Insert after Espinoza v. Montana Department of Revenue and related notes and/or after *Locke v. Davey* and related notes.

CARSON v. MAKIN

Supreme Court of the United States, 2022.
___ U.S. ___, 142 S.Ct. 1987

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." Me. Const., Art. VIII, pt. 1, § 1. In accordance with that command, the legislature has required that every school-age child in Maine "shall be provided an opportunity to receive the benefits of a free public education," and that the required schools be operated by "the legislative and governing bodies of local school administrative units." 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.***

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 [school administrative unit] 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***

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.***

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*.***

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

B

This case concerns two families that live in SAUs that neither maintain their own secondary schools nor contract with any nearby secondary school. Petitioners David and Amy Carson reside in Glenburn, Maine. When this litigation commenced, the Carsons’ daughter attended high school at Bangor Christian Schools (BCS)***. The Carsons sent their daughter to BCS because of the school's high academic standards and because the school's Christian worldview aligns with their sincerely held religious beliefs. Given that BCS is a “sectarian” school that cannot qualify for tuition assistance payments under Maine's program, the Carsons paid the tuition for their daughter to attend BCS themselves.

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

BCS and Temple Academy are both accredited by the New England Association of Schools and Colleges (NEASC), and the Department considers each school a "private school approved for attendance purposes" under the State's compulsory attendance requirement. Yet because neither school qualifies as "nonsectarian," neither is eligible to receive tuition payments under Maine's tuition assistance program.***

In 2018, petitioners brought suit against the commissioner of the Maine Department of Education.*** Applying Circuit precedent that had previously upheld the "nonsectarian" requirement against challenge, the District Court rejected petitioners' constitutional claims and granted judgment to the commissioner.

While petitioners' appeal to the First Circuit was pending, this Court decided *Espinoza.**** The First Circuit recognized that, in light of *Espinoza*, its prior precedent upholding Maine's "nonsectarian" requirement was no longer controlling. But it 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."***

We granted certiorari.

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.* In particular, we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits. A State may not withhold unemployment benefits, for instance, on the ground that an individual lost his job for refusing to abandon the dictates of his faith.***

We have recently applied these principles in the context of two state efforts to withhold otherwise available public benefits from religious organizations. In *Trinity Lutheran*, ***[w]e 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." Such discrimination, we said, was "odious to our Constitution" and could not stand.

Two Terms ago, in *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.***

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." "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."

B

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." 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.

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." A law that operates in that manner, we held in *Espinoza*, must be subjected to "the strictest scrutiny."

***"A law that targets religious conduct for distinctive treatment ... will survive strict scrutiny only in rare cases." *Church of the Lukumi Babalu Aye*.

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

But as we explained in both *Trinity Lutheran* and *Espinoza*, such an "interest in separating church and state 'more fiercely' than the Federal Constitution ... 'cannot qualify as compelling' in the face of the infringement of free exercise." Justice Breyer stresses the importance of "government neutrality" when it comes to religious matters, but there is nothing neutral about Maine's program. The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against

religion. A State's 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.***

***

***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.

But the key manner in which the two educational experiences *are* required to be "equivalent" is that they must both be secular. Saying that Maine offers a benefit limited to private secular education is just another way of saying that Maine does not extend tuition assistance payments to parents who choose to educate their children at religious schools. But "the definition of a particular program can always be

manipulated to subsume the challenged condition," and to allow States to "recast a condition on funding" in this manner would be to see the First Amendment ... reduced to a simple semantic exercise.***

Indeed, were we to accept Maine's argument, our decision in *Espinoza* would be rendered essentially meaningless. By Maine's logic, Montana could have obtained the same result that we held violated the First Amendment simply by redefining its tax credit for sponsors of generally available scholarships as limited to "tuition payments for the rough equivalent of a Montana public education"—meaning a secular education. But our holding in *Espinoza* turned on the substance of free exercise protections, not on the presence or absence of magic words. That holding applies fully whether the prohibited discrimination is in an express provision like or in a party's reconceptualization of the public benefit.

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 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."

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****

Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism. Indeed, Maine concedes that the Department barely engages in any such scrutiny when enforcing the "nonsectarian" requirement. That suggests that any status-use distinction lacks a meaningful application not only in theory, but in practice as well. In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.

