LGBTQ+ RIGHTS AND THE REESTABLISHMENT OF RELIGION

December 11, 2023

David B. Cruz
Visiting Professor, The Williams Institute, UCLA School of Law
Newton Professor of Constitutional Law, USC Gould School of Law

CLE MATERIALS

TABLE OF CONTENTS

TOWN OF GREECE, NEW YORK v. Susan GALLOWAY et al., 572 U.S. 565 (2014)

Syllabus[*]

Since 1999, the monthly town board meetings in Greece, New York, have opened with a roll call, a recitation of the Pledge of Allegiance, and a prayer given by clergy selected from the congregations listed in a local directory. While the prayer program is open to all creeds, nearly all of the local congregations are Christian; thus, nearly all of the participating prayer givers have been too. Respondents, citizens who attend meetings to speak on local issues, filed suit, alleging that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers. They sought to limit the town to " inclusive and ecumenical" prayers that referred only to a "generic God." The District Court upheld the prayer practice on summary judgment, finding no impermissible preference for Christianity; concluding that the Christian identity of most of the prayer givers reflected the predominantly Christian character of the town's congregations, not an official policy or practice of discriminating against minority faiths; finding that the First Amendment did not require Greece to invite clergy from congregations beyond its borders to achieve religious diversity; and rejecting the theory that legislative prayer must be nonsectarian. The Second Circuit reversed, holding that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity.

Held: The judgment is reversed.

681 F.3d 20, reversed.

Justice KENNEDY delivered the opinion of the Court, except as to Part II–B, concluding that the town's prayer practice does not violate the Establishment Clause.

(a) Legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. *Marsh v. Chambers,* 463 U.S. 783, 792, 103 S.Ct. 3330, 77 L.Ed.2d 1019. In *Marsh,* the Court concluded that it was not necessary to define the Establishment Clause's precise boundary in order to uphold Nebraska's practice of employing a legislative chaplain because history supported the conclusion that the specific practice was permitted. The First Congress voted to appoint and pay official chaplains shortly after approving language for the First Amendment, and both Houses have maintained the office virtually uninterrupted since then. See *id.,* at 787–789, and n. 10, 103 S.Ct. 3330. A majority of the States have also had a consistent practice of legislative prayer. *Id.,* at 788–790, and n. 11, 103 S.Ct. 3330. There is historical precedent for the practice of opening local legislative meetings with prayer as well. *Marsh* teaches that the Establishment Clause must be interpreted "by reference to historical practices and understandings." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 670, 109 S.Ct. 3086, 106 L.Ed.2d 472 (opinion of KENNEDY, J.). Thus, any test must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

within the tradition long followed in Congress and the state legislatures.

(b) Respondents' insistence on nonsectarian prayer is not consistent with this tradition. The prayers in *Marsh* were consistent with the First Amendment not because they espoused only a generic theism but because the Nation's history and tradition have shown that prayer in this limited context could "coexis[t] with the principles of disestablishment and religious freedom." 463 U.S., at 786, 103 S.Ct. 3330. Dictum in *County of Allegheny* suggesting that *Marsh* permitted only prayer with no overtly Christian references is irreconcilable with the facts, holding, and reasoning of *Marsh,* which instructed that the "content of the prayer is not of concern to judges," provided "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S., at 794–795, 103 S.Ct. 3330. To hold that invocations must be nonsectarian would force the legislatures sponsoring prayers and the courts deciding these cases to act as supervisors and censors of religious speech, thus involving government in religious matters to a far greater degree than is the case under the town's current practice of neither editing nor approving prayers in advance nor criticizing their content after the fact. Respondents' contrary arguments are unpersuasive. It is doubtful that consensus could be reached as to what qualifies as a generic or nonsectarian prayer. It would also be unwise to conclude that only those religious words acceptable to the majority are permissible, for the First Amendment is not a majority rule and government may not seek to define permissible categories of religious speech. In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from the prayer's place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. From the Nation's earliest days, invocations have been addressed to assemblies comprising many different creeds, striving for the idea that people of many faiths may be united in a community of tolerance and devotion, even if they disagree as to religious doctrine. The prayers delivered in Greece do not fall outside this tradition. They may have invoked, *e.g.,* the name of Jesus, but they also invoked universal themes, *e.g.,* by calling for a "spirit of cooperation." Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a particular prayer will not likely establish a constitutional violation. See 463 U.S., at 794–795, 103 S.Ct. 3330. Finally, so long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.

Justice KENNEDY, joined by THE CHIEF JUSTICE and Justice ALITO, concluded in Part II–B that a fact-sensitive inquiry that considers both the setting in which the prayer arises and the audience to whom it is directed shows that the town is not coercing its citizens to engage in a religious observance. The prayer opportunity is evaluated against the backdrop of a historical practice showing that prayer has become part of the Nation's heritage and tradition. It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens. Furthermore, the principal audience for these invocations is not the public, but the lawmakers themselves. And those lawmakers did not direct the public to participate, single out dissidents for opprobrium, or indicate that their decisions might be influenced by a person's acquiescence in the prayer opportunity. Respondents claim that the prayers gave them offense and made them feel excluded and disrespected, but offense does not equate to coercion. In contrast to *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467, where the Court found coercive a religious invocation at a high school graduation, *id.,* at 592–594, 112 S.Ct. 2649, the record here does not

suggest that citizens are dissuaded from leaving the meeting room during the prayer, arriving late, or making a later protest. That the prayer in Greece is delivered during the opening ceremonial portion of the town's meeting, not the policymaking portion, also suggests that its purpose and effect are to acknowledge religious leaders and their institutions, not to exclude or coerce nonbelievers.

Justice THOMAS, joined by Justice SCALIA as to Part II, agreed that the town's prayer practice does not violate the Establishment Clause, but concluded that, even if the Establishment Clause were properly incorporated against the States through the Fourteenth Amendment, the Clause is not violated by the kind of subtle pressures respondents allegedly suffered, which do not amount to actual legal coercion. The municipal prayers in this case bear no resemblance to the coercive state establishments that existed at the founding, which exercised government power in order to exact financial support of the church, compel religious observance, or control religious doctrine.

KENNEDY, J., delivered the opinion of the Court, except as to Part II–B. ROBERTS, C.J., and ALITO, J., joined the opinion in full, and SCALIA and THOMAS, JJ., joined except as to Part II–B. ALITO, J., filed a concurring opinion, in which SCALIA, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA, J., joined as to Part II. BREYER, J., filed a dissenting opinion. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

Justice KENNEDY delivered the opinion of the Court, except as to Part II–B.[*]

The Court must decide whether the town of Greece, New York, imposes an impermissible establishment of religion by opening its monthly board meetings with a prayer. It must be concluded, consistent with the Court's opinion in *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), that no violation of the Constitution has been shown.

I

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board meetings with a moment of silence. In 1999, the newly elected town supervisor, John Auberger, decided to replicate the prayer practice he had found meaningful while serving in the county legislature. Following the roll call and recitation of the Pledge of Allegiance, Auberger would invite a local clergyman to the front of the room to deliver an invocation. After the prayer, Auberger would thank the minister for serving as the board's "chaplain for the month" and present him with a commemorative plaque. The prayer was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures. App. 22a–25a.

The town followed an informal method for selecting prayer givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month's meeting. The town eventually compiled a list of willing "board chaplains" who had accepted invitations and agreed to return in the future. The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the

[*] THE CHIEF JUSTICE and Justice ALITO join this opinion in full. Justice SCALIA and Justice THOMAS join this opinion except as to Part II–B.

congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.

Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content, in the belief that exercising any degree of control over the prayers would infringe both the free exercise and speech rights of the ministers. *Id.,* at 22a. The town instead left the guest clergy free to compose their own devotions. The resulting prayers often sounded both civic and religious themes. Typical were invocations that asked the divinity to abide at the meeting and bestow blessings on the community:

> "Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility.... Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen." *Id.,* at 45a.

Some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious holidays, scripture, or doctrine, as in the following prayer:

> "Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter.... We pray for peace in the world, an end to terrorism, violence, conflict, and war. We pray for stability, democracy, and good government in those countries in which our armed forces are now serving, especially in Iraq and Afghanistan.... Praise and glory be yours, O Lord, now and forever more. Amen." *Id.,* at 88a–89a.

Respondents Susan Galloway and Linda Stephens attended town board meetings to speak about issues of local concern, and they objected that the prayers violated their religious or philosophical views. At one meeting, Galloway admonished board members that she found the prayers "offensive," "intolerable," and an affront to a "diverse community." Complaint in No. 08–cv–6088 (WDNY), ¶ 66. After respondents complained that Christian themes pervaded the prayers, to the exclusion of citizens who did not share those beliefs, the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess who had read press reports about the prayer controversy requested, and was granted, an opportunity to give the invocation.

Galloway and Stephens brought suit in the United States District Court for the Western District of New York. They alleged that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers, such as those given "in Jesus' name." 732 F.Supp.2d 195, 203 (2010). They did not seek an end to the prayer practice, but rather requested an injunction that would limit the town to "inclusive and ecumenical" prayers that referred only to a "generic God" and would not associate the government with any one faith or belief. *Id.,* at 210, 241.

The District Court on summary judgment upheld the prayer practice as consistent with the First Amendment. It found no impermissible preference for Christianity, noting that the town had opened the prayer program to all creeds and excluded none. Although most of the prayer givers were Christian, this fact reflected only the predominantly Christian identity of the town's congregations, rather than an official policy or practice of discriminating against minority faiths. The District Court

found no authority for the proposition that the First Amendment required Greece to invite clergy from congregations beyond its borders in order to achieve a minimum level of religious diversity.

The District Court also rejected the theory that legislative prayer must be nonsectarian. The court began its inquiry with the opinion in *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, which permitted prayer in state legislatures by a chaplain paid from the public purse, so long as the prayer opportunity was not "exploited to proselytize or advance any one, or to disparage any other, faith or belief," *id.,* at 794–795, 103 S.Ct. 3330. With respect to the prayer in Greece, the District Court concluded that references to Jesus, and the occasional request that the audience stand for the prayer, did not amount to impermissible proselytizing. It located in *Marsh* no additional requirement that the prayers be purged of sectarian content. In this regard the court quoted recent invocations offered in the U.S. House of Representatives "in the name of our Lord Jesus Christ," *e.g.,* 156 Cong Rec. H5205 (June 30, 2010), and situated prayer in this context as part a long tradition. Finally, the trial court noted this Court's statement in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 603, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), that the prayers in *Marsh* did not offend the Establishment Clause "because the particular chaplain had 'removed all references to Christ.'" But the District Court did not read that statement to mandate that legislative prayer be nonsectarian, at least in circumstances where the town permitted clergy from a variety of faiths to give invocations. By welcoming many viewpoints, the District Court concluded, the town would be unlikely to give the impression that it was affiliating itself with any one religion.

The Court of Appeals for the Second Circuit reversed. 681 F.3d 20, 34 (2012). It held that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity. The town's failure to promote the prayer opportunity to the public, or to invite ministers from congregations outside the town limits, all but "ensured a Christian viewpoint." *Id.,* at 30–31. Although the court found no inherent problem in the sectarian content of the prayers, it concluded that the "steady drumbeat" of Christian prayer, unbroken by invocations from other faith traditions, tended to affiliate the town with Christianity. *Id.,* at 32. Finally, the court found it relevant that guest clergy sometimes spoke on behalf of all present at the meeting, as by saying "let us pray," or by asking audience members to stand and bow their heads: "The invitation ... to participate in the prayer ... placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation." *Ibid.* That board members bowed their heads or made the sign of the cross further conveyed the message that the town endorsed Christianity. The Court of Appeals emphasized that it was the "interaction of the facts present in this case," rather than any single element, that rendered the prayer unconstitutional. *Id.,* at 33.

Having granted certiorari to decide whether the town's prayer practice violates the Establishment Clause, 569 U.S. ——, 133 S.Ct. 2388, 185 L.Ed.2d 1103 (2013), the Court now reverses the judgment of the Court of Appeals.

II

In *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, the Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. The decision concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business,

reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society. See *Lynch v. Donnelly,* 465 U.S. 668, 693, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring); cf. A. Adams & C. Emmerich, A Nation Dedicated to Religious Liberty 83 (1990). The Court has considered this symbolic expression to be a "tolerable acknowledgement of beliefs widely held," *Marsh,* 463 U.S., at 792, 103 S.Ct. 3330, rather than a first, treacherous step towards establishment of a state church.

Marsh is sometimes described as "carving out an exception" to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to "any of the formal 'tests' that have traditionally structured" this inquiry. *Id.,* at 796, 813, 103 S.Ct. 3330 (Brennan, J., dissenting). The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause. The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time. See *id.,* at 787–789, and n. 10, 103 S.Ct. 3330; N. Feldman, Divided by God 109 (2005). But see *Marsh, supra,* at 791–792, and n. 12, 103 S.Ct. 3330 (noting dissenting views among the Framers); Madison, "Detached Memoranda", 3 Wm. & Mary Quarterly 534, 558–559 (1946) (hereinafter Madison's Detached Memoranda). When *Marsh* was decided, in 1983, legislative prayer had persisted in the Nebraska Legislature for more than a century, and the majority of the other States also had the same, consistent practice. 463 U.S., at 788–790, and n. 11, 103 S.Ct. 3330. Although no information has been cited by the parties to indicate how many local legislative bodies open their meetings with prayer, this practice too has historical precedent. See Reports of Proceedings of the City Council of Boston for the Year Commencing Jan. 1, 1909, and Ending Feb. 5, 1910, pp. 1–2 (1910) (Rev. Arthur Little) ("And now we desire to invoke Thy presence, Thy blessing, and Thy guidance upon those who are gathered here this morning ..."). "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society." *Marsh, supra,* at 792, 103 S.Ct. 3330.

Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings." *County of Allegheny,* 492 U.S., at 670, 109 S.Ct. 3086 (KENNEDY, J., concurring in judgment in part and dissenting in part). That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society. D. Currie, The Constitution in Congress: The Federalist Period 1789–1801, pp. 12–13 (1997). In the 1850's, the judiciary committees in both the House and Senate reevaluated the practice of official chaplaincies after receiving petitions to abolish the office. The committees concluded that the office posed no threat of an establishment because lawmakers were not compelled to attend the daily prayer, S.Rep. No. 376, 32d Cong., 2d Sess., 2 (1853); no faith was excluded by law, nor any favored, *id.,* at 3; and the cost of the chaplain's salary imposed a vanishingly small burden on taxpayers, H. Rep. No. 124, 33d Cong., 1st Sess., 6 (1854). *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. *County of Allegheny, supra,* at 670, 109 S.Ct. 3086 (opinion of KENNEDY, J.); see also *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 294, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the

permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers"). A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent. See *Van Orden v. Perry,* 545 U.S. 677, 702–704, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in judgment).

The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Respondents assert that the town's prayer exercise falls outside that tradition and transgresses the Establishment Clause for two independent but mutually reinforcing reasons. First, they argue that *Marsh* did not approve prayers containing sectarian language or themes, such as the prayers offered in Greece that referred to the "death, resurrection, and ascension of the Savior Jesus Christ," App. 129a, and the "saving sacrifice of Jesus Christ on the cross," *id.,* at 88a. Second, they argue that the setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board. The sectarian content of the prayers compounds the subtle coercive pressures, they argue, because the nonbeliever who might tolerate ecumenical prayer is forced to do the same for prayer that might be inimical to his or her beliefs.

A

Respondents maintain that prayer must be nonsectarian, or not identifiable with any one religion; and they fault the town for permitting guest chaplains to deliver prayers that "use overtly Christian terms" or "invoke specifics of Christian theology." Brief for Respondents 20. A prayer is fitting for the public sphere, in their view, only if it contains the "'most general, nonsectarian reference to God,'" *id.,* at 33 (quoting M. Meyerson, Endowed by Our Creator: The Birth of Religious Freedom in America 11–12 (2012)), and eschews mention of doctrines associated with any one faith, Brief for Respondents 32–33. They argue that prayer which contemplates "the workings of the Holy Spirit, the events of Pentecost, and the belief that God 'has raised up the Lord Jesus' and 'will raise us, in our turn, and put us by His side'" would be impermissible, as would any prayer that reflects dogma particular to a single faith tradition. *Id.,* at 34 (quoting App. 89a and citing *id.,* at 56a, 123a, 134a).

An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases. The Court found the prayers in *Marsh* consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could "coexis[t] with the principles of disestablishment and religious freedom." 463 U.S., at 786, 103 S.Ct. 3330. The Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable. One of the Senate's first chaplains, the Rev. William White, gave prayers in a series that included the Lord's Prayer, the Collect for Ash Wednesday, prayers for peace and grace, a general thanksgiving, St. Chrysostom's Prayer, and a prayer seeking "the grace of our Lord Jesus Christ, &c." Letter from W. White to H. Jones (Dec. 29, 1830), in B. Wilson, Memoir of the Life of the Right Reverend William White, D. D., Bishop of the Protestant Episcopal Church in the State of Pennsylvania 322 (1839); see also New Hampshire Patriot & State Gazette, Dec. 15, 1823, p. 1 (describing a Senate prayer addressing the "Throne of Grace"); Cong. Globe, 37th Cong., 1st Sess., 2 (1861) (reciting the Lord's Prayer). The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today. Congress continues to permit its appointed and visiting

chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds. See, *e.g.,* 160 Cong. Rec. S1329 (Mar. 6, 2014) (Dalai Lama) ("I am a Buddhist monk—a simple Buddhist monk—so we pray to Buddha and all other Gods"); 159 Cong. Rec. H7006 (Nov. 13, 2013) (Rabbi Joshua Gruenberg) ("Our God and God of our ancestors, Everlasting Spirit of the Universe ..."); 159 Cong. Rec. H3024 (June 4, 2013) (Satguru Bodhinatha Veylanswami) ("Hindu scripture declares, without equivocation, that the highest of high ideals is to never knowingly harm anyone"); 158 Cong. Rec. H5633 (Aug. 2, 2012) (Imam Nayyar Imam) ("The final prophet of God, Muhammad, peace be upon him, stated: 'The leaders of a people are a representation of their deeds'").

The contention that legislative prayer must be generic or nonsectarian derives from dictum in *County of Allegheny,* 492 U.S. 573, 109 S.Ct. 3086, that was disputed when written and has been repudiated by later cases. There the Court held that a crèche placed on the steps of a county courthouse to celebrate the Christmas season violated the Establishment Clause because it had "the effect of endorsing a patently Christian message." *Id.,* at 601, 109 S.Ct. 3086. Four dissenting Justices disputed that endorsement could be the proper test, as it likely would condemn a host of traditional practices that recognize the role religion plays in our society, among them legislative prayer and the "forthrightly religious" Thanksgiving proclamations issued by nearly every President since Washington. *Id.,* at 670–671, 109 S.Ct. 3086. The Court sought to counter this criticism by recasting *Marsh* to permit only prayer that contained no overtly Christian references:

> "However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.... The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'" *Id.,* at 603 [109 S.Ct. 3086] (quoting *Marsh, supra,* at 793, n. 14 [103 S.Ct. 3330]; footnote omitted).

This proposition is irreconcilable with the facts of *Marsh* and with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. The opinion noted that Nebraska's chaplain, the Rev. Robert E. Palmer, modulated the "explicitly Christian" nature of his prayer and "removed all references to Christ" after a Jewish lawmaker complained. 463 U.S., at 793, n. 14, 103 S.Ct. 3330. With this footnote, the Court did no more than observe the practical demands placed on a minister who holds a permanent, appointed position in a legislature and chooses to write his or her prayers to appeal to more members, or at least to give less offense to those who object. See Mallory, "An Officer of the House Which Chooses Him, and Nothing More": How Should *Marsh v. Chambers* Apply to Rotating Chaplains?, 73 U. Chi. L.Rev. 1421, 1445 (2006). *Marsh* did not suggest that Nebraska's prayer practice would have failed had the chaplain not acceded to the legislator's request. Nor did the Court imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed. See *Van Orden,* 545 U.S., at 688, n. 8, 125 S.Ct. 2854 (recognizing that the prayers in *Marsh* were "often explicitly Christian" and rejecting the view that this gave rise to an establishment violation). To the contrary, the Court instructed that the "content of the prayer is not of concern to judges," provided "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S., at 794–795, 103 S.Ct. 3330.

To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the

case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. Cf. *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. ——, ——, 132 S.Ct. 694, 705–706, 181 L.Ed.2d 650 (2012). Our Government is prohibited from prescribing prayers to be recited in our public institutions in order to promote a preferred system of belief or code of moral behavior. *Engel v. Vitale,* 370 U.S. 421, 430, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). It would be but a few steps removed from that prohibition for legislatures to require chaplains to redact the religious content from their message in order to make it acceptable for the public sphere. Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy. See *Lee v. Weisman,* 505 U.S. 577, 590, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted"); *Schempp,* 374 U.S., at 306, 83 S.Ct. 1560 (Goldberg, J., concurring) (arguing that "untutored devotion to the concept of neutrality" must not lead to "a brooding and pervasive devotion to the secular").

Respondents argue, in effect, that legislative prayer may be addressed only to a generic God. The law and the Court could not draw this line for each specific prayer or seek to require ministers to set aside their nuanced and deeply personal beliefs for vague and artificial ones. There is doubt, in any event, that consensus might be reached as to what qualifies as generic or nonsectarian. Honorifics like "Lord of Lords" or "King of Kings" might strike a Christian audience as ecumenical, yet these titles may have no place in the vocabulary of other faith traditions. The difficulty, indeed the futility, of sifting sectarian from nonsectarian speech is illustrated by a letter that a lawyer for the respondents sent the town in the early stages of this litigation. The letter opined that references to "Father, God, Lord God, and the Almighty" would be acceptable in public prayer, but that references to "Jesus Christ, the Holy Spirit, and the Holy Trinity" would not. App. 21a. Perhaps the writer believed the former grouping would be acceptable to monotheists. Yet even seemingly general references to God or the Father might alienate nonbelievers or polytheists. *McCreary County v. American Civil Liberties Union of Ky.,* 545 U.S. 844, 893, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (SCALIA, J., dissenting). Because it is unlikely that prayer will be inclusive beyond dispute, it would be unwise to adopt what respondents think is the next-best option: permitting those religious words, and only those words, that are acceptable to the majority, even if they will exclude some. *Torcaso v. Watkins,* 367 U.S. 488, 495, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961). The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.

In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends. Prayer that reflects beliefs specific to only some creeds can still serve to solemnize the occasion, so long as the practice over time is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh,* 463 U.S., at 794–795, 103 S.Ct. 3330.

It is thus possible to discern in the prayers offered to Congress a commonality of theme and tone. While these prayers vary in their degree of religiosity, they often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws. The first prayer delivered to the Continental Congress by the Rev. Jacob Duché on Sept. 7, 1774, provides an example:

> "Be Thou present O God of Wisdom and direct the counsel of this Honorable Assembly; enable them to settle all things on the best and surest foundations; that the scene of blood may be speedily closed; that Order, Harmony, and Peace be effectually restored, and the Truth and Justice, Religion and Piety, prevail and flourish among the people.
>
> "Preserve the health of their bodies, and the vigor of their minds, shower down on them, and the millions they here represent, such temporal Blessings as Thou seest expedient for them in this world, and crown them with everlasting Glory in the world to come. All this we ask in the name and through the merits of Jesus Christ, Thy Son and our Saviour, Amen." W. Federer, America's God and Country 137 (2000).

From the earliest days of the Nation, these invocations have been addressed to assemblies comprising many different creeds. These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being. Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith. See Letter from John Adams to Abigail Adams (Sept. 16, 1774), in C. Adams, Familiar Letters of John Adams and His Wife Abigail Adams, During the Revolution 37–38 (1876).

The prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized. A number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, but they also invoked universal themes, as by celebrating the changing of the seasons or calling for a "spirit of cooperation" among town leaders. App. 31a, 38a. Among numerous examples of such prayer in the record is the invocation given by the Rev. Richard Barbour at the September 2006 board meeting:

> "Gracious God, you have richly blessed our nation and this community. Help us to remember your generosity and give thanks for your goodness. Bless the elected leaders of the Greece Town Board as they conduct the business of our town this evening. Give them wisdom, courage, discernment and a single-minded desire to serve the common good. We ask your blessing on all public servants, and especially on our police force, firefighters, and emergency medical personnel.... Respectful of every religious tradition, I offer this prayer in the name of God's only son Jesus Christ, the Lord, Amen." *Id.,* at 98a–99a.

Respondents point to other invocations that disparaged those who did not accept the town's prayer practice. One guest minister characterized objectors as a "minority" who are "ignorant of the history of our country," *id.,* at 108a, while another lamented that other towns did not have

"God-fearing" leaders, *id.,* at 79a. Although these two remarks strayed from the rationale set out in *Marsh,* they do not despoil a practice that on the whole reflects and embraces our tradition. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation. *Marsh,* indeed, requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer. 463 U.S., at 794–795, 103 S.Ct. 3330.s

Finally, the Court disagrees with the view taken by the Court of Appeals that the town of Greece contravened the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer. The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. The quest to promote "a 'diversity' of religious views" would require the town "to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each," *Lee,* 505 U.S., at 617, 112 S.Ct. 2649 (Souter, J., concurring), a form of government entanglement with religion that is far more troublesome than the current approach.

B

Respondents further seek to distinguish the town's prayer practice from the tradition upheld in *Marsh* on the ground that it coerces participation by nonadherents. They and some *amici* contend that prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation. Citizens attend town meetings, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances. Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling. In their view the fact that board members in small towns know many of their constituents by name only increases the pressure to conform.

It is an elemental First Amendment principle that government may not coerce its citizens "to support or participate in any religion or its exercise." *County of Allegheny,* 492 U.S., at 659, 109 S.Ct. 3086 (KENNEDY, J., concurring in judgment in part and dissenting in part); see also *Van Orden,* 545 U.S., at 683, 125 S.Ct. 2854 (plurality opinion) (recognizing that our "institutions must not press religious observances upon their citizens"). On the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance. The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.

The prayer opportunity in this case must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of "God save the United States and this honorable Court" at the opening of this Court's sessions. See *Lynch,* 465 U.S., at 693, 104 S.Ct. 1355 (O'Connor, J., concurring). It is presumed that the

reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews. See *Salazar v. Buono,* 559 U.S. 700, 720–721, 130 S.Ct. 1803, 176 L.Ed.2d 634 (2010) (plurality opinion); *Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290, 308, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). That many appreciate these acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content. *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing. The District Court in *Marsh* described the prayer exercise as "an internal act" directed at the Nebraska Legislature's "own members," *Chambers v. Marsh,* 504 F.Supp. 585, 588 (D.Neb.1980), rather than an effort to promote religious observance among the public. See also *Lee,* 505 U.S., at 630, n. 8, 112 S.Ct. 2649 (Souter, J., concurring) (describing *Marsh* as a case "in which government officials invoke[d] spiritual inspiration entirely for their own benefit"); *Atheists of Fla., Inc. v. Lakeland,* 713 F.3d 577, 583 (C.A.11 2013) (quoting a city resolution providing for prayer "for the benefit and blessing of" elected leaders); Madison's Detached Memoranda 558 (characterizing prayer in Congress as "religious worship for national representatives"); Brief for U.S. Senator Marco Rubio et al. as *Amici Curiae* 30–33; Brief for 12 Members of Congress as *Amici Curiae* 6. To be sure, many members of the public find these prayers meaningful and wish to join them. But their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.

The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece. Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, they at no point solicited similar gestures by the public. Respondents point to several occasions where audience members were asked to rise for the prayer. These requests, however, came not from town leaders but from the guest ministers, who presumably are accustomed to directing their congregations in this way and might have done so thinking the action was inclusive, not coercive. See App. 69a ("Would you bow your heads with me as we invite the Lord's presence here tonight?"); *id.,* at 93a ("Let us join our hearts and minds together in prayer"); *id.,* at 102a ("Would you join me in a moment of prayer?"); *id.,* at 110a ("Those who are willing may join me now in prayer"). Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support. Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined. In no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished. A practice that classified citizens based on their religious views would violate the Constitution, but that is not the case before this Court.

In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. See *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 44, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (O'Connor, J., concurring) ("The compulsion of which Justice Jackson was concerned ... was of the direct sort—the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree"). If circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course. But the showing has not been made here, where the prayers neither chastised dissenters nor attempted lengthy disquisition on religious dogma. Courts remain free to review the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh,* or whether coercion is a real and substantial likelihood. But in the general course legislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate. See *County of Allegheny,* 492 U.S., at 670, 109 S.Ct. 3086 (KENNEDY, J., concurring in judgment in part and dissenting in part).

This case can be distinguished from the conclusions and holding of *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467. There the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student. *Id.,* at 592–594, 112 S.Ct. 2649; see also *Santa Fe Independent School Dist.,* 530 U.S., at 312, 120 S.Ct. 2266. Four Justices dissented in *Lee,* but the circumstances the Court confronted there are not present in this case and do not control its outcome. Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest. In this case, as in *Marsh,* board members and constituents are "free to enter and leave with little comment and for any number of reasons." *Lee, supra,* at 597, 112 S.Ct. 2649. Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure." *Marsh,* 463 U.S., at 792, 103 S.Ct. 3330 (internal quotation marks and citations omitted).

In the town of Greece, the prayer is delivered during the ceremonial portion of the town's meeting. Board members are not engaged in policymaking at this time, but in more general functions, such as swearing in new police officers, inducting high school athletes into the town hall of fame, and presenting proclamations to volunteers, civic groups, and senior citizens. It is a moment for town leaders to recognize the achievements of their constituents and the aspects of community life that are worth celebrating. By inviting ministers to serve as chaplain for the month, and welcoming them to the front of the room alongside civic leaders, the town is acknowledging the central place that religion, and religious institutions, hold in the lives of those present. Indeed, some congregations are not simply spiritual homes for town residents but also the provider of social services for citizens regardless of their beliefs. See App. 31a (thanking a pastor for his "community involvement"); *id.,* at 44a (thanking a deacon "for the job that you have done on behalf of our

community"). The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers.

Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose. It is not an unconstitutional establishment of religion.

* * *

The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents. The judgment of the U.S. Court of Appeals for the Second Circuit is reversed.

It is so ordered.

Justice ALITO, with whom Justice SCALIA joins, concurring.

I write separately to respond to the principal dissent, which really consists of two very different but intertwined opinions. One is quite narrow; the other is sweeping. I will address both.

I

First, however, since the principal dissent accuses the Court of being blind to the facts of this case, *post,* at ___ (opinion of KAGAN, J.), I recount facts that I find particularly salient.

The town of Greece is a municipality in upstate New York that borders the city of Rochester. The town decided to emulate a practice long established in Congress and state legislatures by having a brief prayer before sessions of the town board. The task of lining up clergy members willing to provide such a prayer was given to the town's office of constituent services. 732 F.Supp.2d 195, 197–198 (W.D.N.Y.2010). For the first four years of the practice, a clerical employee in the office would randomly call religious organizations listed in the Greece "Community Guide," a local directory published by the Greece Chamber of Commerce, until she was able to find somebody willing to give the invocation. *Id.,* at 198. This employee eventually began keeping a list of individuals who had agreed to give the invocation, and when a second clerical employee took over the task of finding prayer-givers, the first employee gave that list to the second. *Id.,* at 198, 199. The second employee then randomly called organizations on that list—and possibly others in the Community Guide—until she found someone who agreed to provide the prayer. *Id.,* at 199.

Apparently, all the houses of worship listed in the local Community Guide were Christian churches. *Id.,* at 198–200, 203. That is unsurprising given the small number of non-Christians in the area. Although statistics for the town of Greece alone do not seem to be available, statistics have been compiled for Monroe County, which includes both the town of Greece and the city of Rochester. According to these statistics, of the county residents who have a religious affiliation, about 3% are Jewish, and for other non-Christian faiths, the percentages are smaller.[1] There are no

[1] See Assn. of Statisticians of Am. Religious Bodies, C. Grammich et al., 2010 U.S. Religion Census: Religious Congregations & Membership Study 400–401 (2012).

synagogues within the borders of the town of Greece, *id.,* at 203, but there are several not far away across the Rochester border. Presumably, Jewish residents of the town worship at one or more of those synagogues, but because these synagogues fall outside the town's borders, they were not listed in the town's local directory, and the responsible town employee did not include them on her list. *Ibid*. Nor did she include any other non-Christian house of worship. *Id.,* at 198–200.[2]

As a result of this procedure, for some time all the prayers at the beginning of town board meetings were offered by Christian clergy, and many of these prayers were distinctively Christian. But respondents do not claim that the list was attributable to religious bias or favoritism, and the Court of Appeals acknowledged that the town had "no religious animus." 681 F.3d 20, 32 (C.A.2 2012).

For some time, the town's practice does not appear to have elicited any criticism, but when complaints were received, the town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation, and the town has never refused a request to offer an invocation. *Id.,* at 23, 25;732 F.Supp.2d, at 197. The most recent list in the record of persons available to provide an invocation includes representatives of many non-Christian faiths. App. in No. 10–3635 (CA2), pp. A1053–A1055 (hereinafter CA2 App.).

Meetings of the Greece Town Board appear to have been similar to most other town council meetings across the country. The prayer took place at the beginning of the meetings. The board then conducted what might be termed the "legislative" portion of its agenda, during which residents were permitted to address the board. After this portion of the meeting, a separate stage of the meetings was devoted to such matters as formal requests for variances. See Brief for Respondents 5–6; CA2 App. A929–A930; *e.g.,* CA2 App. A1058, A1060.

No prayer occurred before this second part of the proceedings, and therefore I do not understand this case to involve the constitutionality of a prayer prior to what may be characterized as an adjudicatory proceeding. The prayer preceded only the portion of the town board meeting that I view as essentially legislative. While it is true that the matters considered by the board during this initial part of the meeting might involve very specific questions, such as the installation of a traffic light or stop sign at a particular intersection, that does not transform the nature of this part of the meeting.

II

I turn now to the narrow aspect of the principal dissent, and what we find here is that the principal dissent's objection, in the end, is really quite niggling. According to the principal dissent, the town could have avoided any constitutional problem in either of two ways.

A

First, the principal dissent writes, "[i]f the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint." *Post,* at ___. "Priests and ministers, rabbis and imams," the principal dissent continues, "give such invocations all the time" without any great difficulty. *Post,* at ___.

---

[2] It appears that there is one non-Christian house of worship, a Buddhist temple, within the town's borders, but it was not listed in the town directory. 732 F.Supp.2d, at 203. Although located within the town's borders, the temple has a Rochester mailing address. And while the respondents "each lived in the Town more than thirty years, neither was personally familiar with any mosques, synagogues, temples, or other non-Christian places of worship within the Town." *Id*., at 197.

