is whether the educational requirement or curriculum at issue would substantially interfere with the religious development of the child or pose a very real threat of undermining the religious beliefs and practices the parent wishes to instill in the child." *Mahmoud*. As discussed, S.B. 10's requirements clear that threshold.

Nor is it significant that Plaintiffs are not only seeking to "opt out" of a particular educational requirement. *Mahmoud* does not limit the Free Exercise Clause to that kind of relief. And importantly, S.B. 10 provides no practicable means for students to opt out. The Ten Commandments are required to be posted in every classroom of every public school during every hour of every day of the school year. The scripture will either be posted (in accordance with S.B. 10) or not (in violation of S.B. 10). As a result, there is no meaningful way for a student to opt out, as there was in *Mahmoud*, other than to "forgo" the "public benefit" of public school or face consequences under compulsory attendance laws.

NOTES AND QUESTIONS

1. History and Tradition Applied. Judge Duncan identifies six historical hallmarks of religious establishment, drawing on Professor Michael McConnell's historical work:

(1) Government control over religious doctrine, governance, and church personnel; (2) compulsory church attendance; (3) compelled financial support, especially in the form of land grants and religious taxes; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for civil functions; and (6) restriction of political participation to members of the established church.

How should historical work of this kind be translated into constitutional doctrine? Should the six categories be treated as an exhaustive definition of religious establishment, so that a claim fails unless it falls within one of them? Or are the six categories merely illustrative of some broader principle? If the latter, what is the broader principle?

Remember *Larson v. Valente*, which invalidated registration and reporting requirements imposed on some religious organizations but not others because they discriminated among religious denominations. Does *Larson* fit comfortably within any of the six categories above? If not, what does that suggest about the proper level of generality at which courts should formulate historical principles?

In that same article, McConnell wrote that “[a]n establishment is the promotion and inculcation of a common set of beliefs through governmental authority.” Is that a better way of understanding the six categories? If so, how would that understanding affect the proper result in this case?

2. Historical or Religious Instruction. Are there ways for the Ten Commandments to be taught in a neutral way, such as a part of American history, that makes them constitutional? Should that save Texas's statute here?

3. *Nathan* and *Engel v. Vitale*. One feature of the prayers held unconstitutional in *Engel v. Vitale*, 370 U.S. 421 (1962), was that they had been drafted by the New York State Board of Regents. How much does it matter that the Texas state legislature passed a statute requiring the Ten Commandments in classrooms, as compared to a situation where a random teacher chose to put it up.

4. *Nathan* and *Mahmoud*. Does *Mahmoud* support the challengers' claim in *Nathan*, in how *Mahmoud* stressed that many parents were effectively coerced into sending their kids to the public schools by a combination of the truancy laws, the expense of private education, and the difficulty of homeschooling? Or is *Mahmoud* irrelevant, because *Mahmoud* was a Free Exercise claim seeking opt-outs while this is an Establishment Clause claim seeking invalidation? Are opt-outs even possible here? Which way does that cut?

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).

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?