Maine and the dissents invoke *Locke v. Davey*, in support of the argument that the State may preclude parents from designating a religious school to receive tuition assistance payments. In that case, Washington had established a scholarship fund to assist academically gifted students with postsecondary education expenses. But the program excluded one particular use of the scholarship funds: the "essentially religious endeavor" of pursuing a degree designed to "train[ ] a minister to lead a congregation." We upheld that restriction against a free exercise challenge, reasoning that the State had "merely chosen not to fund a distinct category of instruction."

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.

It is so ordered.

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

***

Although the Religion Clauses are, in practice, often in tension, they nonetheless "express complementary values." *Cutter v. Wilkinson*. Together they attempt to chart a "course of constitutional neutrality" with respect to government and religion. *Walz v. Tax Commisioners.* They were written to help create an American Nation free of the religious conflict that had long plagued European nations with "governmentally established religion[s]." *Engel v. Vitale*. Through the Clauses, the Framers sought to avoid the "anguish, hardship and bitter strife" that resulted from the "union of Church and State" in those countries.

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." "[T]he basic purpose of these provisions" was "to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz*. 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). We have historically interpreted the Religion Clauses with these basic principles in mind.

And in applying these Clauses, we have often said that "there is room for play in the joints" between them. This doctrine reflects the fact that it may be difficult to determine in any particular case whether the Free Exercise Clause *requires* a State to fund the activities of a religious institution, or whether the Establishment Clause *prohibits* the State from doing so. Rather than attempting to draw a highly reticulated and complex free-exercise/establishment line that varies based on the specific circumstances of each state-funded program, we have provided general interpretive principles that apply uniformly in all Religion Clause cases. At the same time, we have made clear that States enjoy a degree of freedom to navigate the Clauses' competing prohibitions. This includes choosing not to fund certain religious activity where States have strong, establishment-related reasons for not doing so. And, States have freedom to make this choice even when the Establishment Clause does not itself prohibit the State from funding that activity. The Court today nowhere mentions, and I fear effectively abandons, this longstanding doctrine.

B

I have previously discussed my views of the relationship between the Religion Clauses and how I believe these Clauses should be interpreted to advance their goal of avoiding religious strife. Here I simply note the increased risk of religiously based social conflict when government promotes religion in its public school system.***

***We are today a Nation with well over 100 different religious groups, from Free Will Baptist to African Methodist, Buddhist to Humanist. People in our country adhere to a vast array of beliefs, ideals, and philosophies. And with greater religious diversity comes greater risk of religiously based strife,

conflict, and social division. The Religion Clauses were written in part to help avoid that disunion. As Thomas Jefferson, one of the leading drafters and proponents of those Clauses, wrote, " 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' " *Everson v. Bd. of Education.* And as James Madison, another drafter and proponent, said, compelled taxpayer sponsorship of religion "is itself a signal of persecution," which "will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects." To interpret the Clauses with these concerns in mind may help to further their original purpose of avoiding religious-based division.

I have also previously explained why I believe that a "rigid, bright-line" approach to the Religion Clauses—an approach without any leeway or "play in the joints"—will too often work against the Clauses' underlying purposes.*** Not all state-funded programs that have religious restrictions carry the same risk of creating social division and conflict. In my view, that risk can best be understood by considering the particular benefit at issue, along with the reasons for the particular religious restriction at issue. Recognition that States enjoy a degree of constitutional leeway allows States to enact laws sensitive to local circumstances while also allowing this Court to consider those circumstances in light of the basic values underlying the Religion Clauses.

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

II

The majority believes that the principles set forth in this Court's earlier cases easily resolve this case. But they do not.

We have previously found, as the majority points out, that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." We have thus concluded that a State *may*, consistent with the Establishment Clause, provide funding to religious schools through a general public funding program if the "government aid ... reach[es] religious institutions only by way of the deliberate choices of ... individual [aid] recipients."

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

What happens once "may" becomes "must"? Does that transformation mean that a school district that pays for public schools must pay equivalent funds to parents who wish to send their children to religious schools? Does it mean that school districts that give vouchers for use at charter schools must pay equivalent funds to parents who wish to give their children a religious education? What other social benefits are there the State's provision of which means—under the majority's interpretation of the Free

Exercise Clause—that the State must pay parents for the religious equivalent of the secular benefit provided? The concept of "play in the joints" means that courts need not, and should not, answer with "must" these questions that can more appropriately be answered with "may."