Both Houses of Congress now advise guest chaplains that they should keep in mind that they are addressing members from a variety of faith traditions, and as a matter of policy, this advice has much to recommend it. But any argument that nonsectarian prayer is constitutionally required runs headlong into a long history of contrary congressional practice. From the beginning, as the Court notes, many Christian prayers were offered in the House and Senate, see *ante,* at ___, and when rabbis and other non-Christian clergy have served as guest chaplains, their prayers have often been couched in terms particular to their faith traditions.[3]

Not only is there no historical support for the proposition that only generic prayer is allowed, but as our country has become more diverse, composing a prayer that is acceptable to all members of the community who hold religious beliefs has become harder and harder. It was one thing to compose a prayer that is acceptable to both Christians and Jews; it is much harder to compose a prayer that is also acceptable to followers of Eastern religions that are now well represented in this country. Many local clergy may find the project daunting, if not impossible, and some may feel that they cannot in good faith deliver such a vague prayer.

In addition, if a town attempts to go beyond simply *recommending* that a guest chaplain deliver a prayer that is broadly acceptable to all members of a particular community (and the groups represented in different communities will vary), the town will inevitably encounter sensitive problems. Must a town screen and, if necessary, edit prayers before they are given? If prescreening is not required, must the town review prayers after they are delivered in order to determine if they were sufficiently generic? And if a guest chaplain crosses the line, what must the town do? Must the chaplain be corrected on the spot? Must the town strike this chaplain (and perhaps his or her house of worship) from the approved list?

B

If a town wants to avoid the problems associated with this first option, the principal dissent argues, it has another choice: It may "invit[e] clergy of many faiths." *Post,* at ___. "When one month a clergy member refers to Jesus, and the next to Allah or Jehovah," the principal dissent explains, "the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian prayer is transformed." *Ibid.*

If, as the principal dissent appears to concede, such a rotating system would obviate any constitutional problems, then despite all its high rhetoric, the principal dissent's quarrel with the town of Greece really boils down to this: The town's clerical employees did a bad job in compiling the list of potential guest chaplains. For that is really the only difference between what the town did and what the principal dissent is willing to accept. The Greece clerical employee drew up her list using the town directory instead of a directory covering the entire greater Rochester area. If the task of putting together the list had been handled in a more sophisticated way, the employee in charge would have realized that the town's Jewish residents attended synagogues on the Rochester side of the border and would have added one or more synagogues to the list. But the mistake was at worst careless, and it was not done with a discriminatory intent. (I would view this case very differently

---

[3] For example, when a rabbi first delivered a prayer at a session of the House of Representatives in 1860, he appeared "in full rabbinic dress, 'piously bedecked in a white tallit and a large velvet skullcap,'" and his prayer "invoked several uniquely Jewish themes and repeated the Biblical priestly blessing in Hebrew." See Brief for Nathan Lewin as *Amicus Curiae* 9. Many other rabbis have given distinctively Jewish prayers, *id*., at 10, and n. 3, and distinctively Islamic, Buddhist, and Hindu prayers have also been delivered, see *ante,* at ___.

if the omission of these synagogues were intentional.)

The informal, imprecise way in which the town lined up guest chaplains is typical of the way in which many things are done in small and medium-sized units of local government. In such places, the members of the governing body almost always have day jobs that occupy much of their time. The town almost never has a legal office and instead relies for legal advice on a local attorney whose practice is likely to center on such things as land-use regulation, contracts, and torts. When a municipality like the town of Greece seeks in good faith to emulate the congressional practice on which our holding in *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), was largely based, that municipality should not be held to have violated the Constitution simply because its method of recruiting guest chaplains lacks the demographic exactitude that might be regarded as optimal.

The effect of requiring such exactitude would be to pressure towns to forswear altogether the practice of having a prayer before meetings of the town council. Many local officials, puzzled by our often puzzling Establishment Clause jurisprudence and terrified of the legal fees that may result from a lawsuit claiming a constitutional violation, already think that the safest course is to ensure that local government is a religion-free zone. Indeed, the Court of Appeals' opinion in this case advised towns that constitutional difficulties "may well prompt municipalities to pause and think carefully before adopting legislative prayer." 681 F.3d, at 34. But if, as precedent and historic practice make clear (and the principal dissent concedes), prayer before a legislative session is not inherently inconsistent with the First Amendment, then a unit of local government should not be held to have violated the First Amendment simply because its procedure for lining up guest chaplains does not comply in all respects with what might be termed a "best practices" standard.

III

While the principal dissent, in the end, would demand no more than a small modification in the procedure that the town of Greece initially followed, much of the rhetoric in that opinion sweeps more broadly. Indeed, the logical thrust of many of its arguments is that prayer is *never* permissible prior to meetings of local government legislative bodies. At Greece Town Board meetings, the principal dissent pointedly notes, ordinary citizens (and even children!) are often present. *Post,* at ___. The guest chaplains stand in front of the room facing the public. "[T]he setting is intimate," and ordinary citizens are permitted to speak and to ask the board to address problems that have a direct effect on their lives. *Post,* at ___. The meetings are "occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters." *Post,* at ___. Before a session of this sort, the principal dissent argues, any prayer that is not acceptable to all in attendance is out of bounds.

The features of Greece meetings that the principal dissent highlights are by no means unusual.[4] It is common for residents to attend such meetings, either to speak on matters on the agenda or to request that the town address other issues that are important to them. Nor is there anything unusual about the occasional attendance of students, and when a prayer is given at the beginning of such a

[4] See, *e.g.*, prayer practice of Saginaw City Council in Michigan, described in Letter from Freedom from Religion Foundation to City Manager, Saginaw City Council (Jan. 31, 2014), online at http://media.mlive.com/saginawnews_impact/other/Saginaw%20prayer%20at%20meetings%20letter.pdf (all Internet materials as visited May 2, 2014, and available in Clerk of Court's case file); prayer practice of Cobb County commissions in Georgia, described in *Pelphrey v. Cobb County,* 410 F.Supp.2d 1324 (N.D.Ga.2006).

meeting, I expect that the chaplain generally stands at the front of the room and faces the public. To do otherwise would probably be seen by many as rude. Finally, although the principal dissent, *post,* at ___, attaches importance to the fact that guest chaplains in the town of Greece often began with the words "Let us pray," that is also commonplace and for many clergy, I suspect, almost reflexive.[5] In short, I see nothing out of the ordinary about any of the features that the principal dissent notes. Therefore, if prayer is not allowed at meetings with those characteristics, local government legislative bodies, unlike their national and state counterparts, cannot begin their meetings with a prayer. I see no sound basis for drawing such a distinction.

IV

The principal dissent claims to accept the Court's decision in *Marsh v. Chambers,* which upheld the constitutionality of the Nebraska Legislature's practice of prayer at the beginning of legislative sessions, but the principal dissent's acceptance of *Marsh* appears to be predicated on the view that the prayer at issue in that case was little more than a formality to which the legislators paid scant attention. The principal dissent describes this scene: A session of the state legislature begins with or without most members present; a strictly nonsectarian prayer is recited while some legislators remain seated; and few members of the public are exposed to the experience.*Post,* at ___. This sort of perfunctory and hidden-away prayer, the principal dissent implies, is all that *Marsh* and the First Amendment can tolerate.

It is questionable whether the principal dissent accurately describes the Nebraska practice at issue in *Marsh*,[6] but what is important is not so much what happened in Nebraska in the years prior to *Marsh,* but what happened before congressional sessions during the period leading up to the adoption of the First Amendment. By that time, prayer before legislative sessions already had an impressive pedigree, and it is important to recall that history and the events that led to the adoption of the practice.

The principal dissent paints a picture of "morning in Nebraska" circa 1983, see *post,* at ___, but it is more instructive to consider "morning in Philadelphia," September 1774. The First Continental Congress convened in Philadelphia, and the need for the 13 colonies to unite was imperative. But "[m]any things set colony apart from colony," and prominent among these sources of division was religion.[7] "Purely as a practical matter," however, the project of bringing the colonies together required that these divisions be overcome.[8]

Samuel Adams sought to bridge these differences by prodding a fellow Massachusetts delegate

---

[5] For example, at the most recent Presidential inauguration, a minister faced the assembly of onlookers on the National Mall and began with those very words. 159 Cong. Rec. S183, S186 (Jan. 22, 2013).

[6] See generally Brief for Robert E. Palmer as *Amicus Curiae* (Nebraska Legislature chaplain at issue in *Marsh*); *e.g., id.,* at 11 (describing his prayers as routinely referring "to Christ, the Bible, [and] holy days"). See also *Chambers v. Marsh,* 504 F.Supp. 585, 590, n. 12 (D.Neb.1980) ("A rule of the Nebraska Legislature requires that 'every member shall be present within the Legislative Chamber during the meetings of the Legislature ... unless excused....' Unless the excuse for nonattendance is deemed sufficient by the legislature, the 'presence of any member may be compelled, if necessary, by sending the Sergeant at Arms' " (alterations in original)).

[7] G. Wills, Inventing America: Jefferson's Declaration of Independence 46 (1978).

[8] N. Cousins, In God We Trust: The Religious Beliefs and Ideas of the American Founding Fathers 4–5, 13 (1958).

to move to open the session with a prayer.[9] As John Adams later recounted, this motion was opposed on the ground that the delegates were "so divided in religious sentiments, some Episcopalians, some Quakers, some Anabaptists, some Presbyterians, and some Congregationalists, that [they] could not join in the same act of worship."[10] In response, Samuel Adams proclaimed that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country."[11] Putting aside his personal prejudices,[12] he moved to invite a local Anglican minister, Jacob Duché, to lead the first prayer.[13]

The following morning, Duché appeared in full "pontificals" and delivered both the Anglican prayers for the day and an extemporaneous prayer.[14] For many of the delegates—members of religious groups that had come to America to escape persecution in Britain—listening to a distinctively Anglican prayer by a minister of the Church of England represented an act of notable ecumenism. But Duché's prayer met with wide approval—John Adams wrote that it "filled the bosom of every man" in attendance[151]—and the practice was continued. This first congressional prayer was emphatically Christian, and it was neither an empty formality nor strictly nondenominational.[16] But one of its purposes, and presumably one of its effects, was not to divide, but to unite.

It is no wonder, then, that the practice of beginning congressional sessions with a prayer was continued after the Revolution ended and the new Constitution was adopted. One of the first actions taken by the new Congress when it convened in 1789 was to appoint chaplains for both Houses. The first Senate chaplain, an Episcopalian, was appointed on April 25, 1789, and the first House chaplain, a Presbyterian, was appointed on May 1.[17] Three days later, Madison announced that he planned to introduce proposed constitutional amendments to protect individual rights; on June 8, 1789, those amendments were introduced; and on September 26, 1789, the amendments were approved to be sent to the States for ratification.[18] In the years since the adoption of the First Amendment, the practice of prayer before sessions of the House and Senate has continued, and

---

[9] M. Puls, Samuel Adams: Father of the American Revolution 160 (2006).

[10] Letter to Abigail Adams (Sept. 16, 1774), in C. Adams, Familiar Letters of John Adams and His Wife Abigail Adams, During the Revolution 37 (1876).

[11] *Ibid.*

[12] See G. Wills, *supra,* at 46; J. Miller, Sam Adams 85, 87 (1936); I. Stoll, Samuel Adams: A Life 7, 134–135 (2008).

[13] C. Adams, *supra,* at 37.

[14] *Ibid.*

[15] *Ibid.*; see W. Wells, 2 The Life and Public Services of Samuel Adams 222–223 (1865); J. Miller, *supra,* at 320; E. Burnett, The Continental Congress 40 (1941); M. Puls, *supra,* at 161.

[16] First Prayer of the Continental Congress, 1774, online at http://chaplain.house.gov/archive/continental.html.

[17] 1 Annals of Cong. 24–25 (1789); R. Cord, Separation of Church and State: Historical Fact and Current Fiction 23 (1982).

[18] 1 Annals of Cong. 247, 424; R. Labunski, James Madison and the Struggle for the Bill of Rights 240–241 (2006).

opening prayers from a great variety of faith traditions have been offered.

This Court has often noted that actions taken by the First Congress are presumptively consistent with the Bill of Rights, see, *e.g.,Harmelin v. Michigan,* 501 U.S. 957, 980, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), *Carroll v. United States,* 267 U.S. 132, 150–152, 45 S.Ct. 280, 69 L.Ed. 543 (1925), and this principle has special force when it comes to the interpretation of the Establishment Clause. This Court has always purported to base its Establishment Clause decisions on the original meaning of that provision. Thus, in *Marsh,* when the Court was called upon to decide whether prayer prior to sessions of a state legislature was consistent with the Establishment Clause, we relied heavily on the history of prayer before sessions of Congress and held that a state legislature may follow a similar practice. See 463 U.S., at 786–792, 103 S.Ct. 3330.

There can be little doubt that the decision in *Marsh* reflected the original understanding of the First Amendment. It is virtually inconceivable that the First Congress, having appointed chaplains whose responsibilities prominently included the delivery of prayers at the beginning of each daily session, thought that this practice was inconsistent with the Establishment Clause. And since this practice was well established and undoubtedly well known, it seems equally clear that the state legislatures that ratified the First Amendment had the same understanding. In the case before us, the Court of Appeals appeared to base its decision on one of the Establishment Clause " tests" set out in the opinions of this Court, see 681 F.3d, at 26, 30, but if there is any inconsistency between any of those tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice.

V

This brings me to my final point. I am troubled by the message that some readers may take from the principal dissent's rhetoric and its highly imaginative hypotheticals. For example, the principal dissent conjures up the image of a litigant awaiting trial who is asked by the presiding judge to rise for a Christian prayer, of an official at a polling place who conveys the expectation that citizens wishing to vote make the sign of the cross before casting their ballots, and of an immigrant seeking naturalization who is asked to bow her head and recite a Christian prayer. Although I do not suggest that the implication is intentional, I am concerned that at least some readers will take these hypotheticals as a warning that this is where today's decision leads—to a country in which religious minorities are denied the equal benefits of citizenship.

Nothing could be further from the truth. All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures. In seeming to suggest otherwise, the principal dissent goes far astray.

Justice THOMAS, with whom Justice SCALIA joins as to Part II, concurring in part and concurring in the judgment.

Except for Part II–B, I join the opinion of the Court, which faithfully applies *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). I write separately to reiterate my view that the Establishment Clause is "best understood as a federalism provision," *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 50, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (THOMAS, J., concurring in judgment), and to state my understanding of the proper "coercion" analysis.

I

The Establishment Clause provides that "Congress shall make no law respecting an

establishment of religion." U.S. Const., Amdt. 1. As I have explained before, the text and history of the Clause "resis[t] incorporation" against the States. *Newdow, supra,* at 45–46, 124 S.Ct. 2301; see also *Van Orden v. Perry,* 545 U.S. 677, 692–693, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (THOMAS, J., concurring); *Zelman v. Simmons–Harris,* 536 U.S. 639, 677–680, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (same). If the Establishment Clause is not incorporated, then it has no application here, where only municipal action is at issue.

As an initial matter, the Clause probably prohibits Congress from establishing a national religion. Cf. D. Drakeman, Church, State, and Original Intent 260–262 (2010). The text of the Clause also suggests that Congress "could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause." *Newdow, supra,* at 50, 124 S.Ct. 2301 (opinion of THOMAS, J.). The language of the First Amendment ("Congress shall make no law") "precisely tracked and inverted the exact wording" of the Necessary and Proper Clause ("Congress shall have power ... to make all laws which shall be necessary and proper ..."), which was the subject of fierce criticism by Anti–Federalists at the time of ratification. A. Amar, The Bill of Rights 39 (1998) (hereinafter Amar); see also Natelson, The Framing and Adoption of the Necessary and Proper Clause, in The Origins of the Necessary and Proper Clause 84, 94–96 (G. Lawson, G. Miller, R. Natelson, & G. Seidman eds. 2010) (summarizing Anti–Federalist claims that the Necessary and Proper Clause would aggrandize the powers of the Federal Government). That choice of language—"Congress shall make no law"—effectively denied Congress any power to regulate state establishments.

Construing the Establishment Clause as a federalism provision accords with the variety of church-state arrangements that existed at the Founding. At least six States had established churches in 1789. Amar 32–33. New England States like Massachusetts, Connecticut, and New Hampshire maintained local-rule establishments whereby the majority in each town could select the minister and religious denomination (usually Congregationalism, or "Puritanism"). McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L.Rev. 2105, 2110 (2003); see also L. Levy, The Establishment Clause: Religion and the First Amendment 29–51 (1994) (hereinafter Levy). In the South, Maryland, South Carolina, and Georgia eliminated their exclusive Anglican establishments following the American Revolution and adopted general establishments, which permitted taxation in support of all Christian churches (or, as in South Carolina, all Protestant churches). See Levy 52–58; Amar 32–33. Virginia, by contrast, had recently abolished its official state establishment and ended direct government funding of clergy after a legislative battle led by James Madison. See T. Buckley, Church and State in Revolutionary Virginia, 1776–1787, pp. 155–164 (1977). Other States—principally Rhode Island, Pennsylvania, and Delaware, which were founded by religious dissenters—had no history of formal establishments at all, although they still maintained religious tests for office. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L.Rev. 1409, 1425–1426, 1430 (1990).

The import of this history is that the relationship between church and state in the fledgling Republic was far from settled at the time of ratification. See Muõz, The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation, 8 U. Pa. J. Constitutional L. 585, 605 (2006). Although the remaining state establishments were ultimately dismantled—Massachusetts, the last State to disestablish, would do so in 1833, see Levy 42—that outcome was far from assured when the Bill of Rights was ratified in 1791. That lack of consensus suggests that the First Amendment was simply agnostic on the subject of state establishments; the

decision to establish or disestablish religion was reserved to the States. Amar 41.

The Federalist logic of the original Establishment Clause poses a special barrier to its mechanical incorporation against the States through the Fourteenth Amendment. See *id.,* at 33. Unlike the Free Exercise Clause, which "plainly protects individuals against congressional interference with the right to exercise their religion," the Establishment Clause "does not purport to protect individual rights." *Newdow,* 542 U.S., at 50, 124 S.Ct. 2301 (opinion of THOMAS, J.). Instead, the States are the particular beneficiaries of the Clause. Incorporation therefore gives rise to a paradoxical result: Applying the Clause against the States eliminates their right to establish a religion free from federal interference, thereby "prohibit[ing] exactly what the Establishment Clause protected." *Id.,* at 51, 124 S.Ct. 2301; see Amar 33–34.

Put differently, the structural reasons that counsel against incorporating the Tenth Amendment also apply to the Establishment Clause. *Id.,* at 34. To my knowledge, no court has ever suggested that the Tenth Amendment, which "reserve[s] to the States" powers not delegated to the Federal Government, could or should be applied against the States. To incorporate that limitation would be to divest the States of all powers not specifically delegated to them, thereby inverting the original import of the Amendment. Incorporating the Establishment Clause has precisely the same effect.

The most cogent argument in favor of incorporation may be that, by the time of Reconstruction, the framers of the Fourteenth Amendment had come to reinterpret the Establishment Clause (notwithstanding its Federalist origins) as expressing an individual right. On this question, historical evidence from the 1860's is mixed. Congressmen who catalogued the personal rights protected by the First Amendment commonly referred to speech, press, petition, and assembly, but not to a personal right of nonestablishment; instead, they spoke only of "'free exercise'" or "'freedom of conscience.'" Amar 253, and 385, n. 91 (collecting sources). There may be reason to think these lists were abbreviated, and silence on the issue is not dispositive. See Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 Ariz. St. L.J. 1085, 1141–1145 (1995); but cf. S. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom 50–52 (1995). Given the textual and logical difficulties posed by incorporation, however, there is no warrant for transforming the meaning of the Establishment Clause without a firm historical foundation. See *Newdow, supra,* at 51, 124 S.Ct. 2301 (opinion of THOMAS, J.). The burden of persuasion therefore rests with those who claim that the Clause assumed a different meaning upon adoption of the Fourteenth Amendment.[1]

II

Even if the Establishment Clause were properly incorporated against the States, the municipal

---

[1] This Court has never squarely addressed these barriers to the incorporation of the Establishment Clause. When the issue was first presented in *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), the Court casually asserted that "the Fourteenth Amendment [has been] interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause." *Id.,* at 15, 67 S.Ct. 504 (footnote omitted). The cases the Court cited in support of that proposition involved the Free Exercise Clause—which had been incorporated seven years earlier, in *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)—not the Establishment Clause. 330 U.S., at 15, n. 22, 67 S.Ct. 504 (collecting cases). Thus, in the space of a single paragraph and a nonresponsive string citation, the *Everson* Court glibly effected a sea change in constitutional law. The Court's inattention to these doctrinal questions might be explained, although not excused, by the rise of popular conceptions about "separation of church and state" as an "American" constitutional right. See generally P. Hamburger, Separation of Church and State 454–463 (2002); see also *id.,* at 391–454 (discussing the role of nativist sentiment in the campaign for "separation" as an American ideal).

prayers at issue in this case bear no resemblance to the coercive state establishments that existed at the founding. "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Lee v. Weisman,* 505 U.S. 577, 640, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (SCALIA, J., dissenting); see also *Perry,* 545 U.S., at 693–694, 125 S.Ct. 2854 (THOMAS, J., concurring); *Cutter v. Wilkinson,* 544 U.S. 709, 729, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (THOMAS, J., concurring); *Newdow, supra,* at 52, 124 S.Ct. 2301 (opinion of THOMAS, J.). In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue. McConnell, Establishment and Disestablishment, at 2144–2146, 2152–2159. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church. *Id.,* at 2161–2168, 2176–2180.

This is not to say that the state establishments in existence when the Bill of Rights was ratified were uniform. As previously noted, establishments in the South were typically governed through the state legislature or State Constitution, while establishments in New England were administered at the municipal level. See *supra,* at ___. Notwithstanding these variations, both state and local forms of establishment involved "actual legal coercion," *Newdow, supra,* at 52, 124 S.Ct. 2301 (opinion of THOMAS, J.): They exercised government power in order to exact financial support of the church, compel religious observance, or control religious doctrine.

None of these founding-era state establishments remained at the time of Reconstruction. But even assuming that the framers of the Fourteenth Amendment reconceived the nature of the Establishment Clause as a constraint on the States, nothing in the history of the intervening period suggests a fundamental transformation in their understanding of *what constituted an establishment*. At a minimum, there is no support for the proposition that the framers of the Fourteenth Amendment embraced wholly modern notions that the Establishment Clause is violated whenever the "reasonable observer" feels "subtle pressure," *ante,* at ___, ___, or perceives governmental "endors[ement]," *ante,* at ___. For example, of the 37 States in existence when the Fourteenth Amendment was ratified, 27 State Constitutions "contained an explicit reference to God in their preambles." Calabresi & Agudo, Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 Tex. L.Rev. 7, 12, 37 (2008). In addition to the preamble references, 30 State Constitutions contained other references to the divine, using such phrases as "'Almighty God,'" "'[O]ur Creator,'" and "'Sovereign Ruler of the Universe.'" *Id.,* at 37, 38, 39, n. 104. Moreover, the state constitutional provisions that prohibited religious "comp [ulsion]" made clear that the relevant sort of compulsion was legal in nature, of the same type that had characterized founding-era establishments.[2] These provisions strongly suggest that, whatever nonestablishment principles existed in 1868, they included no concern for the finer sensibilities of the "reasonable observer."

---

[2] See, *e.g.,*Del. Const., Art. I, § 1 (1831) ("[N]o man shall, or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent"); Me. Const., Art. I, § 3 (1820) ("[N]o one shall be hurt, molested or restrained in his person, liberty or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience"); Mo. Const., Art. I, § 10 (1865) ("[N]o person can be compelled to erect, support, or attend any place of worship, or maintain any minister of the Gospel or teacher of religion"); R.I. Const., Art. I, § 3 (1842) ("[N]o man shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of his own voluntary contract"); Vt. Const., Ch. I, § 3 (1777) ("[N]o man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience").

Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the "subtle coercive pressures" allegedly felt by respondents in this case, *ante,* at ___. The majority properly concludes that "[o]ffense ... does not equate to coercion," since "[a]dults often encounter speech they find disagreeable[,] and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." *Ante,* at ___. I would simply add, in light of the foregoing history of the Establishment Clause, that "[p]eer pressure, unpleasant as it may be, is not coercion" either. *Newdow,* 542 U.S., at 49, 124 S.Ct. 2301 (opinion of THOMAS, J.).

Justice BREYER, dissenting.

As we all recognize, this is a "fact-sensitive" case. *Ante,* at ___ (opinion of KENNEDY, J.); see also *post,* at ___ (KAGAN, J., dissenting); 681 F.3d 20, 34 (C.A.2 2012) (explaining that the Court of Appeals' holding follows from the "totality of the circumstances"). The Court of Appeals did not believe that the Constitution forbids legislative prayers that incorporate content associated with a particular denomination. *Id.,* at 28. Rather, the court's holding took that content into account simply because it indicated that the town had not followed a sufficiently inclusive "prayer-giver selection process." *Id.,* at 30. It also took into account related "actions (and inactions) of prayer-givers and town officials." *Ibid.* Those actions and inactions included (1) a selection process that led to the selection of "clergy almost exclusively from places of worship located within the town's borders," despite the likelihood that significant numbers of town residents were members of congregations that gather just outside those borders; (2) a failure to "infor[m] members of the general public that volunteers" would be acceptable prayer givers; and (3) a failure to "infor[m] prayer-givers that invocations were not to be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker." *Id.,* at 31–32 (internal quotation marks omitted).

The Court of Appeals further emphasized what it was not holding. It did not hold that "the town may not open its public meetings with a prayer," or that "any prayers offered in this context must be blandly 'nonsectarian.'" *Id.,* at 33. In essence, the Court of Appeals merely held that the town must do more than it had previously done to try to make its prayer practices inclusive of other faiths. And it did not prescribe a single constitutionally required method for doing so.

In my view, the Court of Appeals' conclusion and its reasoning are convincing. Justice KAGAN's dissent is consistent with that view, and I join it. I also here emphasize several factors that I believe underlie the conclusion that, on the particular facts of this case, the town's prayer practice violated the Establishment Clause.

First, Greece is a predominantly Christian town, but it is not exclusively so. A map of the town's houses of worship introduced in the District Court shows many Christian churches within the town's limits. It also shows a Buddhist temple within the town and several Jewish synagogues just outside its borders, in the adjacent city of Rochester, New York. *Id.,* at 24. Yet during the more than 120 monthly meetings at which prayers were delivered during the record period (from 1999 to 2010), only four prayers were delivered by non-Christians. And all of these occurred in 2008, shortly after the plaintiffs began complaining about the town's Christian prayer practice and nearly a decade after that practice had commenced. See *post,* at ___, ___.

To be precise: During 2008, two prayers were delivered by a Jewish layman, one by the chairman of a Baha'i congregation, and one by a Wiccan priestess. The Jewish and Wiccan prayer givers were invited only after they reached out to the town to inquire about giving an invocation. The town

apparently invited the Baha'i chairman on its own initiative. The inclusivity of the 2008 meetings, which contrasts starkly with the exclusively single-denomination prayers every year before and after, is commendable. But the Court of Appeals reasonably decided not to give controlling weight to that inclusivity, for it arose only in response to the complaints that presaged this litigation, and it did not continue into the following years.

Second, the town made no significant effort to inform the area's non-Christian houses of worship about the possibility of delivering an opening prayer. See *post,* at ___. Beginning in 1999, when it instituted its practice of opening its monthly board meetings with prayer, Greece selected prayer givers as follows: Initially, the town's employees invited clergy from each religious organization listed in a "Community Guide" published by the Greece Chamber of Commerce. After that, the town kept a list of clergy who had accepted invitations and reinvited those clergy to give prayers at future meetings. From time to time, the town supplemented this list in response to requests from citizens and to new additions to the Community Guide and a town newspaper called the Greece Post.

The plaintiffs do not argue that the town intentionally discriminated against non-Christians when choosing whom to invite, 681 F.3d, at 26, and the town claims, plausibly, that it would have allowed anyone who asked to give an invocation to do so. Rather, the evident reasons why the town consistently chose Christian prayer givers are that the Buddhist and Jewish temples mentioned above were not listed in the Community Guide or the Greece Post and that the town limited its list of clergy almost exclusively to representatives of houses of worship situated within Greece's town limits (again, the Buddhist temple on the map was within those limits, but the synagogues were just outside them). *Id.,* at 24, 31.

Third, in this context, the fact that nearly all of the prayers given reflected a single denomination takes on significance. That significance would have been the same had all the prayers been Jewish, or Hindu, or Buddhist, or of any other denomination. The significance is that, in a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing. It could, for example, have posted its policy of permitting anyone to give an invocation on its website, greeceny.gov, which provides dates and times of upcoming town board meetings along with minutes of prior meetings. It could have announced inclusive policies at the beginning of its board meetings, just before introducing the month's prayer giver. It could have provided information to those houses of worship of all faiths that lie just outside its borders and include citizens of Greece among their members. Given that the town could easily have made these or similar efforts but chose not to, the fact that all of the prayers (aside from the 2008 outliers) were given by adherents of a single religion reflects a lack of effort to include others. And that is what I take to be a major point of Justice KAGAN's related discussion. See *post,* at ___, ___, ___, ___.

Fourth, the fact that the board meeting audience included citizens with business to conduct also contributes to the importance of making more of an effort to include members of other denominations. It does not, however, automatically change the nature of the meeting from one where an opening prayer is permissible under the Establishment Clause to one where it is not. Cf. *post,* at ___, ___, ___.

Fifth, it is not normally government's place to rewrite, to parse, or to critique the language of particular prayers. And it is always possible that members of one religious group will find that prayers of other groups (or perhaps even a moment of silence) are not compatible with their faith. Despite this risk, the Constitution does not forbid opening prayers. But neither does the Constitution forbid efforts to explain to those who give the prayers the nature of the occasion and the audience.

The U.S. House of Representatives, for example, provides its guest chaplains with the following

guidelines, which are designed to encourage the sorts of prayer that are consistent with the purpose of an invocation for a government body in a religiously pluralistic Nation:

> "The guest chaplain should keep in mind that the House of Representatives is comprised of Members of many different faith traditions.
>
> "The length of the prayer should not exceed 150 words.
>
> "The prayer must be free from personal political views or partisan politics, from sectarian controversies, and from any intimations pertaining to foreign or domestic policy." App. to Brief for Respondents 2a.

The town made no effort to promote a similarly inclusive prayer practice here. See *post,* at ___.

As both the Court and Justice KAGAN point out, we are a Nation of many religions. *Ante,* at ___; *post,* at ___, ___. And the Constitution's Religion Clauses seek to "protec[t] the Nation's social fabric from religious conflict." *Zelman v. Simmons–Harris,* 536 U.S. 639, 717, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (BREYER, J., dissenting). The question in this case is whether the prayer practice of the town of Greece, by doing too little to reflect the religious diversity of its citizens, did too much, even if unintentionally, to promote the "political division along religious lines" that "was one of the principal evils against which the First Amendment was intended to protect." *Lemon v. Kurtzman,* 403 U.S. 602, 622, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

In seeking an answer to that fact-sensitive question, "I see no test-related substitute for the exercise of legal judgment." *Van Orden v. Perry,* 545 U.S. 677, 700, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in judgment). Having applied my legal judgment to the relevant facts, I conclude, like Justice KAGAN, that the town of Greece failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith. Under these circumstances, I would affirm the judgment of the Court of Appeals that Greece's prayer practice violated the Establishment Clause.

I dissent from the Court's decision to the contrary.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

For centuries now, people have come to this country from every corner of the world to share in the blessing of religious freedom. Our Constitution promises that they may worship in their own way, without fear of penalty or danger, and that in itself is a momentous offering. Yet our Constitution makes a commitment still more remarkable—that however those individuals worship, they will count as full and equal American citizens. A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.

I respectfully dissent from the Court's opinion because I think the Town of Greece's prayer practices violate that norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. I do not contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court's decision in *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer. And I believe that pluralism and inclusion in a town hall can satisfy the constitutional

requirement of neutrality; such a forum need not become a religion-free zone. But still, the Town of Greece should lose this case. The practice at issue here differs from the one sustained in *Marsh* because Greece's town meetings involve participation by ordinary citizens, and the invocations given—directly to those citizens—were predominantly sectarian in content. Still more, Greece's Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought (except briefly when this suit was filed) to involve, accommodate, or in any way reach out to adherents of non-Christian religions. So month in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government.

I

To begin to see what has gone wrong in the Town of Greece, consider several hypothetical scenarios in which sectarian prayer—taken straight from this case's record—infuses governmental activities. None involves, as this case does, a proceeding that could be characterized as a legislative session, but they are useful to elaborate some general principles. In each instance, assume (as was true in Greece) that the invocation is given pursuant to government policy and is representative of the prayers generally offered in the designated setting:

- You are a party in a case going to trial; let's say you have filed suit against the government for violating one of your legal rights. The judge bangs his gavel to call the court to order, asks a minister to come to the front of the room, and instructs the 10 or so individuals present to rise for an opening prayer. The clergyman faces those in attendance and says: "Lord, God of all creation,.... We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength ... from his resurrection at Easter. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side.... Amen." App. 88a–89a. The judge then asks your lawyer to begin the trial.
- It's election day, and you head over to your local polling place to vote. As you and others wait to give your names and receive your ballots, an election official asks everyone there to join him in prayer. He says: "We pray this [day] for the guidance of the Holy Spirit as [we vote].... Let's just say the Our Father together. 'Our Father, who art in Heaven, hallowed be thy name; thy Kingdom come, thy will be done, on earth as it is in Heaven....'" *Id.,* at 56a. And after he concludes, he makes the sign of the cross, and appears to wait expectantly for you and the other prospective voters to do so too.
- You are an immigrant attending a naturalization ceremony to finally become a citizen. The presiding official tells you and your fellow applicants that before administering the oath of allegiance, he would like a minister to pray for you and with you. The pastor steps to the front of the room, asks everyone to bow their heads, and recites: "[F]ather, son, and Holy Spirit—it is with a due sense of reverence and awe that we come before you [today] seeking your blessing.... You are ... a wise God, oh Lord, ... as evidenced even in the plan of redemption that is fulfilled in Jesus Christ. We ask that you would give freely and abundantly wisdom to one and to all ... in the name of the Lord and Savior Jesus Christ, who lives with you and the Holy Spirit, one God for ever and ever. Amen." *Id.,* at 99a–100a.

I would hold that the government officials responsible for the above practices—that is, for prayer

repeatedly invoking a single religion's beliefs in these settings—crossed a constitutional line. I have every confidence the Court would agree. See *ante,* at ___ (ALITO, J., concurring). And even Greece's attorney conceded that something like the first hypothetical (he was not asked about the others) would violate the First Amendment. See Tr. of Oral Arg. 3–4. Why?

The reason, of course, has nothing to do with Christianity as such. This opinion is full of Christian prayers, because those were the only invocations offered in the Town of Greece. But if my hypotheticals involved the prayer of some other religion, the outcome would be exactly the same. Suppose, for example, that government officials in a predominantly Jewish community asked a rabbi to begin all public functions with a chanting of the Sh'ma and V'ahavta. ("Hear O Israel! The Lord our God, the Lord is One.... Bind [these words] as a sign upon your hand; let them be a symbol before your eyes; inscribe them on the doorposts of your house, and on your gates.") Or assume officials in a mostly Muslim town requested a muezzin to commence such functions, over and over again, with a recitation of the Adhan. ("God is greatest, God is greatest. I bear witness that there is no deity but God. I bear witness that Muhammed is the Messenger of God.") In any instance, the question would be why such government-sponsored prayer of a single religion goes beyond the constitutional pale.

One glaring problem is that the government in all these hypotheticals has aligned itself with, and placed its imprimatur on, a particular religious creed. "The clearest command of the Establishment Clause," this Court has held, "is that one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). Justices have often differed about a further issue: whether and how the Clause applies to governmental policies favoring religion (of all kinds) over non-religion. Compare, *e.g.,McCreary County v. American Civil Liberties Union of Ky.,* 545 U.S. 844, 860, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) ("[T]he First Amendment mandates governmental neutrality between ... religion and nonreligion"), with, *e.g.,id.,* at 885, 125 S.Ct. 2722 (SCALIA, J., dissenting) ("[T]he Court's oft repeated assertion that the government cannot favor religious practice [generally] is false"). But no one has disagreed with this much:

> "[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington ... down to the present day, has ... ruled out of order government-sponsored endorsement of religion ... where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Lee v. Weisman,* 505 U.S. 577, 641 [112 S.Ct. 2649, 120 L.Ed.2d 467] (1992) (SCALIA, J., dissenting).

See also *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 605, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) ("Whatever else the Establishment Clause may mean[,] ... [it] means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)").[1] By

[1] That principle meant as much to the founders as it does today. The demand for neutrality among religions is not a product of 21st century "political correctness," but of the 18th century view—rendered no less wise by time—that, in George Washington's words, "[r]eligious controversies are always productive of more acrimony and irreconciliable hatreds than those which spring from any other cause." Letter to Edward Newenham (June 22, 1792), in 10 Papers of George Washington: Presidential Series 493 (R. Haggard & M. Mastromarino eds. 2002) (hereinafter PGW). In an age when almost no one in this country was not a Christian of one kind or another, Washington consistently declined to use language or imagery associated only with that religion. See Brief for Paul Finkelman et al. as *Amici Curiae* 15–19 (noting, for example, that in revising his first inaugural address, Washington deleted the phrase "the blessed Religion

authorizing and overseeing prayers associated with a single religion—to the exclusion of all others—the government officials in my hypothetical cases (whether federal, state, or local does not matter) have violated that foundational principle. They have embarked on a course of religious favoritism anathema to the First Amendment.

And making matters still worse: They have done so in a place where individuals come to interact with, and participate in, the institutions and processes of their government. A person goes to court, to the polls, to a naturalization ceremony—and a government official or his hand-picked minister asks her, as the first order of official business, to stand and pray with others in a way conflicting with her own religious beliefs. Perhaps she feels sufficient pressure to go along—to rise, bow her head, and join in whatever others are saying: After all, she wants, very badly, what the judge or poll worker or immigration official has to offer. Or perhaps she is made of stronger mettle, and she opts not to participate in what she does not believe—indeed, what would, for her, be something like blasphemy. She then must make known her dissent from the common religious view, and place herself apart from other citizens, as well as from the officials responsible for the invocations. And so a civic function of some kind brings religious differences to the fore: That public proceeding becomes (whether intentionally or not) an instrument for dividing her from adherents to the community's majority religion, and for altering the very nature of her relationship with her government.

That is not the country we are, because that is not what our Constitution permits. Here, when a citizen stands before her government, whether to perform a service or request a benefit, her religious beliefs do not enter into the picture. See Thomas Jefferson, Virginia Act for Establishing Religious Freedom (Oct. 31, 1785), in 5 The Founders' Constitution 85 (P. Kurland & R. Lerner eds. 1987) ("[O]pinion[s] in matters of religion ... shall in no wise diminish, enlarge, or affect [our] civil capacities"). The government she faces favors no particular religion, either by word or by deed. And that government, in its various processes and proceedings, imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief. When a person goes to court, a polling place, or an immigration proceeding—I could go on: to a zoning agency, a parole board hearing, or the DMV—government officials do not engage in sectarian worship, nor do they ask her to do likewise. They all participate in the business of government not as Christians, Jews, Muslims (and more), but only as Americans—none of them different from any other for that civic purpose. Why not, then, at a town meeting?

II

In both Greece's and the majority's view, everything I have discussed is irrelevant here because this case involves "the tradition of legislative prayer outlined" in *Marsh v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330.*Ante,* at ___. And before I dispute the Town and Court, I want to give them their due: They are right that, under *Marsh,* legislative prayer has a distinctive constitutional warrant by virtue of tradition. As the Court today describes, a long history, stretching back to the first session of

---

revealed in the word of God" because it was understood to denote only Christianity). Thomas Jefferson, who followed the same practice throughout his life, explained that he omitted any reference to Jesus Christ in Virginia's Bill for Establishing Religious Freedom (a precursor to the Establishment Clause) in order "to comprehend, within the mantle of [the law's] protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination." 1 Writings of Thomas Jefferson 62 (P. Ford ed. 1892). And James Madison, who again used only nonsectarian language in his writings and addresses, warned that religious proclamations might, "if not strictly guarded," express only "the creed of the majority and a single sect." Madison's "Detached Memoranda," 3 Wm. & Mary Quarterly 534, 561 (1946).

Congress (when chaplains began to give prayers in both Chambers), "ha[s] shown that prayer in this limited context could 'coexis[t] with the principles of disestablishment and religious freedom.'" *Ante,* at ___ (quoting *Marsh,* 463 U.S., at 786, 103 S.Ct. 3330). Relying on that "unbroken" national tradition, *Marsh* upheld (I think correctly) the Nebraska Legislature's practice of opening each day with a chaplain's prayer as "a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.,* at 792, 103 S.Ct. 3330. And so I agree with the majority that the issue here is "whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures." *Ante,* at ___.

Where I depart from the majority is in my reply to that question. The town hall here is a kind of hybrid. Greece's Board indeed has legislative functions, as Congress and state assemblies do—and that means some opening prayers are allowed there. But much as in my hypotheticals, the Board's meetings are also occasions for ordinary citizens to engage with and petition their government, often on highly individualized matters. That feature calls for Board members to exercise special care to ensure that the prayers offered are inclusive—that they respect each and every member of the community as an equal citizen.[2] But the Board, and the clergy members it selected, made no such effort. Instead, the prayers given in Greece, addressed directly to the Town's citizenry, were *more* sectarian, and *less* inclusive, than anything this Court sustained in *Marsh*. For those reasons, the prayer in Greece departs from the legislative tradition that the majority takes as its benchmark.

A

Start by comparing two pictures, drawn precisely from reality. The first is of Nebraska's (unicameral) Legislature, as this Court and the state senators themselves described it. The second is of town council meetings in Greece, as revealed in this case's record.

It is morning in Nebraska, and senators are beginning to gather in the State's legislative chamber: It is the beginning of the official workday, although senators may not yet need to be on the floor. See *Chambers v. Marsh,* 504 F.Supp. 585, 590, and n. 12 (D.Neb.1980); *Lee,* 505 U.S., at 597, 112 S.Ct. 2649. The chaplain rises to give the daily invocation. That prayer, as the senators emphasized when their case came to this Court, is "directed only at the legislative membership, not at the public at large." Brief for Petitioners in *Marsh* 30. Any members of the public who happen to be in attendance—not very many at this early hour—watch only from the upstairs visitors' gallery. See App. 72 in *Marsh* (senator's testimony that "as a practical matter the public usually is not there" during the prayer).

The longtime chaplain says something like the following (the excerpt is from his own *amicus* brief supporting Greece in this case): "*O God,* who has given all persons talents and varying capacities, Thou dost only require of us that we utilize Thy gifts to a maximum. In this Legislature to which Thou has entrusted special abilities and opportunities, may each recognize his stewardship for the people of the State." Brief for Robert E. Palmer 9. The chaplain is a Presbyterian minister, and "some of his earlier prayers" explicitly invoked Christian beliefs, but he "removed all references to Christ" after a single legislator complained. *Marsh,* 463 U.S., at 793, n. 14, 103 S.Ct. 3330; Brief

[2] Because Justice ALITO questions this point, it bears repeating. I do not remotely contend that "prayer is not allowed" at participatory meetings of "local government legislative bodies"; nor is that the "logical thrust" of any argument I make. *Ante,* at ___. Rather, what I say throughout this opinion is that in this citizen-centered venue, government officials must take steps to ensure—as none of Greece's Board members ever did—that opening prayers are inclusive of different faiths, rather than always identified with a single religion.

for Petitioners in *Marsh* 12. The chaplain also previously invited other clergy members to give the invocation, including local rabbis. See *ibid.*

Now change the channel: It is evening in Greece, New York, and the Supervisor of the Town Board calls its monthly public meeting to order. Those meetings (so says the Board itself) are "the most important part of Town government." See Town of Greece, Town Board, online at http://greeceny. gov/planning/townboard (as visited May 2, 2014 and available in Clerk of Court's case file). They serve assorted functions, almost all actively involving members of the public. The Board may swear in new Town employees and hand out awards for civic accomplishments; it always provides an opportunity (called a Public Forum) for citizens to address local issues and ask for improved services or new policies (for example, better accommodations for the disabled or actions to ameliorate traffic congestion, see Pl. Exhs. 718, 755, in No. 6:08–cv–6088 (WDNY)); and it usually hears debate on individual applications from residents and local businesses to obtain special land-use permits, zoning variances, or other licenses.

The Town Supervisor, Town Clerk, Chief of Police, and four Board members sit at the front of the meeting room on a raised dais. But the setting is intimate: There are likely to be only 10 or so citizens in attendance. A few may be children or teenagers, present to receive an award or fulfill a high school civics requirement.

As the first order of business, the Town Supervisor introduces a local Christian clergy member—denominated the chaplain of the month—to lead the assembled persons in prayer. The pastor steps up to a lectern (emblazoned with the Town's seal) at the front of the dais, and with his back to the Town officials, he faces the citizens present. He asks them all to stand and to "pray as we begin this evening's town meeting." App. 134a. (He does not suggest that anyone should feel free not to participate.) And he says:

> "The beauties of spring ... are an expressive symbol of the new life of the risen Christ. The Holy Spirit was sent to the apostles at Pentecost so that they would be courageous witnesses of the Good News to different regions of the Mediterranean world and beyond. The Holy Spirit continues to be the inspiration and the source of strength and virtue, which we all need in the world of today. And so ... [w]e pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets." *Ibid.*

After the pastor concludes, Town officials behind him make the sign of the cross, as do some members of the audience, and everyone says "Amen." See 681 F.3d 20, 24 (C.A.2 2012). The Supervisor then announces the start of the Public Forum, and a citizen stands up to complain about the Town's contract with a cable company. See App. in No. 10–3635 (CA2), p. A574.

B

Let's count the ways in which these pictures diverge. First, the governmental proceedings at which the prayers occur differ significantly in nature and purpose. The Nebraska Legislature's floor sessions—like those of the U.S. Congress and other state assemblies—are of, by, and for elected lawmakers. Members of the public take no part in those proceedings; any few who attend are spectators only, watching from a high-up visitors' gallery. (In that respect, note that neither the Nebraska Legislature nor the Congress calls for prayer when citizens themselves participate in a hearing—say, by giving testimony relevant to a bill or nomination.) Greece's town meetings, by contrast, revolve around ordinary members of the community. Each and every aspect of those sessions provides opportunities for Town residents to interact with public officials. And the most important parts enable those citizens to petition their government. In the Public Forum, they urge (or

oppose) changes in the Board's policies and priorities; and then, in what are essentially adjudicatory hearings, they request the Board to grant (or deny) applications for various permits, licenses, and zoning variances. So the meetings, both by design and in operation, allow citizens to actively participate in the Town's governance—sharing concerns, airing grievances, and both shaping the community's policies and seeking their benefits.

Second (and following from what I just said), the prayers in these two settings have different audiences. In the Nebraska Legislature, the chaplain spoke to, and only to, the elected representatives. Nebraska's senators were adamant on that point in briefing *Marsh,* and the facts fully supported them: As the senators stated, "[t]he activity is a matter of internal daily procedure directed only at the legislative membership, not at [members of] the public." Brief for Petitioners in *Marsh* 30; see Reply Brief for Petitioners in *Marsh* 8 ("The [prayer] practice involves no function or power of government vis-à-vis the Nebraska citizenry, but merely concerns an internal decision of the Nebraska Legislature as to the daily procedure by which it conducts its own affairs"). The same is true in the U.S. Congress and, I suspect, in every other state legislature. See Brief for Members of Congress as *Amici Curiae* 6 ("Consistent with the fact that attending citizens are mere passive observers, prayers in the House are delivered for the Representatives themselves, not those citizens"). As several Justices later noted (and the majority today agrees, see *ante,* at ___),[3] *Marsh* involved "government officials invok[ing] spiritual inspiration entirely for their own benefit without directing any religious message at the citizens they lead." *Lee,* 505 U.S., at 630, n. 8, 112 S.Ct. 2649 (Souter, J., concurring).

The very opposite is true in Greece: Contrary to the majority's characterization, see *ante,* at ___, the prayers there are directed squarely at the citizens. Remember that the chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing—the 10 or so members of the public, perhaps including children. See *supra,* at ___. And he typically addresses those people, as even the majority observes, as though he is "directing [his] congregation." *Ante,* at ___. He almost always begins with some version of "Let us all pray together." See, *e.g.,* App. 75a, 93a, 106a, 109a. Often, he calls on everyone to stand and bow their heads, and he may ask them to recite a common prayer with him. See, *e.g., id.,* at 28a, 42a, 43a, 56a, 77a. He refers, constantly, to a collective "we"—to "our" savior, for example, to the presence of the Holy Spirit in "our" lives, or to "our brother the Lord Jesus Christ." See, *e.g., id.,* at 32a, 45a, 47a, 69a, 71a. In essence, the chaplain leads, as the first part of a town meeting, a highly intimate (albeit relatively brief) prayer service, with the public serving as his congregation.

And third, the prayers themselves differ in their content and character. *Marsh* characterized the prayers in the Nebraska Legislature as "in the Judeo–Christian tradition," and stated, as a relevant (even if not dispositive) part of its analysis, that the chaplain had removed all explicitly Christian references at a senator's request. 463 U.S., at 793, n. 14, 103 S.Ct. 3330. And as the majority acknowledges, see *ante,* at ___, *Marsh* hinged on the view that "that the prayer opportunity ha[d] [not] been exploited to proselytize or advance any one ... faith or belief"; had it been otherwise, the Court would have reached a different decision. 463 U.S., at 794–795, 103 S.Ct. 3330.

But no one can fairly read the prayers from Greece's Town meetings as anything other than explicitly Christian—constantly and exclusively so. From the time Greece established its prayer practice in 1999 until litigation loomed nine years later, all of its monthly chaplains were Christian

[3] For ease of reference and to avoid confusion, I refer to Justice KENNEDY's opinion as "the majority." But the language I cite that appears in Part II–B of that opinion is, in fact, only attributable to a plurality of the Court.

clergy. And after a brief spell surrounding the filing of this suit (when a Jewish layman, a Wiccan priestess, and a Baha'i minister appeared at meetings), the Town resumed its practice of inviting only clergy from neighboring Protestant and Catholic churches. See App. 129a–143a. About two-thirds of the prayers given over this decade or so invoked "Jesus," "Christ," "Your Son," or "the Holy Spirit"; in the 18 months before the record closed, 85% included those references. See generally *id.,* at 27a–143a. Many prayers contained elaborations of Christian doctrine or recitations of scripture. See, *e.g., id.,* at 129a ("And in the life and death, resurrection and ascension of the Savior Jesus Christ, the full extent of your kindness shown to the unworthy is forever demonstrated"); *id.,* at 94a ("For unto us a child is born; unto us a son is given. And the government shall be upon his shoulder ..."). And the prayers usually close with phrases like "in the name of Jesus Christ" or " in the name of Your son." See, *e.g., id.,* at 55a, 65a, 73a, 85a.

Still more, the prayers betray no understanding that the American community is today, as it long has been, a rich mosaic of religious faiths. See *Braunfeld v. Brown,* 366 U.S. 599, 606, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion) (recognizing even half a century ago that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference"). The monthly chaplains appear almost always to assume that everyone in the room is Christian (and of a kind who has no objection to government-sponsored worship[4]). The Town itself has never urged its chaplains to reach out to members of other faiths, or even to recall that they might be present. And accordingly, few chaplains have made any effort to be inclusive; none has thought even to assure attending members of the public that they need not participate in the prayer session. Indeed, as the majority forthrightly recognizes, see *ante,* at ___, when the plaintiffs here began to voice concern over prayers that excluded some Town residents, one pastor pointedly thanked the Board "[o]n behalf of all God-fearing people" for holding fast, and another declared the objectors "in the minority and ... ignorant of the history of our country." App. 137a, 108a.

C

Those three differences, taken together, remove this case from the protective ambit of *Marsh* and the history on which it relied. To recap: *Marsh* upheld prayer addressed to legislators alone, in a proceeding in which citizens had no role—and even then, only when it did not "proselytize or advance" any single religion. 463 U.S., at 794, 103 S.Ct. 3330. It was that legislative prayer practice (not every prayer in a body exercising any legislative function) that the Court found constitutional given its "unambiguous and unbroken history." *Id.,* at 792, 103 S.Ct. 3330. But that approved practice, as I have shown, is not Greece's. None of the history *Marsh* cited—and none the majority details today—supports calling on citizens to pray, in a manner consonant with only a single religion's beliefs, at a participatory public proceeding, having both legislative and adjudicative components. Or to use the majority's phrase, no "history shows that th[is] specific practice is permitted." *Ante,* at ___. And so, contra the majority, Greece's prayers cannot simply ride on the constitutional coattails of the legislative tradition *Marsh* described. The Board's practice must, in its own particulars, meet constitutional requirements.

And the guideposts for addressing that inquiry include the principles of religious neutrality I

[4] Leaders of several Baptist and other Christian congregations have explained to the Court that "many Christians believe ... that their freedom of conscience is violated when they are pressured to participate in government prayer, because such acts of worship should only be performed voluntarily." Brief for Baptist Joint Committee for Religious Liberty et al. as *Amici Curiae* 18.

discussed earlier. See *supra,* at ___. The government (whether federal, state, or local) may not favor, or align itself with, any particular creed. And that is nowhere more true than when officials and citizens come face to face in their shared institutions of governance. In performing civic functions and seeking civic benefits, each person of this nation must experience a government that belongs to one and all, irrespective of belief. And for its part, each government must ensure that its participatory processes will not classify those citizens by faith, or make relevant their religious differences.

To decide how Greece fares on that score, think again about how its prayer practice works, meeting after meeting. The case, I think, has a fair bit in common with my earlier hypotheticals. See *supra,* at ___, ___. Let's say that a Muslim citizen of Greece goes before the Board to share her views on policy or request some permit. Maybe she wants the Board to put up a traffic light at a dangerous intersection; or maybe she needs a zoning variance to build an addition on her home. But just before she gets to say her piece, a minister deputized by the Town asks her to pray "in the name of God's only son Jesus Christ." App. 99a. She must think—it is hardly paranoia, but only the truth—that Christian worship has become entwined with local governance. And now she faces a choice—to pray alongside the majority as one of that group or somehow to register her deeply felt difference. She is a strong person, but that is no easy call—especially given that the room is small and her every action (or inaction) will be noticed. She does not wish to be rude to her neighbors, nor does she wish to aggravate the Board members whom she will soon be trying to persuade. And yet she does not want to acknowledge Christ's divinity, any more than many of her neighbors would want to deny that tenet. So assume she declines to participate with the others in the first act of the meeting—or even, as the majority proposes, that she stands up and leaves the room altogether, see *ante,* at ___. At the least, she becomes a different kind of citizen, one who will not join in the religious practice that the Town Board has chosen as reflecting its own and the community's most cherished beliefs. And she thus stands at a remove, based solely on religion, from her fellow citizens and her elected representatives.

Everything about that situation, I think, infringes the First Amendment. (And of course, as I noted earlier, it would do so no less if the Town's clergy always used the liturgy of some other religion. See *supra,* at ___.) That the Town Board selects, month after month and year after year, prayergivers who will reliably speak in the voice of Christianity, and so places itself behind a single creed. That in offering those sectarian prayers, the Board's chosen clergy members repeatedly call on individuals, prior to participating in local governance, to join in a form of worship that may be at odds with their own beliefs. That the clergy thus put some residents to the unenviable choice of either pretending to pray like the majority or declining to join its communal activity, at the very moment of petitioning their elected leaders. That the practice thus divides the citizenry, creating one class that shares the Board's own evident religious beliefs and another (far smaller) class that does not. And that the practice also alters a dissenting citizen's relationship with her government, making her religious difference salient when she seeks only to engage her elected representatives as would any other citizen.

None of this means that Greece's town hall must be religion- or prayer-free. "[W]e are a religious people," *Marsh* observed, 463 U.S., at 792, 103 S.Ct. 3330, and prayer draws some warrant from tradition in a town hall, as well as in Congress or a state legislature, see *supra,* at ___. What the circumstances here demand is the recognition that we are a pluralistic people too. When citizens of all faiths come to speak to each other and their elected representatives in a legislative session, the government must take especial care to ensure that the prayers they hear will seek to include, rather than serve to divide. No more is required—but that much is crucial—to treat every citizen, of

whatever religion, as an equal participant in her government.

And contrary to the majority's (and Justice ALITO's) view, see *ante,* at ___; *ante,* at ___, that is not difficult to do. If the Town Board had let its chaplains know that they should speak in nonsectarian terms, common to diverse religious groups, then no one would have valid grounds for complaint. See *Joyner v. Forsyth County,* 653 F.3d 341, 347 (C.A.4 2011) (Wilkinson, J.) (Such prayers show that "those of different creeds are in the end kindred spirits, united by a respect paid higher providence and by a belief in the importance of religious faith"). Priests and ministers, rabbis and imams give such invocations all the time; there is no great mystery to the project. (And providing that guidance would hardly have caused the Board to run afoul of the idea that "[t]he First Amendment is not a majority rule," as the Court (headspinningly) suggests, *ante,* at ___; what does that is the Board's *refusal* to reach out to members of minority religious groups.) Or if the Board preferred, it might have invited clergy of many faiths to serve as chaplains, as the majority notes that Congress does. See *ante,* at ___. When one month a clergy member refers to Jesus, and the next to Allah or Jehovah—as the majority hopefully though counterfactually suggests happened here, see *ante,* at ___, ___—the government does not identify itself with one religion or align itself with that faith's citizens, and the effect of even sectarian prayer is transformed. So Greece had multiple ways of incorporating prayer into its town meetings—reflecting all the ways that prayer (as most of us know from daily life) can forge common bonds, rather than divide. See also *ante,* at ___ (BREYER, J., dissenting).

But Greece could not do what it did: infuse a participatory government body with one (and only one) faith, so that month in and month out, the citizens appearing before it become partly defined by their creed—as those who share, and those who do not, the community's majority religious belief. In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans (or here, as Grecians). That is what it means to be an equal citizen, irrespective of religion. And that is what the Town of Greece precluded by so identifying itself with a single faith.

III

How, then, does the majority go so far astray, allowing the Town of Greece to turn its assemblies for citizens into a forum for Christian prayer? The answer does not lie in first principles: I have no doubt that every member of this Court believes as firmly as I that our institutions of government belong equally to all, regardless of faith. Rather, the error reflects two kinds of blindness. First, the majority misapprehends the facts of this case, as distinct from those characterizing traditional legislative prayer. And second, the majority misjudges the essential meaning of the religious worship in Greece's town hall, along with its capacity to exclude and divide.

The facts here matter to the constitutional issue; indeed, the majority itself acknowledges that the requisite inquiry—a "fact-sensitive" one—turns on "the setting in which the prayer arises and the audience to whom it is directed." *Ante,* at ___. But then the majority glides right over those considerations—at least as they relate to the Town of Greece. When the majority analyzes the "setting" and "audience" for prayer, it focuses almost exclusively on Congress and the Nebraska Legislature, see *ante,* at ___, ___, ___, ___; it does not stop to analyze how far those factors differ in Greece's meetings. The majority thus gives short shrift to the gap—more like, the chasm—between a legislative floor session involving only elected officials and a town hall revolving around ordinary citizens. And similarly the majority neglects to consider how the prayers in Greece are mostly addressed to members of the public, rather than (as in the forums it discusses) to the

lawmakers. "The District Court in *Marsh,*" the majority expounds, "described the prayer exercise as 'an internal act' directed at the Nebraska Legislature's 'own members.'" *Ante,* at 1825 (quoting *Chambers v. Marsh,* 504 F.Supp., at 588); see *ante,* at ___ (similarly noting that Nebraska senators "invoke[d] spiritual inspiration entirely for their own benefit" and that prayer in Congress is "religious worship for national representatives" only). Well, yes, so it is in Lincoln, and on Capitol Hill. But not in Greece, where as I have described, the chaplain faces the Town's residents—with the Board watching from on high—and calls on them to pray together. See *supra,* at ___, ___.

And of course—as the majority sidesteps as well—to pray in the name of Jesus Christ. In addressing the sectarian content of these prayers, the majority again changes the subject, preferring to explain what happens in *other* government bodies. The majority notes, for example, that Congress "welcom[es] ministers of many creeds," who commonly speak of "values that count as universal," *ante,* at ___, ___; and in that context, the majority opines, the fact "[t]hat a prayer is given in the name of Jesus, Allah, or Jehovah ... does not remove it from" *Marsh* 's protection, see *ante,* at 1823. But that case is not this one, as I have shown, because in Greece only Christian clergy members speak, and then mostly in the voice of their own religion; no Allah or Jehovah ever is mentioned. See *supra,* at ___. So all the majority can point to in the Town's practice is that the Board "maintains a policy of nondiscrimination," and "represent[s] that it would welcome a prayer by any minister or layman who wishe[s] to give one." *Ante,* at ___. But that representation has never been publicized; nor has the Board (except for a few months surrounding this suit's filing) offered the chaplain's role to any non-Christian clergy or layman, in either Greece or its environs; nor has the Board ever provided its chaplains with guidance about reaching out to members of other faiths, as most state legislatures and Congress do. See 732 F.Supp.2d 195, 197–203 (W.D.N.Y.2010); National Conference of State Legislatures, Inside the Legislative Process: Prayer Practices 5–145, 5–146 (2002); *ante,* at ___ (BREYER, J., dissenting). The majority thus errs in assimilating the Board's prayer practice to that of Congress or the Nebraska Legislature. Unlike those models, the Board is determinedly—and relentlessly—noninclusive.[5]

And the month in, month out sectarianism the Board chose for its meetings belies the majority's refrain that the prayers in Greece were "ceremonial" in nature. *Ante,* at ___, ___, ___, ___. Ceremonial references to the divine surely abound: The majority is right that "the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court'" each fits the bill. *Ante,* at ___. But prayers evoking "the saving sacrifice of Jesus Christ on the cross," "the plan of redemption that is fulfilled in Jesus Christ," "the life and death, resurrection and ascension of the Savior Jesus Christ," the workings of the Holy Spirit, the events of Pentecost, and the belief that God "has raised up the Lord Jesus" and "will raise us, in our turn, and put us by His side"? See App. 56a, 88a–89a, 99a, 123a, 129a, 134a. No. These are statements of profound belief and deep meaning, subscribed to by many, denied by some. They "speak of the depths of [one's] life, of the source of[one's] being, of [one's] ultimate concern, of what [one] take[s] seriously

[5] Justice ALITO similarly falters in attempting to excuse the Town Board's constant sectarianism. His concurring opinion takes great pains to show that the problem arose from a sort of bureaucratic glitch: The Town's clerks, he writes, merely "did a bad job in compiling the list" of chaplains. *Ante,* at ___; see *ante,* at ___. Now I suppose one question that account raises is why in over a decade, no member of the Board noticed that the clerk's list was producing prayers of only one kind. But put that aside. Honest oversight or not, the problem remains: Every month for more than a decade, the Board aligned itself, through its prayer practices, with a single religion. That the concurring opinion thinks my objection to that is "really quite niggling," *ante,* at ___, says all there is to say about the difference between our respective views.

without any reservation." P. Tillich, The Shaking of the Foundations 57 (1948). If they (and the central tenets of other religions) ever become mere ceremony, this country will be a fundamentally different—and, I think, poorer—place to live.

But just for that reason, the not-so-implicit message of the majority's opinion—"What's the big deal, anyway?"—is mistaken. The content of Greece's prayers *is* a big deal, to Christians and non-Christians alike. A person's response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world. And the responses of different individuals, in Greece and across this country, of course vary. Contrary to the majority's apparent view, such sectarian prayers are not "part of our expressive idiom" or "part of our heritage and tradition," assuming the word "our" refers to all Americans. *Ante,* at ___. They express beliefs that are fundamental to some, foreign to others—and because that is so they carry the ever-present potential to both exclude and divide. The majority, I think, assesses too lightly the significance of these religious differences, and so fears too little the "religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden v. Perry,* 545 U.S. 677, 704, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in judgment). I would treat more seriously the multiplicity of Americans' religious commitments, along with the challenge they can pose to the project—the distinctively American project—of creating one from the many, and governing all as united.

IV

In 1790, George Washington traveled to Newport, Rhode Island, a longtime bastion of religious liberty and the home of the first community of American Jews. Among the citizens he met there was Moses Seixas, one of that congregation's lay officials. The ensuing exchange between the two conveys, as well as anything I know, the promise this country makes to members of every religion.

Seixas wrote first, welcoming Washington to Newport. He spoke of "a deep sense of gratitude" for the new American Government—"a Government, which to bigotry gives no sanction, to persecution no assistance—but generously affording to All liberty of conscience, and immunities of Citizenship: deeming every one, of whatever Nation, tongue, or language, equal parts of the great governmental Machine." Address from Newport Hebrew Congregation (Aug. 17, 1790), in 6 PGW 286, n. 1 (M. Mastromarino ed. 1996). The first phrase there is the more poetic: a government that to "bigotry gives no sanction, to persecution no assistance." But the second is actually the more startling and transformative: a government that, beyond not aiding persecution, grants "immunities of citizenship" to the Christian and the Jew alike, and makes them "equal parts" of the whole country.

Washington responded the very next day. Like any successful politician, he appreciated a great line when he saw one—and knew to borrow it too. And so he repeated, word for word, Seixas's phrase about neither sanctioning bigotry nor assisting persecution. But he no less embraced the point Seixas had made about equality of citizenship. "It is now no more," Washington said, "that toleration is spoken of, as if it was by the indulgence of one class of people" to another, lesser one. For "[a]ll possess alike ... immunities of citizenship." Letter to Newport Hebrew Congregation (Aug. 18, 1790), in 6 PGW 285. That is America's promise in the First Amendment: full and equal membership in the polity for members of every religious group, assuming only that they, like anyone "who live[s] under [the Government's] protection[,] should demean themselves as good citizens." *Ibid.*

For me, that remarkable guarantee means at least this much: When the citizens of this country

approach their government, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines. I believe, for all the reasons I have given, that the Town of Greece betrayed that promise. I therefore respectfully dissent from the Court's decision.

CARSON, AS NEXT FRIEND OF O.C., v. MAKIN, 142 S.Ct. 1987 (2022)

Syllabus[*]

Maine has enacted a program of tuition assistance for parents who live in school districts that neither operate a secondary school of their own nor contract with a particular school in another district. Under that program, parents designate the secondary school they would like their child to attend, and the school district transmits payments to that school to help defray the costs of tuition. Participating private schools must meet certain requirements to be eligible to receive tuition payments, including either accreditation from the New England Association of Schools and Colleges (NEASC) or approval from the Maine Department of Education. But they may otherwise differ from Maine public schools in various ways. Since 1981, however, Maine has limited tuition assistance payments to "nonsectarian" schools.

Petitioners sought tuition assistance to send their children to Bangor Christian Schools (BCS) and Temple Academy. Although both BCS and Temple Academy are accredited by NEASC, the schools do not qualify as "nonsectarian" and are thus ineligible to receive tuition payments under Maine's tuition assistance program. Petitioners sued the commissioner of the Maine Department of Education, alleging that the "nonsectarian" requirement violated the Free Exercise Clause and the Establishment Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. The District Court rejected petitioners' constitutional claims and granted judgment to the commissioner. The First Circuit affirmed.

Held: Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments violates the Free Exercise Clause.

(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, 108 S.Ct. 1319, 99 L.Ed.2d 534. The Court recently applied this principle 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. ——, 137 S.Ct. 2012, 198 L.Ed.2d 551 the Court considered a Missouri program that offered grants to qualifying nonprofit organizations that installed cushioning playground surfaces, but denied such grants to any applicant that was owned or controlled by a church, sect, or other religious entity. The Court held 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." 582 U. S., at ——–——, 137 S.Ct., at 2021. And in *Espinoza* v. *Montana Department of Revenue*, 591 U. S. ——, 140 S.Ct. 2246, 207 L.Ed.2d 679 the Court 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 religious schools. 591 U. S., at ——, 140 S.Ct., at 2252. "A State need not subsidize private education," the Court concluded, "[b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.,* at ——, 140 S.Ct., at 2261.

(b) The principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case. Maine

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

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*, the religious schools in this case are disqualified from this generally available benefit "solely because of their religious character." 582 U. S., at ——, 137 S.Ct., at 2021. Likewise, in *Espinoza*, as here, the Court considered a state benefit program that provided public funds to support tuition payments at private schools and specifically carved out private religious schools from those eligible to receive such funds. Both that program and this one disqualify certain private schools from public funding "solely because they are religious." 591 U. S., at ——, 140 S.Ct., at 2261. A law that operates in that manner must be subjected to "the strictest scrutiny." *Id.*, at —— – ——, 140 S.Ct., at 2257.

Maine's program cannot survive strict scrutiny. 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 v. Simmons-Harris*, 536 U.S. 639, 652–653, 122 S.Ct. 2460, 153 L.Ed.2d 604. 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 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.