The majority also asserts that "[t]he 'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case." 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."***

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

***

***"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*.***

By contrast, public schools, including those in Maine, seek first and foremost to provide a primarily civic education. We have said that, in doing so, they comprise "a most vital civic institution for the preservation of a democratic system of government, and ... the primary vehicle for transmitting the values on which our society rests." *Plyler v. Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). To play that role effectively, public schools are religiously neutral, neither disparaging nor promoting any one particular system of religious beliefs.***

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.***

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. ***States must have "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause," *Cutter*, in which they can navigate the tension created by the Clauses and consider their own interests in light of the Clauses' competing prohibitions.

Nothing in our Free Exercise Clause cases *compels* Maine to give tuition aid to private schools that will use the funds to provide a religious education. As explained above, this Court's decisions in *Trinity Lutheran* and *Espinoza* prohibit States from denying aid to religious schools solely because of a school's religious *status*—that is, its affiliation with or control by a religious organization. But we have never said that the Free Exercise Clause prohibits States from withholding funds because of the religious *use* to which the money will be put. To the contrary, we upheld in *Locke* a State's decision to deny public funding to a recipient "because of what he proposed *to do*" with the money, when what he proposed to do was to "use the funds to prepare for the ministry." Maine does not refuse to pay tuition at private schools because of religious status or affiliation. The State only denies funding to schools that will use the money to promote religious beliefs through a religiously integrated education—an education that, in Maine's view, is not a replacement for a civic-focused public education. This makes Maine's decision to withhold public funds more akin to the state decision that we upheld in *Locke*, and unlike the withholdings that we invalidated in *Trinity Lutheran* and *Espinoza*.

***

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 legislators who endorsed the State's nonsectarian requirement understood this potential for social conflict. They recognized the important rights that religious schools have to create the sort of religiously inspired curriculum that Bangor Christian and Temple Academy teach. Legislators also recognized that these private schools make religiously based enrollment and hiring decisions. Bangor Christian and Temple Academy, for example, have admissions policies that allow them to deny enrollment to students based on gender, gender-identity, sexual orientation, and religion, and both schools require their teachers to be Born Again Christians. Legislators did not want Maine taxpayers to pay for these religiously based practices—practices not universally endorsed by all citizens of the State—for fear that doing so would cause a significant number of Maine citizens discomfort or displeasure. The nonsectarian requirement helped avoid this conflict—the precise kind of social conflict that the Religion Clauses themselves sought to avoid.

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

Over time, the Court eroded these principles in certain respects. *Zelman v. Simmons-Harris*. Nevertheless, the space between the Clauses continued to afford governments "some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws."

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

***The Court now holds for the first time that "any status-use distinction" is immaterial in both "theory" and "practice." It reaches that conclusion by embracing arguments from prior separate writings

and ignoring decades of precedent affording governments flexibility in navigating the tension between the Religion Clauses. As a result, in just a few years, the Court has upended constitutional doctrine, shifting from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars.

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

From a practical perspective, today's decision directs the State of Maine (and, by extension, its taxpaying citizens) to subsidize institutions that undisputedly engage in religious instruction. In addition, while purporting to protect against discrimination of one kind, the Court requires Maine to fund what many of its citizens believe to be discrimination of other kinds.***

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

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***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. *May or Must?* The dissenting opinions suggest that the majority requires states to fund religious school tuition if states fund any private school tuition. The same is true for any other aid to private schools. Thus, the dissents argue that the Court has turned the "may fund" from *Zelman* into "must fund." The majority responds that states have the option to not fund private schools at all. Beyond semantics, is there significant disagreement between the majority and the dissents about the legal impact of the decision?

2. *Divisiveness.* Justice Breyer's dissent focuses heavily on the divisiveness that state funding for religious education might cause. He explains that the Framers were concerned about this sort of divisiveness and that divisiveness over funding for education and the strings attached to it is even more likely today given our religiously pluralistic society. Do you agree with Justice Breyer's concern?

3. *Whose Free Exercise?* The Court holds that to deny funding to religious schools when other private schools receive funding is to discriminate based on religion, but in most areas in the U.S. won't funding religious schools also cause discrimination? After all, many religious minorities do not have enough adherents in most areas to support religious schools. Will the funding mandated under *Carson*—which will allow religious schools that receive funding to train generations of adherents using taxpayer funds—overwhelmingly benefit more dominant religions with more adherents while further marginalizing religious minorities?