(c) The First Circuit's attempts to recharacterize the nature of Maine's tuition assistance program do not suffice to distinguish this case from *Trinity Lutheran* or *Espinoza.*

(1) The First Circuit held that the "nonsectarian" requirement was constitutional because the benefit was properly viewed not as tuition 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." 979 F.3d 21, 44. But the statute does not say anything like that. The benefit provided by statute 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. Moreover, 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, private schools do not have to accept all students, while public schools generally do. In addition, the free public education that Maine insists it is providing through the tuition assistance program is often not free, as some participating private schools charge several times the maximum benefit that Maine is willing to provide. And the curriculum taught at participating private schools need not even resemble that taught in the Maine public schools.

The key manner in which participating private schools *are* required to resemble Maine public schools, however, is that they must be secular. 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. Maine has chosen 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 public benefit program—including the prohibition on denying the benefit based on a recipient's religious exercise.

(2) 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." 979

F.3d at 35, 37–38. *Trinity Lutheran* and *Espinoza* 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*, 591 U. S. ——, ——, 140 S.Ct. 2049, 2064, 207 L.Ed.2d 870. In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.

Locke v. Davey, 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1, does not assist Maine here. The scholarship funds at issue in *Locke* were intended to be used "to prepare for the ministry." *Trinity Lutheran*, 582 U. S., at ——, 137 S.Ct., at 2023. *Locke*'s reasoning expressly turned on what it identified as the "historic and substantial state interest" against using "taxpayer funds to support church leaders." 540 U.S. at 722, 725, 124 S.Ct. 1307. But "it is clear that there is no 'historic and substantial' tradition against aiding [private religious] schools" that is "comparable." *Espinoza*, 591 U. S., at ——, 140 S.Ct., at 2259. *Locke* cannot be read 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.

979 F.3d 21, reversed and remanded.

[Respondent Makin, Commissioner of the Maine Department of Education sued in his official capacity, was supported by the United States as amicus curiae. The petitioner parents were represented by Christian conservative legal organization First Liberty Institute and libertarian legal advocacy organization Institute for Justice.]

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. BREYER, J., filed a dissenting opinion, in which KAGAN, J., joined, and in which SOTOMAYOR, J., joined as to all but Part I–B. SOTOMAYOR, J., filed a dissenting opinion.

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," Me. Rev. Stat. Ann., Tit. 20–A, § 2(1) (2008), and that the required schools be operated by "the legislative and governing bodies of local school administrative units," § 2(2). 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. App. 4, 70, 73.

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." Me. Rev. Stat. Ann., Tit. 20–A, § 5204(4) (Cum. Supp. 2021). Parents who wish to take advantage of this benefit first select the school they wish their child to attend. *Ibid.* 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. See §§ 2902, 2951, 5204(4).

To be "approved" to receive these payments, a private school must meet certain basic requirements under Maine's compulsory education law. § 2951(1). 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. §§ 2901(2), 2902. 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. §§ 2902(2), 2902(3), 4706(2), 2902(6)(C).

The program imposes no geographic limitation: Parents may direct tuition payments to schools inside or outside the State, or even in foreign countries. §§ 2951(3), 5808. In schools that qualify for the program because they are accredited, teachers need not be certified by the State, § 13003(3), and Maine's curricular requirements do not apply, § 2901(2). Single-sex schools are eligible. See Me. Rev. Stat. Ann., Tit. 5, § 4553(2–A) (exempting single-sex private, but not public, schools from Maine's antidiscrimination law).

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. App. 72. 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." Me. Rev. Stat. Ann., Tit. 20–A, § 2951(2). 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, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002). Following our decision in *Zelman*, the Maine Legislature considered a proposed bill to repeal the "nonsectarian" requirement, but rejected it. App. 100, 108.

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." 979 F.3d 21, 38 (CA1

2020). "The Department's focus is on what the school teaches through its curriculum and related activities, and how the material is presented." *Ibid.* (emphasis deleted). "[A]ffiliation or association with a church or religious institution is one potential indicator of a sectarian school," but "it is not dispositive." *Ibid*.

B

This case concerns two families that live in SAUs that neither maintain their own secondary schools nor contract with any nearby secondary school. App. 70, 71. Petitioners David and Amy Carson reside in Glenburn, Maine. *Id.*, at 74. When this litigation commenced, the Carsons' daughter attended high school at Bangor Christian Schools (BCS), which was founded in 1970 as a ministry of Bangor Baptist Church. *Id.*, at 74, 80. 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. *Id.*, at 74. Given that BCS is a "sectarian" school that cannot qualify for tuition assistance payments under Maine's program, *id.*, at 80, the Carsons paid the tuition for their daughter to attend BCS themselves, *id.*, at 74.

Petitioners Troy and Angela Nelson live in Palermo, Maine. *Id.*, at 78. 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. *Id.*, at 78, 90, 91. 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. *Id.*, at 78. 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. *Id.*, at 79.

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. *Id.*, at 80, 90. Yet because neither school qualifies as "nonsectarian," neither is eligible to receive tuition payments under Maine's tuition assistance program. *Id.*, at 80, 90. 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. *Id.*, at 79.

In 2018, petitioners brought suit against the commissioner of the Maine Department of Education. *Id.*, at 11–12. 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, *id.*, at 23–27, as well as the Equal Protection Clause of the Fourteenth Amendment, *id.*, at 29–30. Their complaint sought declaratory and injunctive relief against enforcement of the requirement. *Id.*, at 31–32. The parties filed cross-motions for summary judgment on a stipulated record. 401 F.Supp.3d 207, 208 (D.Me. 2019). Applying Circuit precedent that had previously upheld the "nonsectarian" requirement against challenge, see *Eulitt v. Maine Dept. of Ed.*, 386 F.3d 344 (CA1 2004), the District Court rejected petitioners' constitutional claims and granted judgment to the commissioner. 401 F.Supp.3d at 209–212.

While petitioners' appeal to the First Circuit was pending, this Court decided *Espinoza* v. *Montana Department of Revenue*, 591 U. S. ——, 140 S.Ct. 2246, 207 L.Ed.2d 679 (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," Art. X, § 6(1), violated the Free Exercise Clause by prohibiting families from using otherwise available scholarship funds at the religious schools of their choosing. The First Circuit recognized that, in light of *Espinoza*, its prior

precedent upholding Maine's "nonsectarian" requirement was no longer controlling. 979 F.3d at 32–36. But it nevertheless affirmed the District Court's grant of judgment to the commissioner. *Id.,* at 49.

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."979 F.3d at 40. 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." 979 F.3d at 44. Thus, "the nature of the restriction at issue and the nature of the school aid program of which it is a key part" led the panel to conclude "once again" that Maine's "nonsectarian" requirement did not violate the Free Exercise Clause. *Id.,* at 46.

We granted certiorari. 594 U. S. ——, 141 S.Ct. 2883, 210 L.Ed.2d 989 (2021).

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, 108 S.Ct. 1319, 99 L.Ed.2d 534 (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, 83 S.Ct. 1790, 10 L.Ed.2d 965 (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, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (a State "cannot exclude" individuals "*because of their faith, or lack of it*, from receiving the benefits of public welfare legislation"). 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. See *Sherbert*, 374 U.S. at 399–402, 83 S.Ct. 1790 (Seventh-day Adventist who refused to work on the Sabbath); *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 709, 720, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (Jehovah's Witness who refused to participate in the production of armaments).

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. ——, 137 S.Ct. 2012, 198 L.Ed.2d 551 (2017), we considered a Missouri program that offered grants to qualifying nonprofit organizations that installed cushioning playground surfaces made from recycled rubber tires. The Missouri Department of Natural Resources maintained an express policy of denying such grants to any applicant owned or controlled by a church, sect, or other religious entity. The Trinity Lutheran Church Child Learning Center applied for a grant to resurface its gravel playground, but the Department denied funding on the ground that the Center was operated by the Church.

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

——, 137 S.Ct., at 2021. 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.,* at ——, 137 S.Ct., at 2022 (citing *McDaniel v. Paty*, 435 U.S. 618, 626, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978) (plurality opinion)). Such discrimination, we said, was "odious to our Constitution" and could not stand. 582 U. S., at ——, 137 S.Ct., at 2025.

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. As a result of that holding, the State terminated the scholarship program, preventing the petitioners from accessing scholarship funds they otherwise would have used to fund their children's educations at religious schools.

We again held that the Free Exercise Clause forbade the State's action. The application of the Montana Constitution's no-aid provision, we explained, required strict scrutiny because it "bar[red] religious schools from public benefits solely because of the religious character of the schools." *Espinoza*, 591 U. S., at ——, 140 S.Ct., at 2255. "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 ——, 140 S.Ct., at 2261.

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." 582 U. S., at ——, 137 S.Ct., at 2021. 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.* (quoting *McDaniel*, 435 U.S. at 626, 98 S.Ct. 1322 (plurality opinion)).

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 ——, 140 S.Ct., at 2261. A law that operates in that manner, we held in *Espinoza*, must be subjected to "the strictest scrutiny." *Id.*, at —— – ——, 140 S.Ct., at 2257.

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, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (quoting *McDaniel*, 435 U.S. at 628, 98 S.Ct. 1322 (plurality opinion)). "A law that targets religious conduct for distinctive treatment ... will survive strict scrutiny only in rare cases." 508 U.S. at 546, 113 S.Ct. 2217.

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, 122 S.Ct. 2460. 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. See also *post,* at ___ (BREYER, J., dissenting) (States may choose "not to fund certain religious activity ... even when the Establishment Clause does not itself prohibit the State from funding that activity___*,* at 2012 (SOTOMAYOR, J., dissenting) (same point).

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 ——, 140 S.Ct., at 2260 (quoting *Trinity Lutheran*, 582 U. S., at ——, 137 S.Ct., at 2024); see also *Widmar v. Vincent*, 454 U.S. 263, 276, 102 S.Ct. 269, 70 L.Ed.2d 440 (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 ___, 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. 979 F.3d at 44; see also Brief for Respondent 22. 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. 979 F.3d at 38–40; see also Brief for Respondent 35. 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." 979 F.3d at 44. As Maine puts it, "[t]he public benefit Maine is offering is a free public education." Brief for Respondent 1–2.

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." Me. Rev. Stat. Ann., Tit. 20–A, § 5204(4). The benefit is *tuition* at a public *or* private school, selected by the parent, with no suggestion that the

[*] Both dissents articulate a number of other reasons not to extend the tuition assistance program to BCS and Temple Academy, based on the schools' particular policies and practices. *Post*, at ___ (opinion of Breyer, J.); *post*, at ___ (opinion of Sotomayor, J.). Maine rightly does not attempt to defend its law on such grounds, however, because the law rigidly excludes any and all sectarian schools regardless of particular characteristics. See *supra*, at ___.

"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. See Stipulated Record, Exh. 2, in No. 1:18–cv–327 (Me., Mar. 12, 2019), ECF Doc. 24–2, p. 11; Brief for Respondent 32.

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." § 6209. 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. Brief for Respondent 32; see NEASC, Standards—20/20 Process (rev. Aug. 2021), https://cis.neasc.org/standards2020 (requiring, for instance, that "[c]urriculum planning supports the school's core beliefs and the needs of the students," and that the "[w]ritten curriculum aligns horizontally and vertically").

Private schools approved by the Department (rather than accredited by NEASC) are likewise exempt from many of the State's curricular requirements, so long as fewer than 60% of their students receive tuition assistance from the State. For instance, such schools need not abide by Maine's "comprehensive, statewide system of learning results," including the "parameters for essential instruction" referenced above, and they need not administer the annual state assessments in English language arts, mathematics, and science. §§ 2951(6), 6209; see also ECF Doc. 24–2, at 9.

There are other distinctions, too. Participating schools need not hire state-certified teachers. Compare Me. Rev. Stat. Ann., Tit. 20–A, § 13003(1), with § 13003(3). And the schools can be single-sex. See ECF Doc. 24–2, at 11. 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." *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 215, 133 S.Ct. 2321, 186 L.Ed.2d 398 (2013) (quoting *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 547, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001)); see also *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 696, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (Harlan, J., concurring) ("The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."). Maine's formulation does not answer the question in this case; it simply restates it.

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 § 2951(2) 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 dissents are wrong to say that under our decision today Maine "*must*" fund religious education. *Post,* at ___ (BREYER, J., dissenting). Maine chose to allow some parents to direct state tuition payments to private schools; that decision was not "forced upon" it. *Post,* at ___ (SOTOMAYOR, J., dissenting). 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." 591 U. S., at ——, 140 S.Ct., at 2261.

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." 979 F.3d at 35, 37–38. Justice BREYER makes the same argument. *Post,* at ___, ___ (dissenting opinion).

In *Trinity Lutheran*, the Missouri Constitution banned the use of public funds in aid of "any church, sect or denomination of religion." 582 U. S., at —— – ——, 137 S.Ct., at 2017. We noted that the case involved "express discrimination based on religious identity," which was sufficient unto the day in deciding it, and that our opinion did "not address religious uses of funding." *Id.*, at ——, n. 3, 137 S.Ct., at 2024, n. 3 (plurality opinion).

So too in *Espinoza*, the discrimination at issue was described by the Montana Supreme Court as a prohibition on aiding "schools controlled by churches," and we analyzed the issue in terms of "religious status and not religious use." 591 U. S., at ——, 140 S.Ct., at 2256. Foreshadowing Maine's argument here, Montana argued that its case was different from Trinity Lutheran's because it involved not playground resurfacing, but general funds that "could be used for religious ends by some recipients, particularly schools that believe faith should '*permeate*[]' everything they do." *Id.,* at ——, 140 S.Ct., at 2256. We explained, however, that the strict scrutiny triggered by status-based discrimination could not be avoided by arguing that "one of its goals or effects [was] preventing religious organizations from putting aid to religious *uses*." *Ibid.* (emphasis added). And we noted that nothing in our analysis was "meant to suggest that we agree[d] with [Montana] that some lesser degree of scrutiny applies to discrimination against religious uses of government aid." *Id.,* at ——, 140 S.Ct., at 2257.

Maine's argument, however—along with the decision below and Justice BREYER's dissent—is premised on precisely such a distinction. See Brief for Respondent 44 ("Maine has not broadly excluded private schools simply because they are affiliated with or controlled by a religious organization. Rather, a school is excluded only if it promotes a particular faith and presents academic material through the lens of that faith."); 979 F.3d at 40 (Maine provision "does not bar schools from receiving funding simply based on their religious identity" but instead "based on the religious use that they would make of it in instructing children."); *post*, at ___ (BREYER, J., dissenting) ("[U]nlike the circumstances present in *Trinity Lutheran* and *Espinoza*, it is religious activity, not religious labels, that lies at the heart of this case.").

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*, 591 U. S. ——, ——, 140 S.Ct. 2049, 2064, 207 L.Ed.2d 870 (2020); see also *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 192, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012).

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. See *Our Lady*, 591 U. S., at ——, 140 S.Ct., at 2068–2069; *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). 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, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004), 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." *Id.,* at 721, 124 S.Ct. 1307; *Espinoza*, 591 U. S., at ——, 140 S.Ct., at 2257. We upheld that restriction against a free exercise challenge, reasoning that the State had "merely chosen not to fund a distinct category of instruction." *Locke,* 540 U.S. at 721, 124 S.Ct. 1307.

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." *Trinity Lutheran*, 582 U. S., at ——, 137 S.Ct., at 2023; see also *Espinoza*, 591 U. S., at ——, 140 S.Ct., at 2257; *Locke*, 540 U.S. at 725, 124 S.Ct. 1307. Funds could be and were used for theology courses; only pursuing a "vocational religious" *degree* was excluded. *Ibid.*; see also *Trinity Lutheran*, 582 U. S., at —— – ——, 137 S.Ct., at 2022–2024 (explaining narrow reach of *Locke*); *Espinoza*, 591 U. S., at —— – ——, 140 S.Ct., at 2257–2258 (same).

Locke's reasoning expressly turned on what it identified as the "historic and substantial state interest" against using "taxpayer funds to support church leaders." 540 U.S. at 722, 725, 124 S.Ct. 1307. 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*." 591 U. S., at ——, 140 S.Ct., at 2259. *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. See *Trinity Lutheran Church of Columbia*, *Inc.* v. *Comer*, 582 U. S. ——, ——, 137 S.Ct. 2012, 2019, 198 L.Ed.2d 551 (2017). 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, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). The first Clause, the Establishment Clause, seems to bar all government "sponsorship, financial support, [or] active involvement ... in religious activity," while the second Clause, the Free Exercise Clause, seems to bar all "governmental restraint on religious practice." *Id.*, at 668, 670, 90 S.Ct. 1409. 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, 90 S.Ct. 1409. Because of this, we have said, the two Clauses "are frequently in tension," *Locke v. Davey*, 540 U.S. 712, 718, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004), and "often exert conflicting pressures" on government action, *Cutter v. Wilkinson*, 544 U.S. 709, 719, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005).

On the one hand, the Free Exercise Clause " 'protect[s] religious observers against unequal treatment.' " *Trinity Lutheran*, 582 U. S., at ——, 137 S.Ct., at 2019 (quoting *Church of Lukumi*

Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 542, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); alteration in original). 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*, 591 U. S. ——, ——, 140 S.Ct. 2246, 2255, 207 L.Ed.2d 679 (2020); see *Trinity Lutheran*, 582 U. S., at —— – ——, 137 S.Ct., at 2021.

On the other hand, the Establishment Clause "commands a separation of church and state." *Cutter*, 544 U.S. at 719, 125 S.Ct. 2113. A State cannot act to "aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947). 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." *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U.S. 203, 211, 68 S.Ct. 461, 92 L.Ed. 649 (1948). Nor may a State "adopt programs or practices in its public schools ... which 'aid or oppose' any religion." *Epperson v. Arkansas*, 393 U.S. 97, 106, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). "This prohibition," we have cautioned, "is absolute." *Ibid.* See, *e.g.*, *McCollum*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (no weekly religious teachings in public schools); *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962) (no prayers in public schools); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (no Bible readings in public schools); *Epperson*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (no religiously tailored curriculum in public schools); *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (no period of silence for meditation or prayer in public schools); *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (no prayers during public school graduations); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (no prayers during public school football games).

Although the Religion Clauses are, in practice, often in tension, they nonetheless "express complementary values." *Cutter*, 544 U.S. at 719, 125 S.Ct. 2113. Together they attempt to chart a "course of constitutional neutrality" with respect to government and religion. *Walz*, 397 U.S. at 669, 90 S.Ct. 1409. 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*, 370 U.S. at 431, 82 S.Ct. 1261. 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. *Id.*, at 429, 82 S.Ct. 1261; see also *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 795–796, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973).

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, 90 S.Ct. 1409. "[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). We have historically interpreted the Religion Clauses with these basic principles in mind. See, *e.g.*, *Nyquist*, 413 U.S. at 771–772, 794–796, 93 S.Ct. 2955; *Walz*, 397 U.S. at 668–670, 90 S.Ct. 1409; *Engel*, 370 U.S. at 429–432, 82 S.Ct. 1261.

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, 90 S.Ct. 1409; see, *e.g.*, *Norwood v. Harrison*, 413 U.S. 455, 469, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973); *Cutter*, 544 U.S. at 719, 125 S.Ct. 2113; *Locke*, 540 U.S. at 718–719, 124 S.Ct. 1307; *Trinity Lutheran*, 582 U. S., at ——, 137 S.Ct., at 2019–2020;

Espinoza, 591 U. S., at ——, 140 S.Ct., at 2253–2254. 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. See, *e.g.*, *Cutter*, 544 U.S. at 713, 719–720, 125 S.Ct. 2113. This includes choosing not to fund certain religious activity where States have strong, establishment-related reasons for not doing so. See, *e.g.*, *Locke*, 540 U.S. at 719–722, 124 S.Ct. 1307. And, States have freedom to make this choice even when the Establishment Clause does not itself prohibit the State from funding that activity.*Id.*, at 719, 124 S.Ct. 1307 ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause"). 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. See, *e.g.*, *Espinoza*, 591 U. S., at ——– ——, 140 S.Ct., at 2288–2292 (dissenting opinion); *Van Orden v. Perry*, 545 U.S. 677, 698–705, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (opinion concurring in judgment); *Zelman v. Simmons-Harris*, 536 U.S. 639, 717–729, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (dissenting opinion). Here I simply note the increased risk of religiously based social conflict when government promotes religion in its public school system. "[T]he prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled," can "give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment" sought to prevent. *Schempp*, 374 U.S. at 307, 83 S.Ct. 1560 (Goldberg, J., concurring).

This potential for religious strife is still with us. We are today a Nation with well over 100 different religious groups, from Free Will Baptist to African Methodist, Buddhist to Humanist. See Pew Research Center, America's Changing Religious Landscape 21 (May 12, 2015). 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*, 330 U.S. at 13, 67 S.Ct. 504. 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." *Id.*, at 68–69, 67 S.Ct. 504 (appendix to dissenting opinion of Rutledge, J.). 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. *Espinoza*, 591 U. S., at ——, 140 S.Ct., at 2291 (dissenting opinion); see also *Van Orden*, 545 U.S. at 669–700, 125 S.Ct. 2854 (opinion concurring in judgment).

"[G]overnment benefits come in many shapes and sizes." *Espinoza*, 591 U. S., at ——, 140 S.Ct., at 2290 (dissenting opinion). 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. See *ibid.*; *Trinity Lutheran*, 582 U. S., at ——, 137 S.Ct., at 2026–2027 (BREYER, J., concurring in judgment). 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." *Ante*, at ___ (citing *Zelman*, 536 U.S. at 652–653, 122 S.Ct. 2460). 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." *Id.*, at 652, 122 S.Ct. 2460.

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 ___. 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." 582 U. S., at ——, 137 S.Ct., at 2017. 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. *Id.*, at ——, ——, n. 3, 137 S.Ct., at 2021, 2024, n. 3. 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. 979 F.3d 21, 38 (CA1 2020) (quoting then-commissioner of Maine's Department of Education). 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. *Ibid.* 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." 591 U. S., at ——, 140 S.Ct., at 2251. 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.' " *Id.*, at ——, 140 S.Ct., at 2252 (quoting Mont. Admin. Rule § 42.4.802(1)(a) (2015)). 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." 591 U. S. at —— – ——, 140 S.Ct., at 2256. 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. See *Engel*, 370 U.S. at 430, 82 S.Ct. 1261 ("Under [the Establishment Clause] ... government in this country, be it state or federal, is without power to prescribe by law ... any program of governmentally sponsored religious activity"); *Walz*, 397 U.S. at 668, 90 S.Ct. 1409 ("[F]or the men who wrote the Religion Clauses ... the 'establishment' of a religion connoted ... [any] active involvement of the sovereign in religious activity"); *Everson*, 330 U.S. at 15, 67 S.Ct. 504 (States may not "pass laws which aid one religion, aid all religions, or prefer one religion over another"). 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

I turn now to consider the Maine program at issue here. Maine's Constitution guarantees Maine's children a free public education by requiring that all towns provide "for the support and maintenance of public schools." Art. VIII, pt. 1, § 1; see also Me. Rev. Stat. Ann., Tit. 20–A, § 2(1) (2008). Because of the State's rural geography and dispersed population, however, over half of Maine's school districts do not operate public secondary schools. App. 70. To fulfill its constitutional promise, Maine created a program that provides some parents in these districts with a monetary grant to help them educate their children "at the public school or the approved private school of the

parent's choice." Me. Rev. Stat. Ann., Tit. 20–A, § 5204(4) (Cum. Supp. 2021). The program's "function is limited to authorizing the provision of tuition subsidies to the parents of children who live within school [districts] that simply do not have the resources to operate a public school system, and whose children would otherwise not be given an opportunity to receive a free public education." *Hallissey v. School Administrative Dist. No. 77*, 2000 ME 143, ¶16, 755 A.2d 1068, 1073.

Under Maine law, an "approved" private school must be "nonsectarian." § 2951(2). A school fails to meet that requirement (and is deemed "sectarian") only if it is *both* (1) " 'associated with a particular faith or belief system' " *and also* (2) " 'promotes the faith or belief system with which it is associated and/or presents the [academic] material taught through the lens of this faith.' " 979 F.3d at 38 (quoting Maine's then-education commissioner). 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.' " *Ibid.* (emphasis deleted). "'[A]ffiliation or association with a church or religious institution ... is not dispositive' " of sectarian status. *Ibid.*

The two private religious schools at issue here satisfy both of these criteria. They are affiliated with a church or religious organization. See App. 80, 91. And they also teach students to accept particular religious beliefs and to engage in particular religious practices.

The first school, Bangor Christian, has "educational objectives" that include "'lead[ing] each unsaved student to trust Christ as his/her personal savior and then to follow Christ as Lord of his/her life,' " and " 'develop[ing] within each student a Christian world view and Christian philosophy of life.' " *Id*., at 84. Bangor Christian "does not believe there is any way to separate the religious instruction from the academic instruction." *Id*., at 85. Academic instruction and religious instruction are thus "completely intertwined." *Ibid.* Bangor Christian teaches in its social studies class, for example, " 'that God has ordained evangelism.'" *Id*., at 87. And in science class, students learn that atmospheric layers " 'are evidence of God's good design.'" *Id*., at 89.

The second school, Temple Academy, similarly promotes religion through academics. Its "educational philosophy 'is based on a thoroughly Christian and Biblical world view.' " *Id*., at 92. The school's "objectives" include " 'foster[ing] within each student an attitude of love and reverence of the Bible as the infallible, inerrant, and authoritative Word of God.' " *Ibid.* And the school's " 'academic growth' objectives" include " 'provid[ing] a sound academic education in which the subjec[t] areas are taught from a Christian point of view,' " and " 'help[ing] every student develop a truly Christian world view by integrating studies with the truths of Scripture.' " *Id*., at 93. Like Bangor Christian, Temple "provides a 'biblically-integrated education,' which means that the Bible is used in every subject that is taught." *Id*., at 96. In mathematics classes, for example, students learn that "a creator designed the universe such that 'one plus one is always going to be two.'" *Ibid.*

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*, 591 U. S. ——, ——, 140 S.Ct. 2049, 2055, 207 L.Ed.2d 870 (2020). "[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.*, at ——, 140 S.Ct., at 2064. 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.*, at ——, ——, 140 S.Ct., at 2055–2056, 2066; see also *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012).

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) (citation and internal quotation marks omitted). 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. Cf. *Edwards v. Aguillard*, 482 U.S. 578, 583–584, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary [public] schools").

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. See, *e.g.*, App. 104 (Maine representative stating that "[f]rom a public policy position, we must believe that a religiously neutral classroom is the best if funded by public dollars"); *id.*, at 106 (Maine senator asserting that the State's "limited [tax] dollars for schools" should be spent on those "that are non-religious and that are neutral on religion"). 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. Cf. *Epperson*, 393 U.S. at 106, 89 S.Ct. 266; *McCollum*, 333 U.S. at 211, 68 S.Ct. 461. 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. See, *e.g.*, *Zelman*, 536 U.S. at 652, 122 S.Ct. 2460. It does not *require* Maine to spend its money in that way. That is because, as explained above, this Court has long followed a legal doctrine that gives States flexibility to navigate the tension between the two Religion Clauses. *Supra*, at ___. This doctrine "recognize[s] that there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran*, 582 U. S., at —— , 137 S.Ct., at 2019 (quoting *Locke*, 540 U.S. at 718, 124 S.Ct. 1307). This wiggle-room means that "[t]he course of constitutional neutrality in this area cannot be an absolutely straight line." *Walz*, 397 U.S. at 669, 90 S.Ct. 1409. And in walking this line of government neutrality, States must have "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause," *Cutter*, 544 U.S. at 719, 125 S.Ct. 2113, in which they can navigate the tension created by the Clauses and consider their own interests in light of the Clauses' competing prohibitions. See, *e.g.*, *Walz*, 397 U.S. at 669, 90 S.Ct. 1409.

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.

Supra, at ___. 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. Cf. *Trinity Lutheran*, 582 U. S., at ——, 137 S.Ct., at 2022–2023. 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." *Trinity Lutheran*, 582 U. S., at ——, 137 S.Ct., at 2023; see also *Espinoza*, 591 U. S., at ——, 140 S.Ct., at 2257 (characterizing *Locke* similarly). 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. See 979 F.3d at 38. 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*.

The Free Exercise Clause thus does not require Maine to fund, through its tuition program, schools that will use public money to promote religion. And considering the Establishment Clause concerns underlying the program, Maine's decision not to fund such schools falls squarely within the play in the joints between those two Clauses. Maine has promised all children within the State the right to receive a free public education. In fulfilling this promise, Maine endeavors to provide children the religiously neutral education required in public school systems. And that, in significant part, reflects the State's antiestablishment interests in avoiding spending public money to support what is essentially religious activity. The Religion Clauses give Maine the ability, and flexibility, to make this choice.

BIn 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. App. 82–83, 89, 93, 98. 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. See, *e.g.*, *id.*, at 101 (Maine representative noting that "private religious schools discriminate against citizens of the State of Maine," such as by "not hir[ing] individuals whose beliefs are not consistent with the school's religious teachings," and

asserting that "it is fundamentally wrong for us to fund" such discrimination); *id.*, at 104 (Maine representative stating that "the people of Maine" should not use "public money" to advance "their religious pursuits," and that "discrimination in religious institutions" should not be funded "with my dollar"); *id.*, at 107 (Maine senator expressing concern that "public funds could be used to teach intolerant religious views"). 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. As one legislator explained, one of the reasons for the nonsectarian requirement was that "[g]overnment officials cannot, and should not, review the religious teachings of religious schools." *Ibid.* Another legislator cautioned that the State would be unable to "reconcile" the curriculum of "private religious schools who teach religion in the classroom" with Maine "standards ... that do not include any sort of religion in them." *Id*., at 102.

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." *Id*., at 90. 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." *Id*., at 99. 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.

I emphasize the problems that may arise out of today's decision because they reinforce my belief that the Religion Clauses do not require Maine to pay for a religious education simply because, in some rural areas, the State will help parents pay for a secular education. After all, the Establishment Clause forbids a State from paying for the practice of religion itself. And state neutrality in respect to the *teaching* of the practice of religion lies at the heart of this Clause. See, *e.g.*, *Locke*, 540 U.S. at 721–722, 124 S.Ct. 1307 (noting that there are "few areas in which a State's antiestablishment interests come more into play" than state funding of ministers who will "lead [their] congregation[s]" in "religious endeavor[s]"). There is no meaningful difference between a State's payment of the salary of a religious minister and the salary of someone who will teach the practice of religion to a person's children. At bottom, there is almost no area "as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits." *Zelman*, 536 U.S. at 725, 122 S.Ct. 2460 (BREYER, J., dissenting). The Establishment Clause was intended to keep the State out of this area.

* * *

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

Justice SOTOMAYOR, dissenting.

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

First, this Court should not have started down this path five years ago. See *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. ——, 137 S.Ct. 2012, 198 L.Ed.2d 551 (2017). 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. *Locke v. Davey*, 540 U.S. 712, 721, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004). 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." *Id.,* at 718–719, 124 S.Ct. 1307 (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)); see *ante,* at ___ (BREYER, J., dissenting). Using this flexibility, and consistent with a rich historical tradition, see *Trinity Lutheran*, 582 U. S., at —— – ——, 137 S.Ct., at 2032–2036 (SOTOMAYOR, J., dissenting), 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.[11]

Over time, the Court eroded these principles in certain respects. See, *e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 662, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (allowing government funds to flow to religious schools if private individuals selected the benefiting schools; the government program was "entirely neutral with respect to religion"; and families enjoyed a "genuine choice among options public and private, secular and religious"). Nevertheless, the space between the Clauses continued to afford governments "some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws." *Trinity Lutheran*, 582 U. S., at ——, 137 S.Ct., at 2031 (SOTOMAYOR, J., dissenting).

Trinity Lutheran veered sharply away from that understanding. After assuming away an Establishment Clause violation, the Court revolutionized Free Exercise doctrine by equating a State's decision not to fund a religious organization with presumptively unconstitutional discrimination on

---

[1] See, e.g., *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16, 67 S.Ct. 504, 91 L.Ed. 711 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions ... "); *Agostini v. Felton*, 521 U.S. 203, 222–223, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (observing that government aid that impermissibly "advanc[ed] ... religion" was constitutionally barred); *Mitchell v. Helms*, 530 U.S. 793, 840, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (O'Connor, J., concurring in judgment) ("[O]ur decisions provide no precedent for the use of public funds to finance religious activities" (internal quotation marks omitted)); see also *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 875–876, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (Souter, J., dissenting) (chronicling cases).

the basis of religious status. See *id.,* at ——— – ———, 137 S.Ct., at 2021–2022. A plurality, however, limited the Court's decision to "express discrimination based on religious identity" (*i.e.,* status), not "religious uses of funding." *Id.,* at ——, n. 3, 137 S.Ct., at 2024, n. 3. In other words, a State was barred from withholding funding from a religious entity "solely because of its religious character," *id.,* at ——, 137 S.Ct., at 2024 (opinion of the Court), but retained authority to do so on the basis that the funding would be put to religious uses. Two Terms ago, the Court reprised and extended *Trinity Lutheran*'s error to hold that a State could not limit a private-school voucher program to secular schools. *Espinoza* v. *Montana Dept. of Revenue*, 591 U. S. ——, ——, 140 S.Ct. 2246, 2255, 207 L.Ed.2d 679 (2020). The Court, however, again refrained from extending *Trinity Lutheran* from funding restrictions based on religious status to those based on religious uses. *Espinoza*, 591 U. S., at ——— – ———, 140 S.Ct., at 2255–2257 (2020).

As Justice BREYER explains, see *ante,* at ___, this status-use distinction readily distinguishes this case from *Trinity Lutheran* and *Espinoza*. I warned in *Trinity Lutheran*, however, that the Court's analysis could "be manipulated to call for a similar fate for lines drawn on the basis of religious use." 582 U. S., at ——, n. 14, 137 S.Ct., at 2041, n. 14 (dissenting opinion). That fear has come to fruition: The Court now holds for the first time that "any status-use distinction" is immaterial in both "theory" and "practice." *Ante,* at ___. 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, see *ante,* at ___ (BREYER, J., dissenting), leaves one to wonder what, if anything, is left of it. The Court's increasingly expansive view of the Free Exercise Clause risks swallowing the space between the Religion Clauses that once "permit[ted] religious exercise to exist without sponsorship and without interference." *Walz*, 397 U.S. at 669, 90 S.Ct. 1409.

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. See *ante,* at ___ (BREYER, J., dissenting). In addition, while purporting to protect against discrimination of one kind, the Court requires Maine to fund what many of its citizens believe to be discrimination of other kinds. See *ante,* at ___ (BREYER, J., dissenting) (summarizing Bangor Christian Schools' and Temple Academy's policies denying enrollment to students based on gender identity, sexual orientation, and religion). The upshot is that Maine must choose between giving subsidies to its residents or refraining from financing religious teaching and practices.

Finally, the Court's decision is especially perverse because the benefit at issue is the public education to which all of Maine's children are entitled under the State Constitution. As this Court has long recognized, the Establishment Clause requires that public education be secular and neutral as to religion. See *ante,* at ___, ___ (BREYER, J., dissenting) (collecting cases). 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." *Ante,* at ___. In fact, any such "deci[sion]," *ibid.*, was forced upon Maine by "the realities of remote geography and low population density," *ante,* at ___, 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. See Me. Rev. Stat. Ann., Tit. 20–A, §§ 2701, 2702 (2008). 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 ——, 137 S.Ct., at 2041 (dissenting opinion). Today, the Court leads us to a place where separation of church and state becomes a constitutional violation. If a State cannot offer subsidies to its citizens without being required to fund religious exercise, any State that values its historic antiestablishment interests more than this Court does will have to curtail the support it offers to its citizens. With growing concern for where this Court will lead us next, I respectfully dissent.

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

Syllabus[*]

Petitioner Joseph Kennedy lost his job as a high school football coach in the Bremerton School District after he knelt at midfield after games to offer a quiet personal prayer. Mr. Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. He also moved for a preliminary injunction requiring the District to reinstate him. The District Court denied that motion, and the Ninth Circuit affirmed. After the parties engaged in discovery, they filed cross-motions for summary judgment. The District Court found that the "'sole reason'" for the District's decision to suspend Mr. Kennedy was its perceived "risk of constitutional liability" under the Establishment Clause for his "religious conduct" after three games in October 2015. 443 F.Supp.3d 1223, 1231. The District Court granted summary judgment to the District and the Ninth Circuit affirmed. The Ninth Circuit denied a petition to rehear the case en banc over the dissents of 11 judges. 4 F.4th 910, 911. Several dissenters argued that the panel applied a flawed understanding of the Establishment Clause reflected in *Lemon v. Kurtzman*, 403 U. S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, and that this Court has abandoned *Lemon*'s "ahistorical, atextual" approach to discerning Establishment Clause violations. 4 F.4th at 911, and n. 3.

Held: The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression. Pp. 2421 - 2433.

(a) Mr. Kennedy contends that the District's conduct violated both the Free Exercise and Free Speech Clauses of the First Amendment. Where the Free Exercise Clause protects religious exercises, the Free Speech Clause provides overlapping protection for expressive religious activities. See, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 269, n. 6, 102 S.Ct. 269, 70 L.Ed.2d 440. A plaintiff must demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries his or her burden, the defendant must show that its actions were nonetheless justified and appropriately tailored. Pp. 2421 - 2432 1.

(1) Mr. Kennedy discharged his burden under the Free Exercise Clause. The Court's precedents permit a plaintiff to demonstrate a free exercise violation multiple 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." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879–881, 110 S.Ct. 1595, 108 L.Ed.2d 876. Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny, under which the government must demonstrate its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. See, *e.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472.

Here, no one questions that Mr. Kennedy seeks to engage in a sincerely motivated religious exercise involving giving "thanks through prayer" briefly "on the playing field" at the conclusion of each game he coaches. App. 168, 171. The contested exercise here does not involve leading prayers with the team; the District disciplined Mr. Kennedy *only* for his decision to persist in praying

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

quietly without his students after three games in October 2015. In forbidding Mr. Kennedy's brief prayer, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character. Prohibiting a religious practice was thus the District's unquestioned "object." The District explained that it could not allow an on-duty employee to engage in *religious* conduct even though it allowed other on-duty employees to engage in personal secular conduct. The District's performance evaluation after the 2015 football season also advised against rehiring Mr. Kennedy on the ground that he failed to supervise student-athletes after games, but any sort of postgame supervisory requirement was not applied in an evenhanded way. Pp. 2421 - 2423. The District thus conceded that its policies were neither neutral nor generally applicable.

(2) Mr. Kennedy also discharged his burden under the Free Speech Clause. 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, 89 S.Ct. 733, 21 L.Ed.2d 731. But teachers and coaches are also government employees paid in part to speak on the government's behalf and to convey its intended messages. To account for the complexity associated with the interplay between free speech rights and government employment, this Court's decisions in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, and *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689, and related cases suggest proceeding in two steps. The first step involves a threshold inquiry into the nature of the speech at issue. When an employee "speaks as a citizen addressing a matter of public concern," the Court's cases indicate that the First Amendment may be implicated and courts should proceed to a second step. *Id.*, at 423, 126 S.Ct. 1951. At this step, courts should engage in "a delicate balancing of the competing interests surrounding the speech and its consequences." *Ibid*. At the first step of the *Pickering–Garcetti* inquiry, the parties' disagreement centers on one question: Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?

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. *Lane v. Franks*, 573 U.S. 228, 240, 134 S.Ct. 2369, 189 L.Ed.2d 312. He did not speak pursuant to government policy and 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, 126 S.Ct. 1951. The timing and circumstances of Mr. Kennedy's prayers—during the postgame period when coaches were free to attend briefly to personal matters and students were engaged in other activities—confirms that Mr. Kennedy did not offer his prayers while acting within the scope of his duties as a coach. It is not dispositive that Coach Kennedy served as a role model and remained on duty after games. To hold otherwise is to posit 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, 126 S.Ct. 1951. That Mr. Kennedy used available time to pray does not transform his speech into government speech. Acknowledging that Mr. Kennedy's prayers represented his own private speech means he has carried his threshold burden. Under the *Pickering–Garcetti* framework, a second step remains where the government may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern.

See *Lane*, 573 U.S. at 242, 134 S.Ct. 2369. Pp. 2423 - 2426.

(3) 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, 113 S.Ct. 2217. A similar standard generally obtains under the Free Speech Clause. See *Reed v. Town of Gilbert*, 576 U.S. 155, 171, 135 S.Ct. 2218, 192 L.Ed.2d 236. The District asks the Court to apply to Mr. Kennedy's claims the more lenient second-step *Pickering–Garcetti* test, or alternatively, intermediate scrutiny. The Court concludes, however, that the District cannot sustain its burden under any standard. Pp. 2425 - 2432.

i. The District, like the Ninth Circuit below, insists Mr. Kennedy's rights to religious exercise and free speech must yield to the District's interest in avoiding an Establishment Clause violation under *Lemon* and its progeny. The *Lemon* approach called for an examination of a law's purposes, effects, and potential for entanglement with religion. *Lemon*, 403 U. S., at 612–613, 91 S.Ct. 2105. In time, that 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, 109 S.Ct. 3086, 106 L.Ed.2d 472. But—given the apparent "shortcomings" associated with *Lemon's* "ambitiou[s]," abstract, and ahistorical approach to the Establishment Clause—this Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion v. American Humanist Assn.*, 588 U. S. ——, ——, 139 S.Ct. 2067, ——, 204 L.Ed.2d 452 (plurality opinion).

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 v. Galloway*, 572 U.S. 565, 576, 134 S.Ct. 1811, 188 L.Ed.2d 835. A natural reading of the First Amendment suggests that the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail over the others. *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 13, 15, 67 S.Ct. 504, 91 L.Ed. 711. 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." *Town of Greece*, at 575, 134 S.Ct. 1811. The District and the Ninth Circuit erred by failing to heed this guidance. Pp. 2425 - 2432.

ii. The District next attempts to justify its suppression of Mr. Kennedy's religious activity by arguing that doing otherwise would coerce students to pray. The Ninth Circuit did not adopt this theory in proceedings below and evidence of coercion in this record is absent. 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. A rule that the only acceptable government role models for students are those who eschew any visible religious expression would undermine a long constitutional tradition in which learning how to tolerate diverse expressive activities has always been "part of learning how to live in a pluralistic society." *Lee v. Weisman*, 505 U.S. 577, 590, 112 S.Ct. 2649, 120 L.Ed.2d 467. No historically sound understanding of the Establishment Clause begins to "mak[e] it necessary for government to be hostile to religion" in this way. *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954. Pp. 2428 - 2432.

iii. There is no conflict between the constitutional commands of the First Amendment in this case. There is only the "mere shadow" of a conflict, a false choice premised on a misconstruction of the Establishment Clause. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 308, 83 S.Ct. 1560, 10 L.Ed.2d 844 (Goldberg, J., concurring). A government entity's concerns about

phantom constitutional violations do not justify actual violations of an individual's First Amendment rights. Pp. 2431 - 2433.

(c) Respect for religious expressions is indispensable to life in a free and diverse Republic. Here, a government entity sought to punish an individual for engaging in a personal religious observance, based on a mistaken view that it has a duty to 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 religious exercise and free speech claims. Pp. 2432 - 2433.

991 F.3d 1004, reversed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, and BARRETT, JJ., joined, and in which KAVANAUGH, J., joined, except as to Part III–B. THOMAS, J., and ALITO, J., filed concurring opinions. SOTOMAYOR, J., filed a dissenting opinion, in which BREYER and KAGAN, JJ., joined.

[The petitioner was represented by, inter alia, former George W. Bush administration Solicitor General Paul Clement and Christian conservative legal organization First Liberty Institute. The respondent was represented by, inter alia, Americans United for Separation of Church and State.]

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. App. 167. 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. *Id.*, at 168, 171. In his prayers, Mr. Kennedy sought to express gratitude for "what the players had accomplished and for the opportunity to be part of their lives through the game of football." *Id.*, at 168. 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." *Id.*, at 168–169.

Initially, Mr. Kennedy prayed on his own. See *ibid.* But over time, some players asked whether they could pray alongside him. 991 F.3d 1004, 1010 (C.A.9 2021); App. 169. Mr. Kennedy

responded by saying, "'This is a free country. You can do what you want.'" *Ibid.* 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. See *ibid*. Eventually, Mr. Kennedy began incorporating short motivational speeches with his prayer when others were present. See *id.*, at 170. 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. *Ibid*. Mr. Kennedy explained that he "never told any student that it was important they participate in any religious activity." *Ibid*. In particular, he "never pressured or encouraged any student to join" his postgame midfield prayers. *Ibid*.

For over seven years, no one complained to the Bremerton School District (District) about these practices. See *id.*, at 63–64. 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. See *id.*, at 109, 229. 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. App. 40. 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]." *Ibid.* Second, he had led "students and coaching staff in a prayer" in the locker-room tradition that "predated [his] involvement with the program." *Id.*, at 41.

The District explained that it sought to establish "clear parameters" "going forward." *Ibid*. 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." *Id.*, at 44. 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." *Id.*, at 45. 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. *Id.*, at 43. 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." *Ibid.*

After receiving the District's September 17 letter, Mr. Kennedy ended the tradition, predating him, of offering locker-room prayers. *Id.*, at 40–41, 77, 170–172. He also ended his practice of incorporating religious references or prayer into his postgame motivational talks to his team on the field. See *ibid.* Mr. Kennedy further felt pressured to abandon his practice of saying his own quiet, on-field postgame prayer. See *id.*, at 172. Driving home after a game, however, Mr. Kennedy felt upset that he had "broken [his] commitment to God" by not offering his own prayer, so he turned his car around and returned to the field. *Ibid.* By that point, everyone had left the stadium, and he walked to the 50-yard line and knelt to say a brief prayer of thanks. See *ibid*.

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. *Id.*, at 62–63, 172. He asked the District to allow him to continue that "private religious expression" alone. *Id.*, at 62. Consistent with the District's policy, see *id.*, at 48, Mr. Kennedy explained that he "neither requests, encourages, nor discourages students from participating in" these prayers, *id.*, at 64. 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." *Id.*, at 69. He "told everybody" that it would be acceptable to him to pray "when the kids went away from [him]." *Id.*, at 292. 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. *Id.*, at 280–282; see also *id.*, at 59. However, Mr. Kennedy objected to the logical implication of the District's September 17 letter, which he understood as banning him "from bowing his head" in the vicinity of students, and as requiring him to "flee the scene if students voluntarily [came] to the same area" where he was praying. *Id.*, at 70. After all, District policy prohibited him from "discourag[ing]" independent student decisions to pray. *Id.*, at 44.

On October 16, shortly before the game that day, the District responded with another letter. See *id.*, at 76. The District acknowledged that Mr. Kennedy "ha[d] complied" with the "directives" in its September 17 letter. *Id.*, at 77. 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." *Id.*, at 81. The District did so because it judged that anything less would lead it to violate the Establishment Clause. *Ibid.*

B

After receiving this letter, Mr. Kennedy offered a brief prayer following the October 16 game. See *id.*, at 90. 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." *Ibid*. 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. See *id.*, at 82, 297.

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. *Id.*, at 100–101, 354–355. Subsequently, the District superintendent explained in an October 20 email to the leader of a state association of school administrators that "the coach moved on from leading prayer with kids, to taking a silent prayer at the 50 yard line." *Id.*, at 83. The official with whom the superintendent corresponded acknowledged that the "use of a silent prayer changes the equation a bit." *Ibid*. On October 21, the superintendent further observed to a state official that "[t]he issue is quickly changing as it has shifted from leading prayer with student athletes, to a coaches [*sic*] right to conduct" his own prayer "on the 50 yard line." *Id.*, at 88.

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." *Id.*, at 90. 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." *Id.*, at 90, 93. 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." *Id.*, at 91, 93. 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." *Id.*, at 93–94.

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." 991 F.3d at 1019; App. 173, 236–239. The superintendent informed the District's board that this prayer "moved closer to what we want," but nevertheless remained "unconstitutional." *Id.*, at 96. 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. 443 F.Supp.3d 1223, 1231 (W.D. Wash. 2020); App. to Pet. for Cert. 182. While he was praying, other adults gathered around him on the field. See 443 F.Supp.3d at 1231; App. 97. Later, Mr. Kennedy rejoined his players for a postgame talk, after they had finished singing the school fight song. 443 F.Supp.3d at 1231; App. 103.

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." *Ibid.* 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. *Id.*, at 102. 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. *Id.*, at 103. Additionally, the letter faulted Mr. Kennedy for not being willing to pray behind closed doors. *Id.*, at 102.

In an October 28 Q&A document provided to the public, the District admitted that it possessed "no evidence that students have been directly coerced to pray with Kennedy." *Id.*, at 105. The Q&A also acknowledged that Mr. Kennedy "ha[d] complied" with the District's instruction to refrain from his "prior practices of leading players in a pre-game prayer in the locker room or leading players in a post-game prayer immediately following games." *Ibid.* But the Q&A asserted that the District could not allow Mr. Kennedy to "engage in a public religious display." *Id.*, at 105, 107, 110. Otherwise, the District would "violat[e] the ... Establishment Clause" because "reasonable ... students and attendees" might perceive the "district [as] endors[ing] ... religion." *Id.*, at 105.

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. *Kennedy v. Bremerton School Dist.*, 869 F.3d 813, 820 (C.A.9 2017). 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.'" *Ibid.* Mr. Kennedy did not return for the next season. *Ibid.*

II

A

After these events, Mr. Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. App. 145, 160–164. He also moved for a preliminary injunction requiring the District to reinstate him. The District Court denied that motion, concluding that a "reasonable observer ... would have seen him as ... leading an orchestrated session of faith." App. to Pet. for Cert. 303. Indeed, if the District had not suspended him, the court agreed, it might have violated the Constitution's Establishment Clause. See *id.*, at 302–303. On appeal, the Ninth Circuit affirmed. *Kennedy*, 869 F.3d at 831.

Following the Ninth Circuit's ruling, Mr. Kennedy sought certiorari in this Court. The Court denied the petition. But Justice ALITO, joined by three other Members of the Court, issued a statement stressing that "denial of certiorari does not signify that the Court necessarily agrees with the decision ... below." *Kennedy v. Bremerton School Dist.*, 586 U. S. ——, ——, 139 S.Ct. 634, 635, 203 L.Ed.2d 137 (2019). Justice ALITO expressed concerns with the lower courts' decisions, including the possibility that, under their reasoning, teachers might be "ordered not to engage in any 'demonstrative' conduct of a religious nature" within view of students, even to the point of being forbidden from "folding their hands or bowing their heads in prayer" before lunch. *Id.*, at ——, 139 S.Ct., at 636.

B

After the case returned to the District Court, the parties engaged in discovery and eventually brought cross-motions for summary judgment. At the end of that process, the District Court found that the "'sole reason'" for the District's decision to suspend Mr. Kennedy was its perceived "risk of constitutional liability" under the Establishment Clause for his "religious conduct" after the October 16, 23, and 26 games. 443 F.Supp.3d at 1231.

The court found that reason persuasive too. Rejecting Mr. Kennedy's free speech claim, the court concluded that because Mr. Kennedy "was hired precisely to occupy" an "influential role for student athletes," any speech he uttered was offered in his capacity as a government employee and unprotected by the First Amendment. *Id.*, at 1237. Alternatively, even if Mr. Kennedy's speech qualified as private speech, the District Court reasoned, the District properly suppressed it. Had it done otherwise, the District would have invited "an Establishment Clause violation." *Ibid.* Turning to Mr. Kennedy's free exercise claim, the District Court held that, even if the District's policies restricting his religious exercise were not neutral toward religion or generally applicable, the District had a compelling interest in prohibiting his postgame prayers, because, once more, had it "allow[ed]" them it "would have violated the Establishment Clause." *Id.*, at 1240.

C

The Ninth Circuit affirmed. It agreed with the District Court that Mr. Kennedy's speech qualified as government rather than private speech because "his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee." 991 F.3d at 1015. Like the District Court, the Ninth Circuit further reasoned that, "even if we were to assume ... that Kennedy spoke as a private citizen," the District had an "adequate justification" for its actions. *Id.*, at 1016. According to the court, "Kennedy's on-field religious activity," coupled with what the court called "his pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities," were enough to lead an "objective observer" to conclude that the District "endorsed Kennedy's religious activity by not stopping the practice." *Id.*, at 1017–1018. And that, the court held, would amount to a violation of the Establishment Clause. *Ibid*.

The Court of Appeals rejected Mr. Kennedy's free exercise claim for similar reasons. The District "concede[d]" that its policy that led to Mr. Kennedy's suspension was not "neutral and generally applicable" and instead "restrict[ed] Kennedy's religious conduct because the conduct [was] religious." *Id.*, at 1020. Still, the court ruled, the District "had a compelling state interest to avoid violating the Establishment Clause," and its suspension was narrowly tailored to vindicate that interest. *Id.*, at 1020–1021.

Later, the Ninth Circuit denied a petition to rehear the case en banc over the dissents of 11 judges. 4 F.4th 910, 911 (2021). Among other things, the dissenters argued that the panel erred by holding that a failure to discipline Mr. Kennedy would have led the District to violate the Establishment Clause. Several dissenters noted that the panel's analysis rested on *Lemon v. Kurtzman*, 403 U. S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and its progeny for the proposition that the Establishment Clause is implicated whenever a hypothetical reasonable observer could conclude the government endorses religion. 4 F.4th at 945–947 (opinion of R. Nelson, J.). These dissenters argued that this Court has long since abandoned that "ahistorical, atextual" approach to discerning "Establishment Clause violations"; they observed that other courts around the country have followed suit by renouncing it too; and they contended that the panel should have likewise "recognized *Lemon*'s demise and wisely left it dead." *Ibid*., and n. 3. We granted certiorari. 595 U. S. ——, 142 S.Ct. 857, 211 L.Ed.2d 533 (2022).

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, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 841, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent. See, *e.g.*, A Memorial and Remonstrance Against Religious Assessments, in Selected Writings of James Madison 21, 25 (R. Ketcham ed. 2006). "[I]n Anglo–American history, ... government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995).

Under this Court's precedents, a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law. See, *e.g.*, *Fulton v. Philadelphia*, 593 U. S. ——, —— – ——, ——, 141 S.Ct. 1868, 1876–1877, 1881, 210 L.Ed.2d 137 (2021); *Reed v. Town of Gilbert*, 576 U.S. 155, 171, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015); *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). We begin by examining whether Mr. Kennedy has discharged his burdens, first under the Free Exercise Clause, then under the Free Speech Clause.

A

The Free Exercise Clause provides that "Congress shall make no law ... prohibiting the free exercise" of religion. Amdt. 1. This Court has held the Clause applicable to the States under the terms of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through "the performance of (or abstention

from) physical acts." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

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." *Id.*, at 879–881, 110 S.Ct. 1595. 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, 113 S.Ct. 2217.[1]

That Mr. Kennedy has discharged his burdens is effectively undisputed. No one questions that he seeks to engage in a sincerely motivated religious exercise. The exercise in question involves, as Mr. Kennedy has put it, giving "thanks through prayer" briefly and by himself "on the playing field" at the conclusion of each game he coaches. App. 168, 171. Mr. Kennedy has indicated repeatedly that he is willing to "wai[t] until the game is over and the players have left the field" to "wal[k] to mid-field to say [his] short, private, personal prayer." *Id.*, at 69; see also *id.*, at 280, 282. The contested exercise before us does not involve leading prayers with the team or before any other captive audience. Mr. Kennedy's "religious beliefs do not require [him] to lead any prayer ... involving students." *Id.*, at 170. At the District's request, he voluntarily discontinued the school tradition of locker-room prayers and his postgame religious talks to students. The District disciplined him *only* for his decision to persist in praying quietly without his players after three games in October 2015. See Parts I–B and I–C, *supra*.

Nor does anyone question that, in forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule. A government policy will not qualify as neutral if it is "specifically directed at ... religious practice." *Smith*, 494 U.S. at 878, 110 S.Ct. 1595. A policy can fail this test if it "discriminate[s] on its face," or if a religious exercise is otherwise its "object." *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217; see also *Smith*, 494 U.S. at 878, 110 S.Ct. 1595. A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions." *Fulton*, 593 U. S., at ——, 141 S.Ct., at 1877. Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny. See *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217.

In this case, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character. As it put it in its September 17 letter, the District prohibited "any overt actions on Mr. Kennedy's part, appearing to a reasonable observer to endorse even voluntary, student-initiated prayer." App. 81. The District further explained that it could not allow "an employee, while still on duty, to engage in *religious* conduct." *Id.*, at 106 (emphasis added). Prohibiting a religious practice was thus the District's unquestioned "object." The District candidly

---

[1] A plaintiff may also prove a free exercise violation by showing that "official expressions of hostility" to religion accompany laws or policies burdening religious exercise; in cases like that we have "set aside" such policies without further inquiry. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. ——, ——, 138 S.Ct. 1719, 1732, 201 L.Ed.2d 35 (2018). To resolve today's case, however, we have no need to consult that test. Likewise, while the test we do apply today has been the subject of some criticism, see, *e.g.*, *Fulton v. Philadelphia*, 593 U. S. ——, ——, 141 S.Ct. 1868, 1876–1877, 210 L.Ed.2d 137 (2021), we have no need to engage with that debate today because no party has asked us to do so.

acknowledged as much below, conceding that its policies were "not neutral" toward religion. 991 F.3d at 1020.

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." App. 114. 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. App. 205; see also Part I–B, *supra*. 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." 991 F.3d at 1020.

B

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, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); see also *Lane v. Franks*, 573 U.S. 228, 231, 134 S.Ct. 2369, 189 L.Ed.2d 312 (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.

To account for the complexity associated with the interplay between free speech rights and government employment, this Court's decisions in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), *Garcetti*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689, and related cases suggest proceeding in two steps. The first step involves a threshold inquiry into the nature of the speech at issue. If a public employee speaks "pursuant to [his or her] official duties," this Court has said the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is—for constitutional purposes at least—the government's own speech. *Id*., at 421, 126 S.Ct. 1951.

At the same time and at the other end of the spectrum, when an employee "speaks as a citizen addressing a matter of public concern," our cases indicate that the First Amendment may be implicated and courts should proceed to a second step. *Id.*, at 423, 126 S.Ct. 1951. At this second step, our cases suggest that courts should attempt to engage in "a delicate balancing of the competing interests surrounding the speech and its consequences." *Ibid*. Among other things, courts at this second step have sometimes considered whether an employee's speech interests are outweighed by "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.*, at 417, 126 S.Ct. 1951 (quoting *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731).

Both sides ask us to employ at least certain aspects of this *Pickering–Garcetti* framework to resolve Mr. Kennedy's free speech claim. They share additional common ground too. They agree that Mr. Kennedy's speech implicates a matter of public concern. See App. to Pet. for Cert. 183; Brief for Respondent 44. They also appear to accept, at least for argument's sake, that Mr. Kennedy's speech does not raise questions of academic freedom that may or may not involve "additional" First Amendment "interests" beyond those captured by this framework. *Garcetti*, 547 U.S. at 425, 126

S.Ct. 1951; see also *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Brief for Petitioner 26, n. 2. 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?

Our cases offer some helpful guidance for resolving this question. In *Garcetti*, the Court concluded that a prosecutor's internal memorandum to a supervisor was made "pursuant to [his] official duties," and thus ineligible for First Amendment protection. 547 U.S. at 421, 126 S.Ct. 1951. In reaching this conclusion, the Court relied on the fact that the prosecutor's speech "fulfill[ed] a responsibility to advise his supervisor about how best to proceed with a pending case." *Ibid.* In other words, the prosecutor's memorandum was government speech because it was speech the government "itself ha[d] commissioned or created" and speech the employee was expected to deliver in the course of carrying out his job. *Id.*, at 422, 126 S.Ct. 1951.

By contrast, in *Lane* a public employer sought to terminate an employee after he testified at a criminal trial about matters involving his government employment. 573 U.S. at 233, 134 S.Ct. 2369. The Court held that the employee's speech was protected by the First Amendment. *Id.*, at 231, 134 S.Ct. 2369. In doing so, the Court held that the fact the speech touched on matters related to public employment was not enough to render it government speech. *Id.*, at 239–240, 134 S.Ct. 2369. Instead, the Court explained, the "critical question ... is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Id.*, at 240, 134 S.Ct. 2369. It is an inquiry this Court has said should be undertaken "practical[ly]," rather than with a blinkered focus on the terms of some formal and capacious written job description. *Garcetti*, 547 U.S. at 424, 126 S.Ct. 1951. To proceed otherwise would be to allow public employers to use "excessively broad job descriptions" to subvert the Constitution's protections. *Ibid*.

Applying these lessons here, it 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. *Lane*, 573 U.S. at 240, 134 S.Ct. 2369. 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. See Part I–B, *supra*. 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, 126 S.Ct. 1951.

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. App. 205; see Part I–B, *supra*. 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. *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951. 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." 991 F.3d at 1015. The court emphasized that Mr. Kennedy remained on duty after games. *Id.*, at 1016. Before us, the District presses the same arguments. See Brief for Respondent 24. 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, 126 S.Ct. 1951. 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. App. 205; see Part I–B, *supra*. 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, 89 S.Ct. 733.

Of course, acknowledging that Mr. Kennedy's prayers represented his own private speech does not end the matter. So far, we have recognized only that Mr. Kennedy has carried his threshold burden. Under the *Pickering–Garcetti* framework, a second step remains where the government may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern. See *Lane*, 573 U.S. at 236, 242, 134 S.Ct. 2369.[2]

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, 113 S.Ct. 2217, *supra*. A similar standard generally obtains under the Free Speech Clause. See *Reed*, 576 U.S. at 171, 135 S.Ct. 2218. 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

As we have seen, the District argues that its suspension of Mr. Kennedy was essential to avoid

---

[2] Because our analysis and the parties' concessions lead to the conclusion that Mr. Kennedy's prayer constituted private speech on a matter of public concern, we do not decide whether the Free Exercise Clause may sometimes demand a different analysis at the first step of the *Pickering–Garcetti* framework.

[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 ___ (opinion of SOTOMAYOR, J.).

a violation of the Establishment Clause. *Id.*, at 35–42. 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. App. 43. To resolve that clash, the District reasoned, Mr. Kennedy's rights had to "yield." *Ibid*. 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. 991 F.3d at 1017; see also *id.*, at 1020–1021.

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. See *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 13, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

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. App. 81. The District then took the view that a "reasonable observer" could think it "endorsed Kennedy's religious activity by not stopping the practice." 991 F.3d at 1018; see also App. 80–81; Parts I and II, *supra*. On the District's account, it did not matter whether the Free Exercise Clause protected Mr. Kennedy's prayer. It did not matter if his expression was private speech protected by the Free Speech Clause. It did not matter that the District never actually endorsed Mr. Kennedy's prayer, no one complained that it had, and a strong public reaction only followed after the District sought to ban Mr. Kennedy's prayer. 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, 115 S.Ct. 2440 (plurality opinion); *Shurtleff v. Boston*, 596 U. S. ——, —— – ——, 142 S.Ct. 1583, 1605–1606, —— L.Ed.2d —— (2022) (GORSUCH, J., concurring in judgment).

To defend its approach, the District relied on *Lemon* and its progeny. See App. 43–45. In upholding the District's actions, the Ninth Circuit followed the same course. See Part II–C, *supra*. 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. ——, ——, 139 S.Ct. 2067, 2101, 204 L.Ed.2d 452 (2019) (plurality opinion). That approach called for an examination of a law's purposes, effects, and potential for entanglement with religion. *Lemon*, 403 U. S., at 612–613, 91 S.Ct. 2105. 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, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989); *id.*, at 630, 109 S.Ct. 3086 (O'Connor, J., concurring in part and concurring in judgment); *Shurtleff*, 596 U. S., at ——, 142 S.Ct., at 1604–1605 (opinion of GORSUCH, J.)

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 —— – ——, 139 S.Ct., at 2079–2081 (plurality opinion); see also *Town of Greece v. Galloway*, 572 U.S. 565, 575–577, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014). The Court has explained that these tests "invited chaos" in lower courts, led to "differing results" in materially identical cases, and created a "minefield" for legislators. *Pinette*, 515 U.S. at 768–769, n. 3, 115 S.Ct. 2440 (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, 121 S.Ct. 2093, 150 L.Ed.2d 151 (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, 110 S.Ct. 2356, 110 L.Ed.2d 191 (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, 125 S.Ct. 2854, 162 L.Ed.2d 607 (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 —— – ——, 142 S.Ct., at 1587–1588; *id.*, at ——, 142 S.Ct., at 1595 (ALITO, J., concurring in judgment); *id.*, at ——, —— – ——, 142 S.Ct., at 1587, 1588–1589 (opinion of GORSUCH, J.).[4]

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, 134 S.Ct. 1811; see also *American Legion*, 588 U. S., at ——, 139 S.Ct., at 2087 (plurality opinion). "'[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, 134 S.Ct. 1811 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294, 83 S.Ct. 1560, 10 L.Ed.2d 844 (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, 134 S.Ct. 1811; see *American Legion*, 588

[4] Nor was that decision an outlier. In the last two decades, this Court has often criticized or ignored *Lemon* and its endorsement test variation. See, *e.g.*, *Espinoza v. Montana Dept. of Revenue*, 591 U. S. ——, 140 S.Ct. 2246, 207 L.Ed.2d 679 (2020); *American Legion v. American Humanist Assn.*, 588 U. S. ——, 139 S.Ct. 2067, 204 L.Ed.2d 452 (2019); *Trump v. Hawaii*, 585 U. S. ——, 138 S.Ct. 2392, 201 L.Ed.2d 775 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U. S. ——, 137 S.Ct. 2012, 198 L.Ed.2d 551 (2017); *Town of Greece v. Galloway*, 572 U.S. 565, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012); *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 131 S.Ct. 1436, 179 L.Ed.2d 523 (2011); *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007); *id.*, at 618, 127 S.Ct. 2553 (Scalia, J., concurring in judgment); *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005); *id.*, at 689, 125 S.Ct. 2854 (BREYER, J., concurring in judgment). A vast number of Justices have criticized those tests over an even longer period. See *Shurtleff v. Boston*, 596 U. S. ——, at —— – ——, and nn. 9–10, 142 S.Ct. 1583, at 1607-1608, and nn. 9–10, —— L.Ed.2d —— (2022) (GORSUCH, J., concurring in judgment) (collecting opinions authored or joined by ROBERTS and Rehnquist, C. J., and THOMAS, BREYER, ALITO, KAVANAUGH, Stevens, O'Connor, Scalia, and Kennedy, JJ.). The point has not been lost on our lower court colleagues. See, *e.g.*, 4 F.4th 910, 939–941 (2021) (O'Scannlain, J., respecting denial of rehearing en banc); *id.*, at 945 (R. Nelson, J., dissenting from denial of rehearing en banc); *id.*, at 947, n. 3 (collecting lower court cases from "around the country" that "have recognized *Lemon*'s demise").

U. S., at ——, 139 S.Ct., at 2087 (plurality opinion); *Torcaso v. Watkins*, 367 U.S. 488, 490, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961) (analyzing certain historical elements of religious establishments); *McGowan v. Maryland*, 366 U.S. 420, 437–440, 81 S.Ct. 1101, 6 L.Ed.2d 393 (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, 90 S.Ct. 1409, 25 L.Ed.2d 697 (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. See Brief for Respondent 34–37. And, the District says, coercing worship amounts to an Establishment Clause violation on anyone's account of the Clause's original meaning.

As it turns out, however, there is a pretty obvious reason why the Ninth Circuit did not adopt this theory in proceedings below: The evidence cannot sustain it. To be sure, this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, "make a religious observance compulsory." *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954 (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, 112 S.Ct. 2649, 120 L.Ed.2d 467 (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.[5] Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause. Compare *Lee*, 505 U.S. at 593, 112 S.Ct. 2649, with *id.*, at 640–641, 112 S.Ct. 2649 (Scalia, J., dissenting). But in this case Mr. Kennedy's private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion.

Begin with the District's own contemporaneous description of the facts. In its correspondence with Mr. Kennedy, the District never raised coercion concerns. To the contrary, the District conceded in a public 2015 document that there was "no evidence that students [were] directly coerced to pray with Kennedy." App. 105. This is consistent with Mr. Kennedy's account too. He has repeatedly stated that he "never coerced, required, or asked any student to pray," and that he never "told any student that it was important that they participate in any religious activity." *Id.*, at 170.

Consider, too, the actual requests Mr. Kennedy made. 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. App. 170. And he willingly ended it, as the District has acknowledged. *Id.*, at 77, 170. He also willingly ended his practice of postgame religious talks with

---

[5] See, *e.g.*, *Lee v. Weisman*, 505 U.S. 577, 640–642, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (Scalia, J. dissenting); *Shurtleff*, 596 U. S., at ——– – ———, 142 S.Ct., at 1608-1610 (opinion of GORSUCH, J.) (discussing coercion and certain other historical hallmarks of an established religion); 1 Annals of Cong. 730–731 (1789) (Madison explaining that the First Amendment aimed to prevent one or multiple sects from "establish[ing] a religion to which they would compel others to conform"); M. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2144–2146 (2003).

his team. *Id.*, at 70, 77, 170–172. 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. *Id.*, at 293–294. 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." *Id.*, at 294. 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. *Id.*, at 280, 282; see also *id.*, at 59 (proposing the team leave the field for the prayer). 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." *Id.*, at 292. It was for three prayers of this sort alone in October 2015 that the District suspended him. See Parts I–B and I–C, *supra*.

Naturally, Mr. Kennedy's proposal to pray quietly by himself on the field would have meant some people would have seen his religious exercise. Those close at hand might have heard him too. But learning how to tolerate speech or prayer of all kinds is "part of learning how to live in a pluralistic society," a trait of character essential to "a tolerant citizenry." *Lee*, 505 U.S. at 590, 112 S.Ct. 2649. This Court has long recognized as well that "secondary school students are mature enough ... to understand that a school does not endorse," let alone coerce them to participate in, "speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U.S. at 250, 110 S.Ct. 2356 (plurality opinion). Of course, some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But "[o]ffense ... does not equate to coercion." *Town of Greece*, 572 U.S. at 589, 134 S.Ct. 1811 (plurality opinion).

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. Brief for Respondent 37. 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." App. 356.

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,'" 991 F.3d at 1012–1013, and thus could not have "reasonably fear[ed]" that he would decrease their "playing time" or destroy their "opportunities" if they did not "participate," Brief for Respondent 43. As for the other two relevant games, "no one joined" Mr. Kennedy on October 23. 991 F.3d at 1019. And only a few members of the public participated on October 26. App. 97, 314–315; see also Part I–B, *supra*.[6]

[6] The dissent expresses concern that looking to "histor[y] an[d] tradition" to guide Establishment Clause inquiries will not afford "school administrators" sufficient guidance. *Post*, at ___. But that concern supplies no excuse to adorn the Constitution with rules not supported by its terms and the traditions undergirding them. Nor, in any event, is there any question that the District understands that coercion can be a hallmark of an Establishment Clause violation. See App. 105. The District's problem isn't a failure to identify coercion as a crucial legal consideration; it is a lack of evidence that coercion actually occurred.

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 ___ (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. See Part III–B, *supra*. 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. See *Town of Greece*, 572 U.S. at 589, 134 S.Ct. 1811 (plurality opinion). 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, 112 S.Ct. 2649. 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, 72 S.Ct. 679.

Our judgments on all these scores find support in this Court's prior cases too. In *Zorach*, for example, challengers argued that a public school program permitting students to spend time in private religious instruction off campus was impermissibly coercive. *Id.*, at 308, 311–312, 72 S.Ct. 679. The Court rejected that challenge because students were not required to attend religious instruction and there was no evidence that any employee had "us[ed] their office to persuade or force students" to participate in religious activity. *Id.*, at 311, and n. 6, 72 S.Ct. 679. What was clear there is even more obvious here—where there is no evidence anyone sought to persuade or force students to participate, and there is no formal school program accommodating the religious activity at issue.

Meanwhile, this case looks very different from those in which this Court has found prayer involving public school students to be problematically coercive. In *Lee*, this Court held that school officials violated the Establishment Clause by "including [a] clerical membe[r]" who publicly recited prayers "as part of [an] official school graduation ceremony" because the school had "in every practical sense compelled attendance and participation in" a "religious exercise." 505 U.S. at 580, 598, 112 S.Ct. 2649. In *Santa Fe Independent School Dist. v. Doe*, the Court held that a school district violated the Establishment Clause by broadcasting a prayer "over the public address system" before each football game. 530 U.S. 290, 294, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). The Court observed that, while students generally were not required to attend games, attendance *was* required for "cheerleaders, members of the band, and, of course, the team members themselves." *Id.*, at 311, 120 S.Ct. 2266. None of that is true here. The prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate. And, in fact, none of Mr. Kennedy's students did participate in any of the three October 2015 prayers that resulted in Mr. Kennedy's discipline. See App. 90, 97, 173, 236–239; Parts I–B

and I–C, *supra*.[7]

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. 991 F.3d at 1017; App. 43. 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, 83 S.Ct. 1560 (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. See, *e.g.*, *Rosenberger*, 515 U.S. at 845–846, 115 S.Ct. 2510; *Good News Club*, 533 U.S. at 112–119, 121 S.Ct. 2093; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394–395, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Widmar*, 454 U.S. at 270–275, 102 S.Ct. 269.[8]

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

---

[7] Even if the personal prayers Mr. Kennedy sought to offer after games are not themselves coercive, the dissent suggests that they bear an indelible taint of coercion by association with the school's past prayer practices—some of which predated Mr. Kennedy, and all of which the District concedes he ended on request. But none of those abandoned practices formed the basis for Mr. Kennedy's suspension, and he has not sought to claim First Amendment protection for them. See *Town of Greece*, 572 U.S. at 585, 134 S.Ct. 1811 (other past practices do not permanently "despoil a practice" later challenged under the Establishment Clause). Nor, contrary to the dissent, does the possibility that students might choose, unprompted, to participate in Mr. Kennedy's prayers necessarily prove them coercive. See *post*, at ___, ___. For one thing, the District has conceded that no coach may "discourag[e]" voluntary student prayer under its policies. Tr. of Oral Arg. 91. For another, Mr. Kennedy has repeatedly explained that he is willing to conduct his prayer without students—as he did after each of the games that formed the basis of his suspension—and after students head to the locker room or bus. See App. 280, 282, 292–294.

[8] Failing under its coercion theory, the District offers still another backup argument. It contends that it had to suppress Mr. Kennedy's protected First Amendment activity to ensure order at Bremerton football games. See also *post*, at ___, ___, ___, ___ (SOTOMAYOR, J., dissenting). But the District never raised concerns along these lines in its contemporaneous correspondence with Mr. Kennedy. And unsurprisingly, neither the District Court nor the Ninth Circuit invoked this rationale to justify the District's actions. Government "justification[s]" for interfering with First Amendment rights "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). Nor under our Constitution does protected speech or religious exercise readily give way to a "heckler's veto." *Good News Club v. Milford Central School*, 533 U.S. 98, 119, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001); *supra*, at ___.

Reversed.

Justice THOMAS, concurring.

I join the Court's opinion because it correctly holds that Bremerton School District violated Joseph Kennedy's First Amendment rights. I write separately to emphasize that the Court's opinion does not resolve two issues related to Kennedy's free-exercise claim.

First, the Court refrains from deciding whether or how public employees' rights under the Free Exercise Clause may or may not be different from those enjoyed by the general public. See *ante,* at ___, n. 2. In "striking the appropriate balance" between public employees' constitutional rights and "the realities of the employment context," we have often "consider[ed] whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 600, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). In the free-speech context, for example, that inquiry has prompted us to distinguish between different kinds of speech; we have held that "the First Amendment protects public employee speech only when it falls within the core of First Amendment protection—speech on matters of public concern." *Ibid.* It remains an open question, however, if a similar analysis can or should apply to free-exercise claims in light of the "history" and "tradition" of the Free Exercise Clause. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 406, 131 S.Ct. 2488, 180 L.Ed.2d 408 (2011) (Scalia, J., concurring in judgment in part and dissenting in part); see also *id.,* at 400, 131 S.Ct. 2488 (THOMAS, J., concurring in judgment).

Second, the Court also does not decide what burden a government employer must shoulder to justify restricting an employee's religious expression because the District had no constitutional basis for reprimanding Kennedy under any possibly applicable standard of scrutiny. See *ante,* at ___. While we have many public-employee precedents addressing how the interest-balancing test set out in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), applies under the Free Speech Clause, the Court has never before applied *Pickering* balancing to a claim brought under the Free Exercise Clause. A government employer's burden therefore might differ depending on which First Amendment guarantee a public employee invokes.

Justice ALITO, concurring.

The expression at issue in this case is unlike that in any of our prior cases involving the free-speech rights of public employees. Petitioner's expression occurred while at work but during a time when a brief lull in his duties apparently gave him a few free moments to engage in private activities. When he engaged in this expression, he acted in a purely private capacity. The Court does not decide what standard applies to such expression under the Free Speech Clause but holds only that retaliation for this expression cannot be justified based on any of the standards discussed. On that understanding, I join the opinion in full.

Justice SOTOMAYOR, with whom Justice BREYER and Justice 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, 82 S.Ct. 1261, 8 L.Ed.2d 601 (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. ——, ——, 142 S.Ct. 1987, —— L.Ed.2d —— (2022) (BREYER, J., dissenting). 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, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and calls into question decades of subsequent precedents that it deems "offshoot[s]" of that decision. *Ante,* at ___. 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.

I

As the majority tells it, Kennedy, a coach for the District's football program, "lost his job" for "pray[ing] quietly while his students were otherwise occupied." *Ante,* at ___. The record before us, however, tells a different story.

A

The District serves approximately 5,057 students and employs 332 teachers and 400 nonteaching personnel in Kitsap County, Washington. The county is home to Bahá'ís, Buddhists, Hindus, Jews, Muslims, Sikhs, Zoroastrians, and many denominations of Christians, as well as numerous residents who are religiously unaffiliated. See Brief for Religious and Denominational Organizations et al. as *Amici Curiae* 4.

The District first hired Kennedy in 2008, on a renewable annual contract, to serve as a part-time assistant coach for the varsity football team and head coach for the junior varsity team at Bremerton High School (BHS). Kennedy's job description required him to "[a]ccompany and direct" all home

and out-of-town games to which he was assigned, overseeing preparation and transportation before games, being "[r]esponsible for player behavior both on and off the field," supervising dressing rooms, and "secur[ing] all facilities at the close of each practice." App. 32–34, 36. His duties encompassed "supervising student activities immediately following the completion of the game" until the students were released to their parents or otherwise allowed to leave. *Id.,* at 133.

The District also set requirements for Kennedy's interactions with players, obliging him, like all coaches, to "exhibit sportsmanlike conduct at all times," "utilize positive motivational strategies to encourage athletic performance," and serve as a "mentor and role model for the student athletes." *Id.,* at 56. In addition, Kennedy's position made him responsible for interacting with members of the community. In this capacity, the District required Kennedy and other coaches to "maintain positive media relations," "always approach officials with composure" with the expectation that they were "constantly being observed by others," and "communicate effectively" with parents. *Ibid.*

Finally, District coaches had to "[a]dhere to [District] policies and administrative regulations" more generally. *Id.,* at 30–31. As relevant here, the District's policy on "Religious-Related Activities and Practices" provided that "[s]chool staff shall neither encourage or discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity" and that "[r]eligious services, programs or assemblies shall not be conducted in school facilities during school hours or in connection with any school sponsored or school related activity." *Id.,* at 26–28.

B

In September 2015, a coach from another school's football team informed BHS' principal that Kennedy had asked him and his team to join Kennedy in prayer. The other team's coach told the principal that he thought it was "'cool'" that the District "'would allow [its] coaches to go ahead and invite other teams' coaches and players to pray after a game.'" *Id*., at 229.

The District initiated an inquiry into whether its policy on Religious-Related Activities and Practices had been violated. It learned that, since his hiring in 2008, Kennedy had been kneeling on the 50-yard line to pray immediately after shaking hands with the opposing team. Kennedy recounted that he initially prayed alone and that he never asked any student to join him. Over time, however, a majority of the team came to join him, with the numbers varying from game to game. Kennedy's practice evolved into postgame talks in which Kennedy would hold aloft student helmets and deliver speeches with "overtly religious references," which Kennedy described as prayers, while the players kneeled around him. *Id.,* at 40. The District also learned that students had prayed in the past in the locker room prior to games, before Kennedy was hired, but that Kennedy subsequently began leading those prayers too.

While the District's inquiry was pending, its athletic director attended BHS' September 11, 2015, football game and told Kennedy that he should not be conducting prayers with players. After the game, while the athletic director watched, Kennedy led a prayer out loud, holding up a player's helmet as the players kneeled around him. While riding the bus home with the team, Kennedy posted on Facebook that he thought he might have just been fired for praying.

On September 17, the District's superintendent sent Kennedy a letter informing him that leading prayers with students on the field and in the locker room would likely be found to violate the Establishment Clause, exposing the District to legal liability. The District acknowledged that Kennedy had "not actively encouraged, or required, participation" but emphasized that "school staff may not indirectly encourage students to engage in religious activity" or "endors[e]" religious activity; rather, the District explained, staff "must remain neutral" "while performing their job

duties." *Id.,* at 41–43. The District instructed Kennedy that any motivational talks to students must remain secular, "so as to avoid alienation of any team member." *Id*., at 44.

The District reiterated that "all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities." *Id.*, at 45. To avoid endorsing student religious exercise, the District instructed that such activity must be nondemonstrative or conducted separately from students, away from student activities. *Ibid*. The District expressed concern that Kennedy had continued his midfield prayer practice at two games after the District's athletic director and the varsity team's head coach had instructed him to stop. *Id.,* at 40–41.

Kennedy stopped participating in locker room prayers and, after a game the following day, gave a secular speech. He returned to pray in the stadium alone after his duties were over and everyone had left the stadium, to which the District had no objection. Kennedy then hired an attorney, who, on October 14, sent a letter explaining that Kennedy was "motivated by his sincerely-held religious beliefs to pray following each football game." *Id.,* at 63. The letter claimed that the District had required that Kennedy "flee from students if they voluntarily choose to come to a place where he is privately praying during personal time," referring to the 50-yard line of the football field immediately following the conclusion of a game. *Id.,* at 70. Kennedy requested that the District simply issue a "clarif[ication] that the prayer is [Kennedy's] private speech" and that the District not "interfere" with students joining Kennedy in prayer. *Id*., at 71. The letter further announced that Kennedy would resume his 50-yard-line prayer practice the next day after the October 16 homecoming game.[1]

Before the homecoming game, Kennedy made multiple media appearances to publicize his plans to pray at the 50-yard line, leading to an article in the Seattle News and a local television broadcast about the upcoming homecoming game. In the wake of this media coverage, the District began receiving a large number of emails, letters, and calls, many of them threatening.

The District responded to Kennedy's letter before the game on October 16. It emphasized that Kennedy's letter evinced "materia[l] misunderstand[ings]" of many of the facts at issue. *Id.,* at 76. For instance, Kennedy's letter asserted that he had not invited anyone to pray with him; the District noted that that might be true of Kennedy's September 17 prayer specifically, but that Kennedy had acknowledged inviting others to join him on many previous occasions. The District's September 17 letter had explained that Kennedy traditionally held up helmets from the BHS and opposing teams while players from each team kneeled around him. While Kennedy's letter asserted that his prayers "occurr[ed] 'on his own time,' after his duties as a District employee had ceased," the District pointed out that Kennedy "remain[ed] on duty" when his prayers occurred "immediately following completion of the football game, when students are still on the football field, in uniform, under the stadium lights, with the audience still in attendance, and while Mr. Kennedy is still in his District-issued and District-logoed attire." *Id*., at 78 (emphasis deleted). The District further noted that "[d]uring the time following completion of the game, until players are released to their parents or otherwise allowed to leave the event, Mr. Kennedy, like all coaches, is clearly on duty and paid to continue supervision of students." *Id*., at 79.

The District stated that it had no objection to Kennedy returning to the stadium when he was off

---

[1] The Court recounts that Kennedy was "willing to say his 'prayer while the players were walking to the locker room' or 'bus,' and then catch up with his team." *Ante,* at ___ (quoting App. 280–282); see also *ante,* at ___. Kennedy made the quoted remarks, however, only during his deposition in the underlying litigation, stating in response to a question that such timing would have been "physically possible" and "possibly" have been acceptable to him, but that he had never "discuss[ed] with the District whether that was a possibility for [him] to do" and had "no idea" whether his lawyers raised it with the District. App. 280.

duty to pray at the 50-yard line, nor with Kennedy praying while on duty if it did not interfere with his job duties or suggest the District's endorsement of religion. The District explained that its establishment concerns were motivated by the specific facts at issue, because engaging in prayer on the 50-yard line immediately after the game finished would appear to be an extension of Kennedy's "prior, long-standing and well-known history of leading students in prayer" on the 50-yard line after games. *Id.*, at 81. The District therefore reaffirmed its prior directives to Kennedy.

On October 16, after playing of the game had concluded, Kennedy shook hands with the opposing team, and as advertised, knelt to pray while most BHS players were singing the school's fight song. He quickly was joined by coaches and players from the opposing team. Television news cameras surrounded the group.[2] Members of the public rushed the field to join Kennedy, jumping fences to access the field and knocking over student band members. After the game, the District received calls from Satanists who "'intended to conduct ceremonies on the field after football games if others were allowed to.'" *Id.,* at 181. To secure the field and enable subsequent games to continue safely, the District was forced to make security arrangements with the local police and to post signs near the field and place robocalls to parents reiterating that the field was not open to the public.

The District sent Kennedy another letter on October 23, explaining that his conduct at the October 16 game was inconsistent with the District's requirements for two reasons. First, it "drew [him] away from [his] work"; Kennedy had, "until recently, ... regularly c[o]me to the locker room with the team and other coaches following the game" and had "specific responsibility for the supervision of players in the locker room following games." *Id.,* at 92–93. Second, his conduct raised Establishment Clause concerns, because "any reasonable observer saw a District employee, on the field only by virtue of his employment with the District, still on duty, under the bright lights of the stadium, engaged in what was clearly, given [his] prior public conduct, overtly religious conduct." *Id.,* at 93.

Again, the District emphasized that it was happy to accommodate Kennedy's desire to pray on the job in a way that did not interfere with his duties or risk perceptions of endorsement. Stressing that "[d]evelopment of accommodations is an interactive process," it invited Kennedy to reach out to discuss accommodations that might be mutually satisfactory, offering proposed accommodations and inviting Kennedy to raise others. *Id*., at 93–94. The District noted, however, that "further violations of [its] directives" would be grounds for discipline or termination. *Id.*, at 95.

Kennedy did not directly respond or suggest a satisfactory accommodation. Instead, his attorneys told the media that he would accept only demonstrative prayer on the 50-yard line immediately after games. During the October 23 and October 26 games, Kennedy again prayed at the 50-yard line immediately following the game, while postgame activities were still ongoing. At the October 23 game, Kennedy kneeled on the field alone with players standing nearby. At the October 26 game, Kennedy prayed surrounded by members of the public, including state representatives who attended the game to support Kennedy. The BHS players, after singing the fight song, joined Kennedy at midfield after he stood up from praying.

In an October 28 letter, the District notified Kennedy that it was placing him on paid administrative leave for violating its directives at the October 16, October 23, and October 26 games

---

[2] The Court describes the events of the October 16 game as having "spurred media coverage of Mr. Kennedy's case." *Ante,* at ___. In fact, the District Court found that Kennedy himself generated the media coverage by publicizing his dispute with the District in his initial Facebook posting and in his media appearances before the October 16 game. 443 F.Supp.3d 1223, 1230 (W.D. Wash. 2020).

by kneeling on the field and praying immediately following the games before rejoining the players for postgame talks. The District recounted that it had offered accommodations to, and offered to engage in further discussions with, Kennedy to permit his religious exercise, and that Kennedy had failed to respond to these offers. The District stressed that it remained willing to discuss possible accommodations if Kennedy was willing.

After the issues with Kennedy arose, several parents reached out to the District saying that their children had participated in Kennedy's prayers solely to avoid separating themselves from the rest of the team. No BHS students appeared to pray on the field after Kennedy's suspension.

In Kennedy's annual review, the head coach of the varsity team recommended Kennedy not be rehired because he "failed to follow district policy," "demonstrated a lack of cooperation with administration," "contributed to negative relations between parents, students, community members, coaches, and the school district," and "failed to supervise student-athletes after games due to his interactions with media and community" members. *Id.,* at 114. The head coach himself also resigned after 11 years in that position, expressing fears that he or his staff would be shot from the crowd or otherwise attacked because of the turmoil created by Kennedy's media appearances. Three of five other assistant coaches did not reapply.

C

Kennedy then filed suit. He contended, as relevant, that the District violated his rights under the Free Speech and Free Exercise Clauses of the First Amendment. Kennedy moved for a preliminary injunction, which the District Court denied based on the circumstances surrounding Kennedy's prayers. The court concluded that Kennedy had "chose[n] a time and event," the October 16 homecoming game, that was "a big deal" for students, and then "used that opportunity to convey his religious views" in a manner a reasonable observer would have seen as a "public employee ... leading an orchestrated session of faith." App. to Pet. for Cert. 303. The Court of Appeals affirmed, again emphasizing the specific context of Kennedy's prayers. The court rejected Kennedy's contention that he had been "praying on the fifty-yard line 'silently and alone.'" *Kennedy v. Bremerton School Dist.*, 869 F.3d 813, 825 (C.A.9 2017). The court noted that he had in fact refused "an accommodation permitting him to pray ... after the stadium had emptied," "indicat[ing] that it is essential that his speech be delivered in the presence of students and spectators." *Ibid.* This Court denied certiorari.

Following discovery, the District Court granted summary judgment to the District. The court concluded that Kennedy's 50-yard-line prayers were not entitled to protection under the Free Speech Clause because his speech was made in his capacity as a public employee, not as a private citizen. 443 F.Supp.3d 1223, 1237 (W.D. Wash. 2020). In addition, the court held that Kennedy's prayer practice violated the Establishment Clause, reasoning that "speech from the center of the football field immediately after each game ... conveys official sanction." *Id.,* at 1238. That was especially true where Kennedy, a school employee, initiated the prayer; Kennedy was "joined by students or adults to create a group of worshippers in a place the school controls access to"; and Kennedy had a long "history of engaging in religious activity with players" that would have led a familiar observer to believe that Kennedy was "continuing this tradition" with prayer at the 50-yard line. *Id.*, at 1238–1239. The District Court further found that players had reported "feeling compelled to join Kennedy in prayer to stay connected with the team or ensure playing time," and that the "slow accumulation of players joining Kennedy suggests exactly the type of vulnerability to social pressure that makes the Establishment Clause vital in the high school context." *Id.*, at 1239. The court rejected Kennedy's free exercise claim, finding the District's directive narrowly tailored to its Establishment

Clause concerns and citing Kennedy's refusal to cooperate in finding an accommodation that would be acceptable to him. *Id.,* at 1240.

The Court of Appeals affirmed, explaining that "the facts in the record utterly belie [Kennedy's] contention that the prayer was personal and private." 991 F.3d 1004, 1017 (C.A.9 2021). The court instead concluded that Kennedy's speech constituted government speech, as he "repeatedly acknowledged that—and behaved as if—he was a mentor, motivational speaker, and role model to students specifically at the conclusion of the game." *Id.*, at 1015 (emphasis deleted). In the alternative, the court concluded that Kennedy's speech, even if in his capacity as a private citizen, was appropriately regulated by the District to avoid an Establishment Clause violation, emphasizing once more that this conclusion was tied to the specific "evolution of Kennedy's prayer practice with students" over time. *Id.,* at 1018. The court rejected Kennedy's free exercise claim for the reasons stated by the District Court. *Id.,* at 1020. The Court of Appeals denied rehearing en banc, and this Court granted certiorari.

II

Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.

A

The Establishment Clause prohibits States from adopting laws "respecting an establishment of religion." Amdt. 1; see *Wallace v. Jaffree*, 472 U.S. 38, 49, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (recognizing the Clause's incorporation against the States). The First Amendment's next Clause prohibits the government from making any law "prohibiting the free exercise thereof." Taken together, these two Clauses (the Religion Clauses) express the view, foundational to our constitutional system, "that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). Instead, "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere," which has the "freedom to pursue that mission." *Ibid.*

The Establishment Clause protects this freedom by "command[ing] a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). At its core, this means forbidding "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). In the context of public schools, it 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." *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U.S. 203, 211, 68 S.Ct. 461, 92 L.Ed. 649 (1948).

Indeed, "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583–584, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). The reasons motivating this vigilance inhere in the nature of schools themselves and the young people they serve. Two are relevant here.

First, government neutrality toward religion is particularly important in the public school context given the role public schools play in our society. "'The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny,'" meaning that "'[i]n no activity of the State is it more vital to keep out divisive forces than in its schools.'" *Id.* at 584, 107 S.Ct. 2573. Families "entrust public schools with the education of their children ... on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Ibid.* Accordingly, the Establishment Clause "proscribes public schools from 'conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred'" or otherwise endorsing religious beliefs. *Lee*, 505 U.S. at 604–605, 112 S.Ct. 2649 (Blackmun, J., concurring) (emphasis deleted).

Second, schools face a higher risk of unconstitutionally "coerc[ing] ... support or participat[ion] in religion or its exercise" than other government entities. *Id.,* at 587, 112 S.Ct. 2649 (opinion of the Court). The State "exerts great authority and coercive power" in schools as a general matter "through mandatory attendance requirements." *Edwards*, 482 U.S. at 584, 107 S.Ct. 2573. Moreover, the State exercises that great authority over children, who are uniquely susceptible to "subtle coercive pressure." *Lee*, 505 U.S. at 588, 112 S.Ct. 2649; cf. *Town of Greece v. Galloway*, 572 U.S. 565, 590, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014) (plurality opinion) ("[M]ature adults," unlike children, may not be "'readily susceptible to religious indoctrination or peer pressure'"). Children are particularly vulnerable to coercion because of their "emulation of teachers as role models" and "susceptibility to peer pressure." *Edwards*, 482 U.S. at 584, 107 S.Ct. 2573. Accordingly, this Court has emphasized that "the State may not, consistent with the Establishment Clause, place primary and secondary school children" in the dilemma of choosing between "participating, with all that implies, or protesting" a religious exercise in a public school. *Lee*, 505 U.S. at 593, 112 S.Ct. 2649.

Given the twin Establishment Clause concerns of endorsement and coercion, it is unsurprising that the Court has consistently held integrating prayer into public school activities to be unconstitutional, including when student participation is not a formal requirement or prayer is silent. See *Wallace*, 472 U.S. 38, 105 S.Ct. 2479 (mandatory moment of silence for prayer); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (nonmandatory recitation of Bible verses and prayer); *Engel*, 370 U.S. at 424, 82 S.Ct. 1261 (nonmandatory recitation of one-sentence prayer). The Court also has held that incorporating a nondenominational general benediction into a graduation ceremony is unconstitutional. *Lee*, 505 U.S. 577, 112 S.Ct. 2649. Finally, this Court has held that including prayers in student football games is unconstitutional, even when delivered by students rather than staff and even when students themselves initiated the prayer. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000).

B

Under these precedents, the Establishment Clause violation at hand is clear. This Court has held that a "[s]tate officia[l] direct[ing] the performance of a formal religious exercise" as a part of the "ceremon[y]" of a school event "conflicts with settled rules pertaining to prayer exercises for students." *Lee*, 505 U.S. at 586–587, 112 S.Ct. 2649. Kennedy was on the job as a school official "on government property" when he incorporated a public, demonstrative prayer into "government-sponsored school-related events" as a regularly scheduled feature of those events. *Santa Fe*, 530 U.S. at 302, 120 S.Ct. 2266.

Kennedy's tradition of a 50-yard line prayer thus strikes at the heart of the Establishment

Clause's concerns about endorsement. For students and community members at the game, Coach Kennedy was the face and the voice of the District during football games. The timing and location Kennedy selected for his prayers were "clothed in the traditional indicia of school sporting events." *Id.,* at 308, 120 S.Ct. 2266. Kennedy spoke from the playing field, which was accessible only to students and school employees, not to the general public. Although the football game itself had ended, the football game events had not; Kennedy himself acknowledged that his responsibilities continued until the players went home. Kennedy's postgame responsibilities were what placed Kennedy on the 50-yard line in the first place; that was, after all, where he met the opposing team to shake hands after the game. Permitting a school coach to lead students and others he invited onto the field in prayer at a predictable time after each game could only be viewed as a postgame tradition occurring "with the approval of the school administration." *Ibid.*

Kennedy's prayer practice also implicated the coercion concerns at the center of this Court's Establishment Clause jurisprudence. This Court has previously recognized a heightened potential for coercion where school officials are involved, as their "effort[s] to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject." *Lee*, 505 U.S. at 590, 112 S.Ct. 2649. The reasons for fearing this pressure are self-evident. This Court has recognized that students face immense social pressure. Students look up to their teachers and coaches as role models and seek their approval. Students also depend on this approval for tangible benefits. Players recognize that gaining the coach's approval may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting. In addition to these pressures to please their coaches, this Court has recognized that players face "immense social pressure" from their peers in the "extracurricular event that is American high school football." *Santa Fe*, 530 U.S. at 311, 120 S.Ct. 2266.

The record before the Court bears this out. The District Court found, in the evidentiary record, that some students reported joining Kennedy's prayer because they felt social pressure to follow their coach and teammates. Kennedy told the District that he began his prayers alone and that players followed each other over time until a majority of the team joined him, an evolution showing coercive pressure at work.

Kennedy does not defend his longstanding practice of leading the team in prayer out loud on the field as they kneeled around him. Instead, he responds, and the Court accepts, that his highly visible and demonstrative prayer at the last three games before his suspension did not violate the Establishment Clause because these prayers were quiet and thus private. This Court's precedents, however, do not permit isolating government actions from their context in determining whether they violate the Establishment Clause. To the contrary, this Court has repeatedly stated that Establishment Clause inquiries are fact specific and require careful consideration of the origins and practical reality of the specific practice at issue. See, *e.g.*, *id.,* at 315, 120 S.Ct. 2266; *Lee*, 505 U.S. at 597, 112 S.Ct. 2649. In *Santa Fe*, the Court specifically addressed how to determine whether the implementation of a new policy regarding prayers at football games "insulates the continuation of such prayers from constitutional scrutiny." 530 U.S. at 315, 120 S.Ct. 2266. The Court held that "inquiry into this question not only can, but must, include an examination of the circumstances surrounding" the change in policy, the "long-established tradition" before the change, and the "'unique circumstances'" of the school in question. *Ibid.* This Court's precedent thus does not permit treating Kennedy's "new" prayer practice as occurring on a blank slate, any more than those in the District's school community would have experienced Kennedy's changed practice (to the degree there was one) as erasing years of prior actions by Kennedy.

Like the policy change in *Santa Fe,* Kennedy's "changed" prayers at these last three games were a clear continuation of a "long-established tradition of sanctioning" school official involvement in student prayers. *Ibid*. Students at the three games following Kennedy's changed practice witnessed Kennedy kneeling at the same time and place where he had led them in prayer for years. They witnessed their peers from opposing teams joining Kennedy, just as they had when Kennedy was leading joint team prayers. They witnessed members of the public and state representatives going onto the field to support Kennedy's cause and pray with him. Kennedy did nothing to stop this unauthorized access to the field, a clear dereliction of his duties. The BHS players in fact joined the crowd around Kennedy after he stood up from praying at the last game. That BHS students did not join Kennedy in these last three specific prayers did not make those events compliant with the Establishment Clause. The coercion to do so was evident. Kennedy himself apparently anticipated that his continued prayer practice would draw student participation, requesting that the District agree that it would not "interfere" with students joining him in the future. App. 71.

Finally, Kennedy stresses that he never formally required students to join him in his prayers. But existing precedents do not require coercion to be explicit, particularly when children are involved. To the contrary, this Court's Establishment Clause jurisprudence establishes that "'the government may no more use social pressure to enforce orthodoxy than it may use more direct means.'" *Santa Fe*, 530 U.S. at 312, 120 S.Ct. 2266. Thus, the Court has held that the Establishment Clause "will not permit" a school "'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game." *Ibid.* To uphold a coach's integration of prayer into the ceremony of a football game, in the context of an established history of the coach inviting student involvement in prayer, is to exact precisely this price from students.

C

As the Court explains, see *ante,* at ___, Kennedy did not "shed [his] constitutional rights ... at the schoolhouse gate" while on duty as a coach. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Constitutional rights, however, are not absolutes. Rights often conflict and balancing of interests is often required to protect the separate rights at issue. See *Dobbs v. Jackson Women's Health Organization*, 597 U. S. ——, ——, 142 S.Ct. 2228, 2322-2323, —— L.Ed.2d —— (2022) (BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (noting that "the presence of countervailing interests ... is what ma[kes]" a constitutional question "hard, and what require[s] balancing").

The particular tensions at issue in this case, between the speech interests of the government and its employees and between public institutions' religious neutrality and private individuals' religious exercise, are far from novel. This Court's settled precedents offer guidance to assist courts, governments, and the public in navigating these tensions. Under these precedents, the District's interest in avoiding an Establishment Clause violation justified both its time and place restrictions on Kennedy's speech and his exercise of religion.

First, as to Kennedy's free speech claim, Kennedy "accept[ed] certain limitations" on his freedom of speech when he accepted government employment. *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). The Court has recognized that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions" to ensure "the efficient provision of public services." *Ibid*. Case law instructs balancing "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs

through its employees" to determine whose interests should prevail. *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

As the Court of Appeals below outlined, the District has a strong argument that Kennedy's speech, formally integrated into the center of a District event, was speech in his official capacity as an employee that is not entitled to First Amendment protections at all. See *Garcetti*, 547 U.S. at 418, 126 S.Ct. 1951; 991 F.3d at 1014–1016 (applying *Garcetti*).[3] It is unnecessary to resolve this question, however, because, even assuming that Kennedy's speech was in his capacity as a private citizen, the District's responsibilities under the Establishment Clause provided "adequate justification" for restricting it. *Garcetti*, 547 U.S. at 418, 126 S.Ct. 1951.

Similarly, Kennedy's free exercise claim must be considered in light of the fact that he is a school official and, as such, his participation in religious exercise can create Establishment Clause conflicts. Accordingly, his right to pray at any time and in any manner he wishes while exercising his professional duties is not absolute. See *Lee*, 505 U.S. at 587, 112 S.Ct. 2649 (noting that a school official's choice to integrate a prayer is "attributable to the State"). As the Court explains, see *ante,* at ___, the parties agree (and I therefore assume) that for the purposes of Kennedy's claim, the burden is on the District to establish that its policy prohibiting Kennedy's public prayers was the least restrictive means of furthering a compelling state interest. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

Here, the District's directive prohibiting Kennedy's demonstrative speech at the 50-yard line was narrowly tailored to avoid an Establishment Clause violation. The District's suspension of Kennedy followed a long history. The last three games proved that Kennedy did not intend to pray silently, but to thrust the District into incorporating a religious ceremony into its events, as he invited others to join his prayer and anticipated in his communications with the District that students would want to join as well. Notably, the District repeatedly sought to work with Kennedy to develop an accommodation to permit him to engage in religious exercise during or after his game-related responsibilities. Kennedy, however, ultimately refused to respond to the District's suggestions and declined to communicate with the District, except through media appearances. Because the District's valid Establishment Clause concerns satisfy strict scrutiny, Kennedy's free exercise claim fails as well.

III

Despite the overwhelming precedents establishing that school officials leading prayer violates the Establishment Clause, the Court today holds that Kennedy's midfield prayer practice did not violate the Establishment Clause. This decision rests on an erroneous understanding of the Religion

---

[3] The Court's primary argument that Kennedy's speech is not in his official capacity is that he was permitted "to call home, check a text, [or] socialize" during the time period in question. *Ante,* at ___. These truly private, informal communications bear little resemblance, however, to what Kennedy did. Kennedy explicitly sought to make his demonstrative prayer a permanent ritual of the postgame events, at the physical center of those events, where he was present by virtue of his job responsibilities, and after years of giving prayer-filled motivational speeches to students at the same relative time and location. In addition, Kennedy gathered public officials and other members of the public onto the field to join him in the prayer, contrary to school policies controlling access to the field. Such behavior raises an entirely different risk of depriving the employer of "control over what the employer itself has commissioned or created" than an employee making a call home on the sidelines, fleetingly checking email, or pausing to hug a friend in the crowd. *Garcetti*, 547 U.S. at 422, 126 S.Ct. 1951.

Clauses. It also disregards the balance this Court's cases strike among the rights conferred by the Clauses. The Court relies on an assortment of pluralities, concurrences, and dissents by Members of the current majority to effect fundamental changes in this Court's Religion Clauses jurisprudence, all the while proclaiming that nothing has changed at all.

A

This case involves three Clauses of the First Amendment. As a threshold matter, the Court today proceeds from two mistaken understandings of the way the protections these Clauses embody interact.

First, the Court describes the Free Exercise and Free Speech Clauses as "work[ing] in tandem" to "provid[e] overlapping protection for expressive religious activities," leaving religious speech "doubly protect[ed]." *Ante,* at ___. This narrative noticeably (and improperly) sets the Establishment Clause to the side. The Court is correct that certain expressive religious activities may fall within the ambit of both the Free Speech Clause and the Free Exercise Clause, but "the First Amendment protects speech and religion by quite different mechanisms." *Lee*, 505 U.S. at 591, 112 S.Ct. 2649. The First Amendment protects speech "by ensuring its full expression even when the government participates." *Ibid.* Its "method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse," however, based on the understanding that "the government is not a prime participant" in "religious debate or expression," whereas government is the "object of some of our most important speech." *Ibid.* Thus, as this Court has explained, while the Free Exercise Clause has "close parallels in the speech provisions of the First Amendment," the First Amendment's protections for religion diverge from those for speech because of the Establishment Clause, which provides a "specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions." *Ibid.* Therefore, while our Constitution "counsel[s] mutual respect and tolerance," the Constitution's vision of how to achieve this end does in fact involve some "singl[ing] out" of religious speech by the government. *Ante*, at ___. This is consistent with "the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." *Lee*, 505 U.S. at 591–592, 112 S.Ct. 2649.

Second, the Court contends that the lower courts erred by introducing a false tension between the Free Exercise and Establishment Clauses. See *ante,* at ___. The Court, however, has long recognized that these two Clauses, while "express[ing] complementary values," "often exert conflicting pressures." *Cutter*, 544 U.S. at 719, 125 S.Ct. 2113. See also *Locke v. Davey*, 540 U.S. 712, 718, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) (describing the Clauses as "frequently in tension"). The "absolute terms" of the two Clauses mean that they "tend to clash" if "expanded to a logical extreme." *Walz*, 397 U.S. at 668–669, 90 S.Ct. 1409.

The Court inaccurately implies that the courts below relied upon a rule that the Establishment Clause must always "prevail" over the Free Exercise Clause. *Ante,* at ___. In focusing almost exclusively on Kennedy's free exercise claim, however, and declining to recognize the conflicting rights at issue, the Court substitutes one supposed blanket rule for another. The proper response where tension arises between the two Clauses is not to ignore it, which effectively silently elevates one party's right above others. The proper response is to identify the tension and balance the interests based on a careful analysis of "whether [the] particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz*, 397 U.S. at 669, 90 S.Ct. 1409. As discussed above, that inquiry leads to the conclusion that permitting Kennedy's

desired religious practice at the time and place of his choosing, without regard to the legitimate needs of his employer, violates the Establishment Clause in the particular context at issue here. *Supra,* at ___.

B

For decades, the Court has recognized that, in determining whether a school has violated the Establishment Clause, "one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the [practice], would perceive it as a state endorsement of prayer in public schools." *Santa Fe*, 530 U.S. at 308, 120 S.Ct. 2266 (internal quotation marks omitted). The Court now says for the first time that endorsement simply does not matter, and completely repudiates the test established in *Lemon*, 403 U.S. 602, 91 S.Ct. 2105. *Ante,* at ___. Both of these moves are erroneous and, despite the Court's assurances, novel.

Start with endorsement. The Court reserves particular criticism for the longstanding understanding that government action that appears to endorse religion violates the Establishment Clause, which it describes as an "offshoot" of *Lemon* and paints as a "'modified heckler's veto, in which ... religious activity can be proscribed'" based on "'"perceptions"'" or "'"discomfort."'" *Ante,* at ___ (quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 119, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001)). This is a strawman. Precedent long has recognized that endorsement concerns under the Establishment Clause, properly understood, bear no relation to a "'heckler's veto.'" *Ante*, at ___. *Good News Club* itself explained the difference between the two: The endorsement inquiry considers the perspective not of just any hypothetical or uninformed observer experiencing subjective discomfort, but of "'the reasonable observer'" who is "'aware of the history and context of the community and forum in which the religious [speech takes place].'" 533 U.S. at 119, 121 S.Ct. 2093. That is because "'the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from ... discomfort'" but concern "'with the political community writ large.'" *Ibid.* (emphasis deleted).

Given this concern for the political community, it is unsurprising that the Court has long prioritized endorsement concerns in the context of public education. See, *e.g., Santa Fe*, 530 U.S. at 305, 120 S.Ct. 2266; *Wallace*, 472 U.S. at 60–61, 105 S.Ct. 2479; *Edwards*, 482 U.S. at 578, 593, 107 S.Ct. 2573; see also *Lee*, 505 U.S. at 618–619, 112 S.Ct. 2649 (Souter, J., concurring) (explaining that many of the Court's Establishment Clause holdings in the school context are concerned not with whether the policy in question "coerced students to participate in prayer" but with whether it "'convey[ed] a message of state approval of prayer activities in the public schools'" (quoting *Wallace*, 472 U.S. at 61, 105 S.Ct. 2479)).[4] No subsequent decisions in other contexts, including the cases about monuments and legislative meetings on which the Court relies, have so much as questioned the application of this core Establishment Clause concern in the context of public schools. In fact, *Town of Greece v. Galloway*, 572 U.S. 565, 134 S.Ct. 1811, 188 L.Ed.2d 835, which held a prayer during a town meeting permissible, specifically distinguished *Lee* because *Lee* considered the Establishment Clause in the context of schools. 572 U.S. at 590, 134 S.Ct. 1811 (plurality opinion).

[4] The Court attempts to recast *Lee* and *Santa Fe* as solely concerning coercion, *ante,* at ___, but both cases emphasized that it was important to avoid appearances of "'state endorsement of prayer in public schools.'" *Santa Fe*, 530 U.S. at 308, 120 S.Ct. 2266; see *Lee*, 505 U.S. at 590, 112 S.Ct. 2649 (finding that the "degree of school involvement" indicated that the "prayers bore the imprint of the State").

Paying heed to these precedents would not "'purge from the public sphere' anything an observer could reasonably infer endorses" religion. *Ante,* at ___. To the contrary, the Court has recognized that "there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." *Lee,* 505 U.S. at 598–599, 112 S.Ct. 2649. These instances, the Court has said, are "often questions of accommodat[ing]" religious practices to the degree possible while respecting the Establishment Clause. *Id.*, at 599, 112 S.Ct. 2649.[5] In short, the endorsement inquiry dictated by precedent is a measured, practical, and administrable one, designed to account for the competing interests present within any given community.

Despite all of this authority, the Court claims that it "long ago abandoned" both the "endorsement test" and this Court's decision in *Lemon,* 403 U.S. 602, 91 S.Ct. 2105. *Ante,* at ___. The Court chiefly cites the plurality opinion in *American Legion v. American Humanist Assn.*, 588 U. S. ——, 139 S.Ct. 2067, 204 L.Ed.2d 452 (2019) to support this contention. That plurality opinion, to be sure, criticized *Lemon*'s effort at establishing a "grand unified theory of the Establishment Clause" as poorly suited to the broad "array" of diverse establishment claims. 588 U. S., at ——, ——, 139 S.Ct., at 2080, 2087. All the Court in *American Legion* ultimately held, however, was that application of the *Lemon* test to "longstanding monuments, symbols, and practices" was ill-advised for reasons specific to those contexts. 588 U. S., at ——, 139 S.Ct., at 2082; see also *id.,* at —— – ——, 139 S.Ct., at 2081–2085 (discussing at some length why the *Lemon* test was a poor fit for those circumstances). The only categorical rejection of *Lemon* in *American Legion* appeared in separate writings. See 588 U. S., at ——, 139 S.Ct., at 2092 (KAVANAUGH, J., concurring); *id.,* at ——, 139 S.Ct., at 2098 (THOMAS, J., concurring in judgment); *id.,* at ——, 139 S.Ct., at 2101 (GORSUCH, J., concurring in judgment); see *ante,* at ___, n. 4.[6]

The Court now goes much further, overruling *Lemon* entirely and in all contexts. It is wrong to do so. *Lemon* summarized "the cumulative criteria developed by the Court over many years" of experience "draw[ing] lines" as to when government engagement with religion violated the Establishment Clause. 403 U.S. at 612, 91 S.Ct. 2105. *Lemon* properly concluded that precedent generally directed consideration of whether the government action had a "secular legislative purpose," whether its "principal or primary effect must be one that neither advances nor inhibits

---

[5] The notion that integration of religious practices into the workplace may require compromise and accommodation is not unique to the public-employer context where Establishment Clause concerns arise. The Court's precedents on religious discrimination claims similarly recognize that the employment context requires balancing employer and employee interests, and that religious practice need not always be accommodated. See *Kennedy v. Bremerton School Dist.*, 586 U. S. ——, ——, 139 S.Ct. 634, 637, 203 L.Ed.2d 137 (2019) (ALITO, J., statement respecting denial of certiorari) (noting that "Title VII's prohibition of discrimination on the basis of religion does not require an employer to make any accommodation that imposes more than a *de minimis* burden"). Surely, an employee's religious practice that forces a school district to engage in burdensome measures to stop spectators from rushing onto a field and knocking people down imposes much more than a *de minimis* burden.

[6] The Court also cites *Shurtleff v. Boston*, 596 U. S. ——, 142 S.Ct. 1583, —— L.Ed.2d —— (2022), as evidence that the *Lemon* test has been rejected. See *ante,* at ___. Again, while separate writings in *Shurtleff* criticized *Lemon*, the Court did not. The opinion of the Court simply applied the longstanding rule that, when the government does not speak for itself, it cannot exclude speech based on the speech's "'religious viewpoint.'" *Shurtleff*, 596 U. S., at ——, 142 S.Ct., at 1593 (quoting *Good News Club*, 533 U.S. at 112, 121 S.Ct. 2093). The Court further infers *Lemon*'s implicit overruling from recent decisions that do not apply its test. See *ante,* at ___, n. 4. As explained above, however, not applying a test in a given case is a different matter from overruling it entirely and, moreover, the Court has never before questioned the relevance of endorsement in the school-prayer context.

religion," and whether in practice it "foster[s] 'an excessive government entanglement with religion.'" *Id.,* at 612–613, 91 S.Ct. 2105. It is true "that rigid application of the *Lemon* test does not solve every Establishment Clause problem," but that does not mean that the test has no value. *American Legion*, 588 U. S., at ——, 139 S.Ct., at 2094 (KAGAN, J., concurring in part).

To put it plainly, the purposes and effects of a government action matter in evaluating whether that action violates the Establishment Clause, as numerous precedents beyond *Lemon* instruct in the particular context of public schools. See *supra,* at ___, ___. Neither the critiques of *Lemon* as setting out a dispositive test for all seasons nor the fact that the Court has not referred to *Lemon* in all situations support this Court's decision to dismiss that precedent entirely, particularly in the school context.

C

Upon overruling one "grand unified theory," the Court introduces another: It holds that courts must interpret whether an Establishment Clause violation has occurred mainly "by 'reference to historical practices and understandings.'" *Ante,* at ___ (quoting *Town of Greece*, 572 U.S. at 576, 134 S.Ct. 1811 (internal quotation marks omitted)). Here again, the Court professes that nothing has changed. In fact, while the Court has long referred to historical practice as one element of the analysis in specific Establishment Clause cases, the Court has never announced this as a general test or exclusive focus. *American Legion,* 588 U. S., at —— – ——, 139 S.Ct., at 2091 (BREYER, J., concurring) (noting that the Court was "appropriately 'look[ing] to history for guidance'" but was not "adopt[ing] a 'history and tradition test'").

The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on. It should not escape notice, however, that the effects of the majority's new rule could be profound. The problems with elevating history and tradition over purpose and precedent are well documented. See *Dobbs*, 597 U. S., at ——, 142 S.Ct. at 2325-2326 (BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (explaining that the Framers "defined rights in general terms to permit future evolution in their scope and meaning"); *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U. S. ——, —— – ——, 142 S.Ct. 2111, 2175-2179, —— L.Ed.2d —— (2022) (BREYER, J., dissenting) (explaining the pitfalls of a "near-exclusive reliance on history" and offering examples of when this Court has "misread" history in the past); *Brown v. Davenport*, 596 U. S. ——, —— – ——, 142 S.Ct. 1510, 1535, —— L.Ed.2d —— (2022) (KAGAN, J., dissenting) (noting the inaccuracies risked when courts "play amateur historian").

For now, it suffices to say that the Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals' rights to religious exercise above all else? Today's opinion provides little in the way of answers; the Court simply sets the stage for future legal changes that will inevitably follow the Court's choice today to upset longstanding rules.

D

Finally, the Court acknowledges that the Establishment Clause prohibits the government from coercing people to engage in religion practice, *ante*, at ___, but its analysis of coercion misconstrues both the record and this Court's precedents.

The Court claims that the District "never raised coercion concerns" simply because the District conceded that there was "'no evidence that students [were] *directly* coerced to pray with Kennedy.'" *Ante,* at ___ (emphasis added). The Court's suggestion that coercion must be "direc[t]" to be cognizable under the Establishment Clause is contrary to long-established precedent. The Court repeatedly has recognized that indirect coercion may raise serious establishment concerns, and that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee*, 505 U.S. at 592, 112 S.Ct. 2649 (opinion of the Court); see also *supra,* at ___. Tellingly, *none* of this Court's major cases involving school prayer concerned school practices that required students to do any more than listen silently to prayers, and some did not even formally require students to listen, instead providing that attendance was not mandatory. See *Santa Fe*, 530 U.S. at 296–298, 120 S.Ct. 2266; *Lee*, 505 U.S. at 593, 112 S.Ct. 2649; *Wallace*, 472 U.S. at 40, 105 S.Ct. 2479; *School Dist. of Abington Township*, 374 U.S. at 205, 83 S.Ct. 1560; *Engel*, 370 U.S. at 422, 82 S.Ct. 1261. Nevertheless, the Court concluded that the practices were coercive as a constitutional matter.

Today's Court quotes the *Lee* Court's remark that enduring others' speech is "'part of learning how to live in a pluralistic society.'" *Ante,* at ___ (quoting *Lee*, 505 U.S. at 590, 112 S.Ct. 2649). The *Lee* Court, however, expressly concluded, in the very same paragraph, that "[t]his argument cannot prevail" in the school-prayer context because the notion that being subject to a "brief" prayer in school is acceptable "overlooks a fundamental dynamic of the Constitution": its "specific prohibition on ... state intervention in religious affairs." *Id*., at 591, 112 S.Ct. 2649; see also *id.,* at 594, 112 S.Ct. 2649 ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means").[7]

The Court also distinguishes *Santa Fe* because Kennedy's prayers "were not publicly broadcast or recited to a captive audience." *Ante,* at ___. This misses the point. In *Santa Fe*, a student council chaplain delivered a prayer over the public-address system before each varsity football game of the season. 530 U.S. at 294, 120 S.Ct. 2266. Students were not required as a general matter to attend the games, but "cheerleaders, members of the band, and, of course, the team members themselves" were, and the Court would have found an "improper effect of coercing those present" even if it "regard[ed] every high school student's decision to attend ... as purely voluntary." *Id.,* at 311–312, 120 S.Ct. 2266. Kennedy's prayers raise precisely the same concerns. His prayers did not need to be broadcast. His actions spoke louder than his words. His prayers were intentionally, visually demonstrative to an audience aware of their history and no less captive than the audience in *Santa Fe*, with spectators watching and some players perhaps engaged in a song, but all waiting to rejoin their coach for a postgame talk. Moreover, Kennedy's prayers had a greater coercive potential because they were delivered not by a student, but by their coach, who was still on active duty for postgame events.

In addition, despite the direct record evidence that students felt coerced to participate in Kennedy's prayers, the Court nonetheless concludes that coercion was not present in any event because "Kennedy did not seek to direct any prayers to students or require anyone else to participate." *Ante,* at ___; see also *ante,* at 2432, n. 7 (contending that the fact that "students might

---

[7] The Court further claims that *Lee* is distinguishable because it involved prayer at an event in which the school had "'in every practical sense compelled attendance and participation in [a] religious exercise.'" *Ante*, at ___ (quoting *Lee*, 505 U.S. at 598, 112 S.Ct. 2649). The Court in *Lee*, however, recognized expressly that attendance at the graduation ceremony was not mandatory and that students who attended only had to remain silent during and after the prayers. *Id.*, at 583, 593, 112 S.Ct. 2649.

choose, unprompted, to participate" in their coach's on-the-field prayers does not "necessarily prove them coercive"). But nowhere does the Court engage with the unique coercive power of a coach's actions on his adolescent players.[8]

In any event, the Court makes this assertion only by drawing a bright line between Kennedy's yearslong practice of leading student prayers, which the Court does not defend, and Kennedy's final three prayers, which BHS students did not join, but student peers from the other teams did. See *ante*, at ___ (distinguishing Kennedy's prior practice and focusing narrowly on "three prayers ... in October 2015"). As discussed above, see *supra,* at ___, this mode of analysis contravenes precedent by "turn[ing] a blind eye to the context in which [Kennedy's practice] arose," *Santa Fe*, 530 U.S. at 315, 120 S.Ct. 2266.[9] This Court's precedents require a more nuanced inquiry into the realities of coercion in the specific school context concerned than the majority recognizes today. The question before the Court is not whether a coach taking a knee to pray on the field would constitute an Establishment Clause violation in any and all circumstances. It is whether permitting Kennedy to continue a demonstrative prayer practice at the center of the football field after years of inappropriately leading students in prayer in the same spot, at that same time, and in the same manner, which led students to feel compelled to join him, violates the Establishment Clause. It does.

Having disregarded this context, the Court finds Kennedy's three-game practice distinguishable from precedent because the prayers were "quie[t]" and the students were otherwise "occupied." *Ante,* at ___. The record contradicts this narrative. Even on the Court's myopic framing of the facts, at two of the three games on which the Court focuses, players witnessed student peers from the other team and other authority figures surrounding Kennedy and joining him in prayer. The coercive pressures inherent in such a situation are obvious. Moreover, Kennedy's actual demand to the District was that he give "verbal" prayers specifically at the midfield position where he traditionally led team prayers, and that students be allowed to join him "voluntarily" and pray. App. 64, 69–71. Notably, the Court today does not embrace this demand, but it nonetheless rejects the District's right to ensure that students were not pressured to pray.

To reiterate, the District did not argue, and neither court below held, that "*any* visible religious conduct by a teacher or coach should be deemed ... impermissibly coercive on students." *Ante,* at ___. Nor has anyone contended that a coach may never visibly pray on the field. The courts below

---

[8] Puzzlingly, the Court goes a step further and suggests that Kennedy may have been in violation of the District policy on Religious-Related Activities and Practices if he did not permit the players to join his prayers because the policy prohibited staff from "discourag[ing]" student prayer. *Ante,* at ___, ___, n. 7. The policy, however, specifically referred to student prayer of the student's "own volition" and equally prohibited staff from "encourag[ing]" student prayer. App. 28.

[9] The Court claims that Kennedy's "past prayer practices" should not be seen to "taint" his current ones by again turning to *Town of Greece v. Galloway*, the town assembly prayer case. *Ante,* at ___, n. 7. In the passage the Court cites, *Town of Greece* concluded that "two remarks" by two different "guest minister[s]" on two isolated occasions did not constitute a "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose." 572 U.S. at 585, 134 S.Ct. 1811. As *Town of Greece* itself emphasizes, the school context presents Establishment Clause concerns distinct from those raised in a town meeting for "mature adults." *Id.,* at 590, 134 S.Ct. 1811 (plurality opinion). See *supra,* at ___. In any event, Kennedy's yearslong "past prayer practices" constituted an established pattern, not an isolated occasion, and he hardly "abandoned" the practice. *Ante,* at ___, n. 7. As his October 14 letter and subsequent actions made clear, Kennedy attempted to hew as closely to his past practice as possible, taking a knee at the same time and place as previously, and in the same manner that initially drew students to join him and by improperly permitting spectators to join him on the field.

simply recognized that Kennedy continued to initiate prayers visible to students, while still on duty during school events, under the exact same circumstances as his past practice of leading student prayer. It is unprecedented for the Court to hold that this conduct, taken as a whole, did not raise cognizable coercion concerns. Importantly, nothing in the Court's opinion should be read as calling into question that Kennedy's conduct may have raised other concerns regarding disruption of school events or misuse of school facilities that would have separately justified employment action against Kennedy.

* * *

The Free Exercise Clause and Establishment Clause are equally integral in protecting religious freedom in our society. The first serves as "a promise from our government," while the second erects a "backstop that disables our government from breaking it" and "start[ing] us down the path to the past, when [the right to free exercise] was routinely abridged." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U. S. ——, ——, 137 S.Ct. 2012, 2041, 198 L.Ed.2d 551 (2017) (SOTOMAYOR, J., dissenting).

Today, the Court once again weakens the backstop. It elevates one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections for religious liberty for all. Today's decision is particularly misguided because it elevates the religious rights of a school official, who voluntarily accepted public employment and the limits that public employment entails, over those of his students, who are required to attend school and who this Court has long recognized are particularly vulnerable and deserving of protection. In doing so, the Court sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance. As much as the Court protests otherwise, today's decision is no victory for religious liberty. I respectfully dissent.

BARBER V. BRYANT, 193 F.Supp.3d 677 (S.D. Miss. 2016)

Reversed on standing grounds, 860 F.3d 345 (5th Cir. 2017)

[On the later appeal, the plaintiffs' private counsel were joined by Lambda Legal Education & Defense Fund and the Mississippi Center for Justice. They were supported on appeal by numerous amici including "organizations that advocate for religious freedom, tolerance, and equality" including Americans United for Separation of Church and State and the Central Conference of American Rabbis; HIV/AIDS support organizations including Gay Men's Health Crisis; GLBTQ Legal Advocates & Defenders (GLAD), National Center for Lesbian Rights, and American Civil Liberties Union; "Mississippi-based businesses, business owners, entrepreneurs, and consumers"; "a broad range of religious stakeholders that affirm and cherish human dignity, freedom of religion and conscience, and equal rights"; "some of the largest companies in the United States" including CVS; church-state legal scholars; and "Scholars Who Study the LGBT Population" including "[m]any ... affiliated with the Williams Institute." Amici supporting the state defendant on appeal included the Foundation for Moral Law; the Christian Legal Society and National Association of Evangelicals; the states of Texas, Arkansas, Louisiana, Nebraska, Nevada, Oklahoma, South Carolina, Utah; and the North Carolina Values Coalition and the Liberty, Life, and Law Foundation.]

MEMORANDUM OPINION AND ORDER

Carlton W. Reeves, UNITED STATES DISTRICT JUDGE

The plaintiffs filed these suits to enjoin a new state law, "House Bill 1523," before it goes into effect on July 1, 2016. They contend that the law violates the First and Fourteenth Amendments to the United States Constitution. The Attorney General's Office has entered its appearance to defend HB 1523. The parties briefed the relevant issues and presented evidence and argument at a joint hearing on June 23 and 24, 2016.

The United States Supreme Court has spoken clearly on the constitutional principles at stake. Under the Establishment Clause of the First Amendment, a state "may not aid, foster, or promote one religion or religious theory against another." *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary Cnty., Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 860, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (citation omitted). Under the Equal Protection Clause of the Fourteenth Amendment, meanwhile, a state may not deprive lesbian and gay citizens of "the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings." *Romer v. Evans*, 517 U.S. 620, 630, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

HB 1523 grants special rights to citizens who hold one of three "sincerely held religious beliefs or moral convictions" reflecting disapproval of lesbian, gay, transgender, and unmarried persons. Miss. Laws 2016, HB 1523 § 2 (eff. July 1, 2016). That violates both the guarantee of religious neutrality and the promise of equal protection of the laws.

The Establishment Clause is violated because persons who hold contrary religious beliefs are unprotected—the State has put its thumb on the scale to favor some religious beliefs over others. Showing such favor tells "nonadherents that they are outsiders, not full members of the political community, and ... adherents that they are insiders, favored members of the political community."

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (quotation marks and citation omitted). And the Equal Protection Clause is violated by HB 1523's authorization of arbitrary discrimination against lesbian, gay, transgender, and unmarried persons.

"It is not within our constitutional tradition to enact laws of this sort." *Romer*, 517 U.S. at 633, 116 S.Ct. 1620. The plaintiffs' motions are granted and HB 1523 is preliminarily enjoined.

I. THE PARTIES

A. Plaintiffs

The plaintiffs in this matter are 13 individuals and two organizations—Joshua Generation Metropolitan Community Church (JGMCC) and the Campaign for Southern Equality (CSE).

All of the individual plaintiffs are residents, citizens, and taxpayers of Mississippi who disagree with the beliefs protected by HB 1523. They fall into three broad and sometimes overlapping categories: (1) clergy and other religious officials whose religious beliefs are not reflected in HB 1523; (2) members of groups targeted by HB 1523; and (3) other citizens who, based on their religious or moral convictions, do not hold the beliefs HB 1523 protects.

The first group includes Rev. Dr. Rims Barber, Rev. Carol Burnett, Rev. Don Fortenberry, Brandiilyne Mangum-Dear, Susan Mangum, and Rev. Dr. Susan Hrostowski. Rev. Dr. Barber is an ordained minister in the Presbyterian church. Rev. Burnett is an ordained United Methodist minister. Rev. Fortenberry is an ordained United Methodist minister and the retired chaplain of Millsaps College. Mangum-Dear is the pastor at JGMCC, while Mangum is the director of worship at that church. Rev. Dr. Hrostowski is the vicar of St. Elizabeth's Episcopal Church in Collins, Mississippi, as well as an employee of the University of Southern Mississippi.

Katherine Elizabeth Day, Anthony (Tony) Laine Boyette, Dr. Susan Glisson, and Renick Taylor comprise the second group of plaintiffs.[10] Day is a transgender woman; Boyette is a transgender man. Dr. Glisson, an employee of the University of Mississippi, is unmarried and in a long-term sexual romantic relationship with an unmarried man. Taylor is a gay man who is engaged to his male partner. The couple plans to marry in the summer of 2017.

The third group of individual plaintiffs includes Joan Bailey, Derrick Johnson, and Dorothy Triplett. Bailey is a retired therapist whose practice was primarily devoted to lesbians. Johnson is the Executive Director of the Mississippi State Conference of the NAACP, and Triplett is a retired government employee and a longtime activist.

JGMCC is a ministry in Forrest County, Mississippi, whose members fall into all three categories. It "welcomes all people regardless of age, race, sexual orientation, gender identity, or social status." Docket No. 1, ¶ 16, in Cause No. 3:16-CV-417 [hereinafter *Barber*]. In particular, the church sponsors "a community service ministry that promotes LGBT+ equality." *Id.* Approximately 90% of its members in Forrest County identify as LGBT. Transcript of Hearing on Motion for Preliminary Injunction at 168, Barber v. Bryant, No. 3:16-CV-417 (S.D. Miss. June 23, 2016) [hereinafter Tr. of June 23]. There are over 400 Metropolitan Community Churches worldwide. *Id.*

CSE is a non-profit organization that works "across the South to promote the full humanity and equality of lesbian, gay, bisexual, and transgender people in American life." Docket No. 2-2, at 2, in Cause No. 3:16-CV-442 [hereinafter *CSE IV*]. It is based in North Carolina but has worked in Mississippi since 2012. *Id.* CSE claims to advocate for Mississippians in all three categories of

[10] Mangum-Dear, Mangum, and Rev. Dr. Hrostowski also fall into this group.

plaintiffs. *Id.* at 4.

B. Defendants

Governor Phil Bryant is sued in his official capacity as the chief executive of the State of Mississippi. State law charges him with the responsibility to "see that the laws are faithfully executed." Miss. Code Ann. § 7-1-5(c).

Attorney General Jim Hood is also sued in his official capacity. Among his powers and duties, he is required to "intervene and argue the constitutionality of any statute when notified of a challenge." *Id.* § 7-5-1; *see In the Interest of R.G.*, 632 So.2d 953, 955 (Miss.1994).

John Davis is the Executive Director of the Mississippi Department of Human Services. Under Mississippi Code § 43-1-2(5), he is tasked with implementing state laws protecting children. One of the offices under his purview, the Division of Family and Children's Services, is "responsible for the development, execution and provisions of services" regarding foster care, adoption, licensure, and other social services. Miss. Code Ann. § 43-1-51.[11]

Judy Moulder is the Mississippi State Registrar of Vital Records. She is responsible for "carry[ing] into effect the provisions of law relating to registration of marriages." *Id.* § 51-57-43. HB 1523 requires Moulder to collect and record recusal notices from persons authorized to issue marriage licenses who wish to *not* issue marriage licenses to certain couples due to a belief enumerated in HB 1523. HB 1523 § 3(8)(a).

II. Factual and Procedural History

A. Same-Sex Marriage

Because HB 1523 is a direct response to the Supreme Court's 2015 same-sex marriage ruling, it is necessary to discuss the background of that ruling.

This country had long debated whether lesbian and gay couples could join the institution of civil marriage. *See, e.g.*, Andrew Sullivan, *Here Comes the Groom*, The New Republic, Aug. 27, 1989. The debate played itself out on the local, state, and national levels via constitutional amendments, legislative enactments, ballot initiatives, and propositions.

In its most optimistic retelling, "[i]ndividuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views." *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 2627, 192 L.Ed.2d 609 (2015) (Scalia, J., dissenting). *But see* David Carter, Stonewall: The Riots that Sparked the Gay Revolution 109-10, 183-84 (2004) (describing the 1966 Compton's Cafeteria riots by transgender citizens in San Francisco, and the famous 1969 Stonewall riots in New York City). Less charitably, but also true, is the reality that every time lesbian and gay citizens moved one step closer to legal equality, voters and their representatives passed new laws to preserve the status quo.

In the 1990s, for example, Hawaii's same-sex marriage lawsuit inspired the federal Defense of Marriage Act (DOMA) and a wave of state-level "mini-DOMAs." *Campaign for Southern Equality v. Bryant*, 64 F.Supp.3d 906, 915 (S.D.Miss.2014) [hereinafter *CSE I*]. Mississippi's politicians joined the movement by issuing an executive order and passing a law banning same-sex marriage.

---

[11] During the 2016 legislative session, Mississippi's lawmakers created the Department of Child Protective Services, a standalone agency independent of the Department of Human Services. *See* 2016 Miss. Laws, SB 2179. The new department was created upon passage, but the bill allows a transition period of up to two years. *Id.*

Id. It was not until 2013 that DOMA was struck down in part. *United States v. Windsor*, —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). Mississippi's mini-DOMA lasted until 2015. *CSE I*, 64 F.Supp.3d at 906.

In the early 2000s, *Lawrence v. Texas* and *Goodridge v. Department of Public Health*, cases that found in favor of lesbian and gay privacy and marriage rights, respectively, resulted in a wave of state constitutional amendments banning same-sex marriage. *CSE I*, 64 F.Supp.3d at 915. Mississippians approved such a constitutional amendment by the largest margin in the nation. *Id.*; *see* Michael Foust, *'Gay Marriage' a Loser: Amendments Pass in all 11 States*, Baptist Press, Nov. 3, 2004.

The lawfulness of same-sex marriage was finally resolved in 2015. The Supreme Court ruled in *Obergefell v. Hodges* that same-sex couples must be allowed to join in civil marriage "on the same terms and conditions as opposite-sex couples." 135 S.Ct. at 2605. The decision applies to every governmental agency and agent in the country. "The majority of the United States Supreme Court dictates the law of the land, and lower courts are bound to follow it." *Campaign for Southern Equality v. Mississippi Dep't of Human Servs.*, 175 F.Supp.3d 691, 710, 2016 WL 1306202, at *14 (S.D.Miss. Mar. 31, 2016) [hereinafter *CSE III*].

Many celebrated the ruling as overdue. Others felt like change was happening too quickly.[12] And some citizens were concerned enough to advocate new laws "to insulate state officials from legal risk if they do not obey the decision based on a religious objection."[13] Lyle Denniston, *A Plea to Resist the Court on Same-Sex Marriage*, SCOTUSblog, July 9, 2015.

The Supreme Court's decision *had* taken pains to reaffirm religious rights. Its commitment to the free exercise of religion is important and must be quoted in full.

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. ... In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

Obergefell, 135 S.Ct. at 2607.

"As the *Obergefell* majority makes clear, the First Amendment must protect the rights of [religious] individuals, even when they are agents of government, to *voice* their personal objections—this, too, is an essential part of the conversation—but the doctrine of equal dignity prohibits them from *acting on* those objections, particularly in their official capacities, in a way that demeans or subordinates LGBT individuals ...." Laurence H. Tribe, *Equal Dignity: Speaking Its*

---

[12] It is fair to say that same-sex marriage rights went "from unthinkable to the law of the land in just a couple of decades." Nate Silver, *Change Doesn't Usually Come This Fast*, FiveThirtyEight, June 26, 2015.

[13] Sadly, this was predicted years ago. In 1999, four members of Congress expressed concern that religious freedom legislation "would not simply act as a shield to protect religious liberty, but could also be used by some as a sword to attack the rights of many Americans, including unmarried couples, single parents, lesbians and gays." H.R. Rep. No. 106-219, at 41 (1999), *available at* 1999 WL 462644.

Name, 129 Harv. L. Rev. F. 16 (Nov. 10, 2015). *Obergefell*'s author, Justice Kennedy, had also reaffirmed this principle in *Burwell v. Hobby Lobby Stores*. "[N]o person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons ... in protecting their own interests." —— U.S. ——, 134 S.Ct. 2751, 2786–87, 189 L.Ed.2d 675 (2014) (Kennedy, J., concurring).

In the immediate wake of *Obergefell*, the Fifth Circuit issued a published opinion declaring that "*Obergefell,* in both its Fourteenth and First Amendment iterations, is the law of the land and, consequently, the law of this circuit and should not be taken lightly by actors within the jurisdiction of this court." *Campaign for Southern Equality v. Bryant*, 791 F.3d 625, 627 (5th Cir.2015) [hereinafter *CSE II*]. The court issued the mandate forthwith. *Id.*

A few hours later, with this mandate in hand, this Court issued a Permanent Injunction and a Final Judgment enjoining enforcement of Mississippi's statutory and constitutional same-sex marriage ban. The Attorney General's Office soon advised Circuit Clerks to issue marriage licenses "to same-sex couples on the same terms and conditions accorded to couples of the opposite sex." *In re Steve Womack*, 2015 WL 4920123, at *1 (Miss. A.G. July 17, 2015).

In physics, every action has its equal and opposite reaction. In politics, every action has its predictable overreaction. Politicians reacted to the Hawaiian proceedings with DOMA and mini-DOMAs. *Lawrence* and *Goodridge* birthed the state constitutional amendments. And now *Obergefell* has led to HB 1523. The next chapter of this back-and-forth has begun.

B. House Bill 1523

Mississippi's highest elected officials were displeased with *Obergefell*. Governor Bryant stated that *Obergefell* "usurped [states'] right to self-governance and has mandated that states must comply with federal marriage standards—standards that are out of step with the wishes of many in the United States and that are certainly out of step with the majority of Mississippians."[14] Governor Phil Bryant, *Governor Bryant Issues Statement on Supreme Court Obergefell Decision*, June 26, 2015.[15]

Legislative leaders felt similarly. Lieutenant Governor Tate Reeves, who presides over the State Senate, called the decision an "overreach of the federal government." Geoff Pender, *Lawmaker: State Could Stop Marriage Licenses Altogether*, The Clarion-Ledger, June 26, 2015.[16] Speaker of

[14] Governor Bryant's statement is only partially true. While states have mostly been permitted to regulate marriage within their borders, the Supreme Court has stepped in to ensure that "self-governance" complies with equal protection. *See Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) ("Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes ... is surely to deprive all the State's citizens of liberty without due process of law.").

[15] The Governor's remarks sounded familiar. In the mid-1950s, Governor J.P. Coleman said that *Brown v. Board of Education* "represents an unwarranted invasion of the rights and powers of the states." Charles C. Bolton, William F. Winter and the New Mississippi: A Biography 97 (2013). In 1962, before a joint session of the Mississippi Legislature—and to a "hero's reception"—Governor Ross Barnett was lauded for invoking states' rights during the battle to integrate the University of Mississippi. Charles W. Eagles, The Price of Defiance: James Meredith and the Integration of Ole Miss 290-91 (2009) [hereinafter Price of Defiance].

[16] The State has objected to the Court's use of newspaper articles. In an Establishment Clause challenge, however, a District Court errs when it takes "insufficient account of the context in which the statute was enacted and the reasons for its passage." *Salazar v. Buono*, 559 U.S. 700, 715, 130 S.Ct. 1803, 176 L.Ed.2d 634 (2010). The Fifth Circuit agrees: "context is critical in assessing neutrality" in this area of the law. *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 473

the House Philip Gunn said *Obergefell* was "in direct conflict with God's design for marriage as set forth in the Bible. The threat of this decision to religious liberty is very clear." Id.[17] Representative Andy Gipson, Chairman of the House Judiciary B Committee, pledged to study whether Mississippi should stop issuing marriage licenses altogether. *Id.*[18]

The angst was not limited to the executive and legislative branches. Two Justices of the Mississippi Supreme Court also expressed their disgust with *Obergefell*. In 2014, a lesbian had petitioned that body for the right to divorce her wife in a Mississippi court. *Czekala–Chatham v. State ex rel. Hood*, 195 So.3d 187, 2015 WL 10985118 (Miss. Nov. 5, 2015). While her case was pending, the U.S. Supreme Court handed-down *Obergefell*. Although a majority of the Mississippi Supreme Court concluded that *Obergefell* resolved her case in her favor, Justices Dickinson and Coleman argued that the *Obergefell* Court had legislated from the bench and overstepped its authority. *Id.* at *3 (Dickinson, J., dissenting). They opined that "state courts are not required to recognize as legitimate legal authority a Supreme Court decision that is in no way a constitutional interpretation," and claimed "a duty to examine those decisions to make sure they indeed are constitutional interpretations, rather than ... an exercise in judicial will." *Id.* at *4, *6.[19] *Obergefell* was "[w]orthy only to be disobeyed," they said. *Id.* at *5.

Mississippi's legislators formally responded to *Obergefell* in the next legislative session.[20] Speaker Gunn drafted and introduced HB 1523, the "Protecting Freedom of Conscience from Government Discrimination Act."[21] The bill overwhelmingly passed both chambers, and the

---

(5th Cir.2001).

[17] Using God as a justification for discrimination is nothing new. It was Governor Barnett who proclaimed that "[t]he Good Lord was the original segregationist. He made us white, and he intended that we stay that way." Price of Defiance at 282. Warping the image of God was not reserved to Mississippi politicians. In testimony before Congress during the debate on the Civil Rights Act of 1964, a Maryland businessman testified before a Senate committee that "God himself was the greatest segregationist of all time as is evident when he placed the Caucasians in Europe, the black people in Africa, the yellow people in the Orient and so forth." Linda C. McClain, *The Civil Rights Act of 1964 and "Legislating Morality": On Conscience, Prejudice, and Whether "Stateways" Can Change "Folkways"*, 95 B.U. L. Rev. 891, 917 (2015). He continued, "Christ himself never lived an integrated life, and ... when he chose His close associates, they were all white. This doesn't mean that He didn't love all His creatures, but it does indicate that He didn't think we had to have all this togetherness in order to go to heaven." *Id.*

[18] The suggestion was (again) familiar. A few months after the Supreme Court's decision in *Brown*, Mississippians—those who were permitted to vote, that is—"voted two to one approving a constitutional amendment abolishing the state schools system if it integrated." Dennis J. Mitchell, A New History of Mississippi 404 (2014).

[19] *But see James v. City of Boise, Idaho*, —— U.S. ——, 136 S.Ct. 685, 686, 193 L.Ed.2d 694 (2016) (per curiam) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law. The state court erred in concluding otherwise.").

[20] This had happened before in the religious liberty context. In 1994, "[o]n a wave of public sentiment and indignation over the treatment of a Principal ... who allowed students to begin each school day with a prayer over the intercom, the Mississippi legislature passed the School Prayer Statute at issue here." *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 277 (5th Cir.1996). The statute was unconstitutional. *Id.*

[21] "'After the Supreme Court decision in Obergefell (v. Hodges), it became apparent that there would be a head-on collision between religious convictions about gay marriage and the right to gay marriage created by the decision,' [Speaker] Gunn said." Adam Ganucheau, *Mississippi's 'Religious Freedom' Law Drafted Out of State*, Mississippi Today, May 17, 2016. One commentator concluded that "HB 1523 was hatched" after the issuance of this Court's

Governor signed it into law on April 5, 2016. It goes into effect on July 1.

HB 1523's meaning is contested. A layperson reading about the bill might conclude that it gives a green light to discrimination and prevents accountability for discriminatory acts. Arielle Dreher, *Hundreds Rally to Repeal HB 1523, State Faces Deadline Today Before Lawsuit*, Jackson Free Press, May 2, 2016 (quoting Chad Griffin, President of the Human Rights Campaign, as saying, "it's sweeping and allows almost any individual or organization to justify discrimination against LGBT people, against single mothers and against unwed couples."). Someone else reading the same article might conclude that HB 1523 simply "reinforces" the First Amendment. *Id.* (quoting Speaker Gunn as saying the gay community "can do the same things that they could before"). So any discussion should begin with the plain text of the bill.

HB 1523 enumerates three "sincerely held religious beliefs or moral convictions" entitled to special legal protection. They are,

> (a) Marriage is or should be recognized as the union of one man and one woman;
>
> (b) Sexual relations are properly reserved to such a marriage; and
>
> (c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.

HB 1523 § 2. These will be referred to as the "§ 2" beliefs.

The bill then says that the State of Mississippi will not "discriminate" against persons who act pursuant to a § 2 belief. *Id.* §§ 3-4.[22] For example, if a small business owner declines to provide goods or services for a same-sex wedding because it would violate his or her § 2 beliefs, HB 1523 allows the business to decline without fear of State "discrimination."

"Discrimination" is defined broadly. It covers consequences in the realm of taxation, employment, benefits, court proceedings, licenses, financial grants, and so on. In other words, the State of Mississippi will not tax you, penalize you, fire you, deny you a contract, withhold a diploma or license, modify a custody agreement, or retaliate against you, among many other enumerated things, for your § 2 beliefs. *Id.*[23] An organization or person who acts on a § 2 belief is essentially immune from State punishment.[24]

The Governor's signing statement recognized that consequences under federal law are unchanged. States "lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood v. Drown*, 556 U.S. 729, 736, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009).

Parts of the law provide fodder for both its opponents and its proponents. One section of HB 1523 guarantees that the State will not take adverse action against a religious organization that declines to solemnize a wedding because of a § 2 belief. *Id.* § 3. There is nothing new or controversial about that section. Religious organizations already have that right under the Free

---

Permanent Injunction. Sid Salter, *Constitutional Ship has Sailed on Same-Sex Marriage*, The Clarion-Ledger, May 8, 2016. "Clearly, House Bill 1523 seeks to work around the federal *Obergefell* decision at the state level." *Id.*

[22] HB 1523 § 9(2)-(3) defines "State government" to include private persons, corporations, and other legal entities.

[23] This is more expansive than other anti-discrimination laws, such as Title VII or Title IX.

[24] The broad immunity provision may violate the Mississippi Constitution, which provides that "every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay." Miss. Const. § 24.

Exercise Clause of the First Amendment.

Citizens also enjoy substantial religious rights under existing state law. The Mississippi Constitution ensures that "the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred," and "no preference shall be given by law to any religious sect or mode of worship."[25] Miss. Const., § 18. In addition, a 2014 law called the "Mississippi Religious Freedom Restoration Act" (RFRA) states that the government "may substantially burden a person's exercise of religion *only* if it demonstrates that application of the burden to the person: (i) Is in furtherance of a compelling governmental interest; and (ii) Is the least restrictive means of furthering that compelling governmental interest." Miss. Code Ann. § 11-61-1(5)(b) (emphasis added). HB 1523 does not change either of these laws.[26]

We return to HB 1523. Several parts of the bill are unclear. One says the State will not take action against foster or adoptive parents who intend to raise a foster or adoptive child in accordance with § 2 beliefs. HB 1523 § 3(3). It is not obvious how the State would respond if the child in urgent need of placement was a 14-year-old lesbian.

Another section discusses a professional's right to refuse to participate in "psychological, counseling, or fertility services" because of a § 2 belief. *Id.* § 3(4). But some professions' ethical rules prohibit "engag[ing] in discrimination against prospective or current clients ... based on ... gender, gender identity, sexual orientation, [and] marital/partnership status," to name a few categories. American Counseling Association, Code of Ethics § C.5 (2014). Under HB 1523, though, a public university's faculty must confer a degree upon, and the State must license, a person who refuses to abide by her chosen profession's Code of Ethics.[27]

Section 3(8)(a) of the law, in contrast, is crystal clear. It says that a government employee with authority to issue marriage licenses may recuse herself from that duty if it would violate one of her § 2 beliefs. HB 1523 § 3(8)(a). The employee must provide prior written notice to the State Registrar of Vital Records and be prepared to "take all necessary steps to ensure that the authorization and licensing of any legally valid marriage is not impeded or delayed as a result of any recusal." *Id.* The State's attorneys agree that this section "effectively amends Mississippi County Circuit Clerks' Office's marriage licensing obligations under state law by specifying conditions under which a clerk's employee may recuse himself or herself from authorizing or licensing marriages." Docket No. 41, at 6, in Cause No. 3:14-CV-818.

The significance of this section is in the eye of the beholder. The plaintiffs argue that it facilitates discrimination against LGBT Mississippians by encouraging clerks to opt-out of serving same-sex couples.

---

[25] Despite the inclusive language just quoted, § 18 of the Mississippi Constitution then says that "[t]he rights hereby secured shall not be construed ... to exclude the Holy Bible from use in any public school."

[26] Mississippi's RFRA is also part of the political back-and-forth on LGBT rights. "State-based RFRAs were passed to preemptively provide religious exemptions to people in advance of a Supreme Court ruling on gay marriage, [Professor Doug] NeJaime said." Alana Semuels, *Should Adoption Agencies Be Allowed to Discriminate Against Gay Parents?,* The Atlantic, Sept. 23, 2015. Mississippi's RFRA fits this timeline perfectly. In summer 2013, the Supreme Court's ruling in *United States v. Windsor* foreshadowed an imminent victory for same-sex marriage. A few months later, Mississippi's elected officials enacted the State RFRA.

[27] Relatedly, in other states, citizens have successfully sued so-called "gay conversion" therapists for consumer fraud and professional malpractice. *See* Olga Khazan, *The End of Gay Conversion Therapy*, The Atlantic, June 26, 2015. HB 1523 § 4 would bar a Mississippi court from enforcing such a verdict.

HB 1523's defenders respond that the bill protects *against* discrimination by ensuring that clerks do not have to violate their religious beliefs. When Senator Jenifer Branning shepherded the bill through the Senate floor debate, she argued that the legislation actually *lifts* a burden imposed by *Obergefell*.[28] H.B. 1523, Debate on the Floor of the Mississippi Senate, at 7:02 (Mar. 31, 2016) (statement of Sen. Jenifer Branning) [hereinafter Senate Floor Debate]. In her view, HB 1523 is "balancing" legislation allowing those who oppose same-sex marriage to continue to perform their jobs with a "clear conscience," while protecting the rights of same-sex couples to receive a marriage license from another clerk. *Id.* at 26:55, 32:27.[29]

C. These Suits

On June 3, 2016, Rev. Dr. Barber, Rev. Burnett, Bailey, Day, Boyette, Rev. Fortenberry, Dr. Glisson, Johnson, Triplett, Taylor, Mangum-Dear, Mangum, and JGMCC filed the first suit encompassed by this Order. *See* Docket No. 1, in *Barber*. They asserted Establishment and Equal Protection claims against Governor Bryant, General Hood, Executive Director Davis, and Registrar Moulder. *Id.* They requested a declaratory judgment that HB 1523 is unconstitutional on its face, as well as preliminary and permanent injunctive relief enjoining its enforcement.

CSE and Rev. Dr. Hrostowski sued the same defendants on June 10, 2016. *See* Docket No. 1, in *CSE IV*. They asserted an Establishment Clause claim and sought the same relief as the *Barber* plaintiffs. *Id.*

The various plaintiffs conferred and moved to consolidate. The State was prepared to argue *Barber*, but objected to consolidation to avoid an abbreviated briefing schedule and a hearing in *CSE IV*. *See* Docket No. 22, in *Barber*. During a status conference, the Court heard the parties' positions and granted the State its requested response deadline. The Court also delayed the motion hearing—which was converted into a joint hearing—by two days. The State renewed its objection to the consolidated hearing and was overruled. These reasons follow.

The State essentially argued that there were too many HB 1523-related lawsuits—there are four—to fully prepare for a hearing in *CSE IV*. It entered into the record a Mississippi Today article in which General Hood said, "'I and over half of our lawyers in the Civil Litigation Division are working overtime and weekends attempting to prepare for the hearings.'" Docket No. 22-2, in *Barber*. General Hood added that budget cuts prevented him from hiring an expert to prepare "for the highly specialized area of the law seldom litigated in Mississippi—the Establishment Clause." *Id.* (ellipses omitted).

The first hurdle for the State is the substantial overlap in subject matter between *Barber* and *CSE IV*. The similar briefing suggests that little additional work was required to defend *CSE IV*. *Barber*,

---

[28] Mississippi does not have formal legislative history; however, the Mississippi College School of Law's Legislative History Project archives the floor debate for bills that pass. The HB 1523 videos are available at http://law.mc.edu/legislature/bill_details.php?id=4621& session=2016. Unofficial transcripts were also introduced into evidence. *See* Docket No. 33-14, in *CSE IV*.

[29] These arguments are apparently increasingly common. *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2560-61 (2015) (arguing that proponents of traditional morality "now emphasize different justifications for excluding same-sex couples from marriage—for example, that marriage is about biological procreation or that preserving 'traditional marriage' protects religious liberty. At the same time, in anticipation of the possibility of defeat, they argue for exemptions from laws that recognize same-sex marriage. In so doing, they shift from speaking as a majority enforcing customary morality to speaking as a minority seeking exemptions based on religious identity.").

in fact, has a greater number of substantive claims than *CSE IV*. Having prepared for the more comprehensive hearing, it is difficult for the State to object to the narrower one.

The second, more significant problem with the State's argument is the utter predictability of these lawsuits. The media started reporting the likelihood of litigation on April 5, the day the Governor signed HB 1523 into law. *See, e.g.*, Arielle Dreher, *'Total Infringement': Governor Signs HB 1523 Over Protests of Business Leaders, Citizens*, Jackson Free Press, Apr. 5, 2016 ("'You will see several lawsuits filed before it becomes law if the governor signs it,'" one attorney said); Caray Grace, *Local Residents and City Leaders React to House Bill 1523*, WLOX, Apr. 5, 2016 ("'the lawyers were already starting to draft up lawsuits so that as soon as he signed it, they could start filing them,' said [Molly] Kester.").

General Hood apparently knew these lawsuits were coming as early as April 5, when he said he would make "case-by-case" decisions on whether to defend the lawsuits, and warned that the bill doesn't override federal or constitutional rights. *Legal Pressure May Be Ahead for Mississippi Law Denying Service to Gays*, Chicago Tribune, Apr. 5, 2016.

The media even telegraphed the exact Establishment Clause arguments the plaintiffs eventually asserted. In early April, the press reported that 10 law professors from across the country released a memorandum outlining several ways in which HB 1523 violates the Establishment Clause. *See* Sierra Mannie, *Will Mississippi's "Religious Freedom" Act Impact Children in Public and Private Schools?*, The Hechinger Report, Apr. 8, 2016. In May, Jackson attorney Will Manuel, a partner at Bradley LLP, said, "'[b]y only endorsing certain religious thought, I believe it is in violation of the Establishment Clause of the First Amendment which prohibits government from establishing or only protecting one religion. That should be a fairly clear cut constitutional challenge." Ted Carter, *Feds Unlikely to Ignore Mississippi's HB1523, Lawyers Say*, Mississippi Business Journal, May 26, 2016; *see also* Arielle Dreher, *HB 1523: Bad for the Business Sector*, Jackson Free Press, June 8, 2016 (noting other legal concerns).

Perhaps the State's best argument against a hearing in *CSE IV* was that it would be unprepared to cross-examine religion experts because it did not have time to find its own expert.[30] > Its objection fell flat when its attorneys filed the article in which General Hood said that *budget cuts* caused the lack of expert assistance.[31] If budget cuts explain the State's lack of expert assistance, no extension of time could have helped it prepare for a hearing.

For these reasons, the hearings were consolidated. Now, having considered the evidence and heard oral argument, the motions for preliminary injunction have been consolidated into this Order. The cases remain their separate identities pending further motion practice.

That brings us to the State's initial legal arguments.

III. THRESHOLD QUESTIONS

A. Standing

The State first challenges the plaintiffs' capacity to bring these suits.

---

[30] The Court has sought to understand what kind and amount of evidence would show a forbidden religious preference. In this case, it finds the plain language of HB 1523 and basic knowledge of local religious beliefs to be sufficient. Today's outcome is informed by but does not turn on the expert testimony heard in *CSE IV*.

[31] It also weakens the State's objection to the Court's use of newspaper articles.

The United States Constitution limits the jurisdiction of federal courts to actual cases and controversies. U.S. Const. art. III, § 2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (quotation marks and citation omitted). "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

As the party seeking to invoke this Court's jurisdiction, the plaintiffs must demonstrate all three elements of standing: (1) an injury in fact that is concrete and particularized as well as imminent or actual; (2) a causal connection between the injury and the defendant's conduct; and (3) that a favorable decision is likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

In a standing analysis, the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501–02, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Standing is not handed out in gross. *CSE III*, 175 F.Supp.3d at 698–99, 2016 WL 1306202, at *2. A case with multiple plaintiffs can move forward as long as one plaintiff has standing as to each claim. *CSE I*, 64 F.Supp.3d at 916.

1. Injury in Fact

To establish an injury in fact, the plaintiffs must show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (quotation marks and citation omitted). An injury is particularized if it "affect[s] the plaintiff in a personal and individual way." *Id.* at 560 n. 1, 112 S.Ct. 2130. An injury is concrete when it is "real, not abstract." *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S.Ct. 1540, 1556, 194 L.Ed.2d 635 (2016) (quotation marks and citation omitted). Intangible injuries can satisfy the concreteness requirement. *Id.* at 9. A plaintiff must demonstrate "that he has sustained or is immediately in danger of sustaining some direct injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (quotation marks and citations omitted).

a. Equal Protection Injuries

The *Barber* plaintiffs in category two—*i.e.*, the LGBT plaintiffs and Dr. Glisson—allege that HB 1523 violates their rights under the Equal Protection Clause of the Fourteenth Amendment.[32] Claims under the Equal Protection Clause can include both tangible and intangible injuries. As noted in *Heckler v. Matthews*,

> discrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

465 U.S. 728, 739–40, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984) (quotation marks and citation omitted). "Stigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing's injury requirement if the plaintiff identifies some concrete interest with respect to which he or she is personally subject to discriminatory treatment and that interest independently satisfies the

[32] In discussing the Equal Protection claim, references to LGBT citizens should also be read to include unmarried-but-sexually-active citizens. The latter group may have been a collateral consequence of HB 1523.

causation requirement of standing doctrine." *CSE I*, 64 F.Supp.3d at 917 (quotation marks and citation omitted).

The State first challenges standing on the basis that the plaintiffs' injuries are speculative and not imminent, arguing that the plaintiffs have not alleged the denial of any right or benefit as a result of HB 1523. It points to *Clapper v. Amnesty International, USA*, which held that "[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." —— U.S. ——, 133 S.Ct. 1138, 1147, 185 L.Ed.2d 264 (2013) (quotation marks and citation omitted).

This language, however, supports that the plaintiffs *do* have imminent injuries. If it goes into effect on July 1, plaintiffs say, HB 1523 will subject them to a wide range of arbitrary denials of service at the hands of public employees and private businesses.

The plaintiffs also say that HB 1523 will limit the protections LGBT persons currently have under state, county, city, and public school anti-discrimination policies. In the City of Jackson, for example, a municipal ordinance provides protection from discrimination on the basis of religion, sexual orientation, and gender identity, among other characteristics. Docket No. 32-17, in *Barber*. This ordinance protects several of the plaintiffs. *Id.* The plaintiffs then point to University of Southern Mississippi's (USM) anti-discrimination policy, which guarantees equal access to "educational, programmatic and employment opportunities without regard to" religion, sexual orientation, or gender identity. Docket No. 32-18, in *Barber*. If HB 1523 goes into effect, USM's policy cannot be fully enforced. USM employees who invoke a § 2 belief will enjoy enhanced protection to decline to serve others on the basis of sexual orientation, and USM will not be able to discipline those employees who violate its internal anti-discrimination policy.[33]

In this context, the imminent injury to the plaintiffs, other LGBT persons, and unmarried persons is exactly the same as the injury recognized by the Supreme Court in *Romer*. In striking down an amendment to Colorado's constitution, the Court found that:

> Amendment 2 bars homosexuals from securing protection against the injuries that these public accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions .... Not confined to the private sphere, Amendment 2 also operates to repeal and forbid laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.

517 U.S. at 629, 116 S.Ct. 1620.

A closer analogue is difficult to imagine. As in *Romer*, HB 1523 "withdraws from homosexuals, [transgender, and unmarried-but-sexually-active persons,] but no others, specific legal protection from the injuries caused by discrimination, and it forbids the reinstatement of these laws and policies." *Id.* at 627, 116 S.Ct. 1620. If individuals had standing to file *Romer* before Amendment 2 went into effect, these plaintiffs may certainly do the same.

The State's argument overlooks the fundamental injurious nature of HB 1523—the establishment of a broad-based system by which LGBT persons and unmarried persons can be subjected to differential treatment based solely on their status. This type of differential treatment is the hallmark

---

[33] Imagine that two USM students, who are a gay couple, walk into the cafeteria but are refused service because of the worker's religious views. Could that employee be disciplined for refusing service? It is not clear what remedy they would have to remove the sting of humiliation.

of what is prohibited by the Fourteenth Amendment. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979) ("The [Equal Protection] Clause announces a fundamental principle: the State must govern impartially."). To put it plainly, the plaintiffs' injuries are "certainly impending" today, and without Court intervention, the plaintiffs will suffer actual injuries. *Clapper*, 133 S.Ct. at 1147.

The State then argues that the plaintiffs lack standing because they are not the "objects" of HB 1523. The argument comes from *Lujan*'s statement that "standing depends considerably upon whether the plaintiff is himself an object of the" government's action or inaction at issue. *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. The true objects of the law, the State claims, are those persons who want to freely exercise a § 2 belief. Docket No. 30, at 18, in *Barber*.

The Court is not persuaded. A robust record shows that HB 1523 was intended to benefit some citizens at the expense of LGBT and unmarried citizens. At oral argument, the State admitted that HB 1523 was passed in direct response to *Obergefell*, stating, "after *Obergefell*, citizens who hold the beliefs that are protected by 1523 were effectively told by the U.S. Supreme Court, *Your beliefs are garbage*." Transcript of Hearing on Motion for Preliminary Injunction at 324, Barber v. Bryant, No. 3:16-CV-417 (S.D. Miss. June 24, 2016) [hereinafter Tr. of June 24].

It is therefore difficult to accept the State's implausible assertion that HB 1523 was intended to protect certain religious liberties and simultaneously ignore that the bill was passed because same-sex marriage was legalized last summer. *See Romer*, 517 U.S. at 626, 116 S.Ct. 1620.

Members of the LGBT community and persons like Dr. Glisson will suffer a concrete and particular injury as a result of HB 1523. Part of the injury is stigmatic, *see CSE I*, 64 F.Supp.3d at 917, but that stigmatic injury is linked to the tangible rights that will be taken away on July 1, including the tangible rights *Obergefell* extended. There are almost endless explanations for how HB 1523 condones discrimination against the LGBT community, but in its simplest terms it denies LGBT citizens equal protection under the law. Thus, those plaintiffs who are members of the LGBT community, as well as Dr. Glisson, have demonstrated an injury in fact sufficient to bring their Equal Protection claim.

b. Establishment Clause Injuries

All plaintiffs have asserted Establishment Clause claims.

In Establishment Clause actions, the injury in fact requirement may vary from other types of cases. *See Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 194 (5th Cir.2006). "The concept of injury for standing purposes is particularly elusive in Establishment Clause cases." *Id.*

Plaintiffs can demonstrate "standing based on the direct harm of what is claimed to be an establishment of religion" or "on the ground that they have incurred a cost or been denied a benefit on account of their religion." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129–30, 131 S.Ct. 1436, 179 L.Ed.2d 523 (2011). Courts also recognize that taxpayers have standing to challenge direct government expenditures that violate the Establishment Clause. *Id.* at 138–39, 131 S.Ct. 1436; *see Flast*, 392 U.S. at 106, 88 S.Ct. 1942. The Supreme Court has found standing in a wide variety of Establishment Clause cases "even though nothing was affected but the religious or irreligious sentiments of the plaintiffs." *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1049–50 (9th Cir.2010) (en banc) (collecting cases).

In *Croft v. Governor of Texas*, the Fifth Circuit concluded that a citizen had standing to challenge a public school's daily moment of silence because his children were enrolled in the school and were required to observe the moment of silence. 562 F.3d 735, 746 (5th Cir.2009) [hereinafter *Croft I*].

This injury was sufficient because the plaintiff and his family demonstrated that they were exposed to and injured by the mandatory moment of silence. *Id.* at 746–47.[34]

In our case, the State contends that the plaintiffs' alleged non-economic injuries are insufficiently particular and concrete. It cites *Valley Forge Christian College v. Americans United for Separation of Church and State*, which found that:

> [the plaintiffs] fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by the observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though that disagreement is phrased in constitutional terms.

454 U.S. 464, 485–86, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

In *Valley Forge*, an organization and four of its employees who lived in the Washington D.C. area challenged the constitutionality of a land conveyance from a government agency to a religious-affiliated education program in Pennsylvania. *Id.* at 468–69, 102 S.Ct. 752. The plaintiffs had learned of the land conveyance from a press release. *Id.* at 469, 102 S.Ct. 752. They merely observed the alleged constitutional violation from out-of-state.

The facts in the present case are quite different. Here, the plaintiffs are 13 individuals who reside in Mississippi, a Mississippi church, and an advocacy organization with members in Mississippi. The plaintiffs may have become aware of HB 1523 from news, friends, or social media, but regardless of how they learned of the legislation, it is set to become the law of *their state* on July 1. It will undeniably impact their lives. The enactment of HB 1523 is much more than a "psychological consequence" with which they disagree, it is allegedly an endorsement and elevation by *their* state government of specific religious beliefs over theirs and all others.

A more applicable case is *Catholic League*. There, the plaintiffs included a Catholic civil rights organization and devout Catholics who lived in San Francisco. 624 F.3d at 1048. They sued over a municipal resolution that expressly denounced Catholicism and the Catholic Church's beliefs on same-sex couples. *Id.* at 1047. The appellate court found that they had standing to bring such a case against their local government.

Similarly, today's individual plaintiffs have attested that they are citizens and residents of Mississippi, they disagree with the religious beliefs elevated by HB 1523, HB 1523 conveys the State's disapproval and diminution of their own deeply held religious beliefs, HB 1523 sends a message that they are not welcome in their political community, and HB 1523 sends a message that the state government is unwilling to protect them. *See, e.g.*, Docket Nos. 32-2; 32-3; 32-5 (all in *Barber*).

Plaintiff Taylor, for example, is "a sixth-generation Mississippian" and "former Navy combat veteran." Docket No. 32-8, in *Barber*. He is also a gay man engaged to be married next year. *Id.* Taylor thinks HB 1523 is hostile toward his religious values and targets LGBT persons. *Id.*

Dr. Glisson describes herself as "a member of the Southern Baptist Church co-founded by my grandparents" who has "studied and reflected upon my faith choice almost all my life." Docket No. 32-6, in *Barber*. "I am convinced that the heart of the Gospel is unconditional love. To condemn the presence of God in another human being, especially using faith claims or scripture to do so, is wrong and violates all of the tenets of my Christian faith." *Id.*

---

[34] The Fifth Circuit distinguished *Croft* from *Doe v. Tangipahoa Parish School Board*, where it had declined to find standing in a case challenging prayers at school board meetings because the plaintiffs had never attended a school board meeting.

Dorothy Triplett explained her religious objections in detail. "I am a Christian, and nowhere in scripture does Jesus the Christ condemn homosexuality," she said. Docket No. 32-9, in *Barber*. "He instructed us to love our neighbors as ourselves. In St. Paul's Letter to the Galatians 3:28: New Revised Standard Version (NRSV): 'There is no longer Jew or Greek, there is no longer slave or free, there is no longer male or female; for all of you are one in Christ Jesus.'" *Id.*

Based on their allegations and testimony, each individual plaintiff has adequately alleged cognizable injuries under the Establishment Clause. The "sufficiently concrete injur[ies]" here are the psychological consequences stemming from the plaintiffs' "exclusion or denigration on a religious basis within the political community." *Catholic League*, 624 F.3d at 1052; *see Awad*, 670 F.3d at 1123.

Their injuries are also imminent. HB 1523 is set to become law on July 1. "There is no need for [the plaintiffs] to wait for actual implementation of the statute and actual violations of [their] rights under the First Amendment where the statute" violates the Establishment Clause. *Ingebretsen v. Jackson Public Sch. Dist.*, 88 F.3d 274, 278 (5th Cir.1996).

2. Causation

The State next argues that the plaintiffs have not shown that their injuries have a causal connection to the defendants' conduct. It cites *Southern Christian Leadership Conference v. Supreme Court of Louisiana* for the proposition that an injury cannot be the result of a third party's independent action, and instead must be traceable to the named parties. 252 F.3d 781, 788 (5th Cir.2001). The contention here is that any injuries will be caused by third parties—like a clerk who refuses to promptly issue a marriage license to a same-sex couple—and therefore that the plaintiffs should sue those third parties.

The argument is unpersuasive. On July 1, the plaintiffs will be injured by the state-sponsored endorsement of a set of religious beliefs over all others. *See Santa Fe*, 530 U.S. at 302, 120 S.Ct. 2266; *Awad v. Ziriax*, 754 F.Supp.2d 1298, 1304 (W.D.Okla.2010). Regardless of any third-party conduct, the bill creates a statewide two-tiered system that elevates heterosexual citizens and demeans LGBT citizens. The plaintiffs' injuries are therefore caused by the State—and specifically caused by the Governor who signed HB 1523 bill into law—and will at a minimum be enforced by officials like Davis and Moulder.

In addition, in similar cases under the Establishment and Equal Protection Clauses, the Supreme Court has found a state's governor to be a proper defendant for the causal connection requirement of standing. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985); *Romer,* 517 U.S. at 620, 116 S.Ct. 1620.

Accordingly, the plaintiffs have demonstrated that there is a causal connection between their injuries and the defendants' conduct.

3. Redressability

The final prong of standing requires the plaintiffs to demonstrate that a favorable judicial decision will redress their grievances. *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. The State argues that "Plaintiffs would still be facing their same alleged injury tomorrow if the Court preliminary enjoins the named Defendants today." Docket No. 30, at 24, in *Barber*. It fails to support this claim with any further argument or facts.

"[W]hen the right invoked is that of equal treatment, the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class

as well as by extension of benefits to the excluded class." *Heckler*, 465 U.S. at 740, 104 S.Ct. 1387 (quotation marks and citation omitted). "By declaring the [statute] unconstitutional, the official act of the government becomes null and void." *Catholic League*, 624 F.3d at 1053.

Here, the harm done by HB 1523 would be halted if the statute is enjoined. Nothing in the plaintiffs' briefs, oral argument, or testimony indicates that they expect a favorable ruling to change the hearts and minds of Mississippians opposed to same-sex marriage, transgender equality, or sex before marriage. They simply ask the Court to enjoin the enforcement of a state law that both permits arbitrary discrimination based on those characteristics and endorses the majority's favored religious beliefs. That is squarely within the Court's ability. *See Awad v. Ziriax*, 670 F.3d 1111, 1119 (10th Cir.2012).

"Even more important, a declaratory judgment would communicate to the people of the plaintiffs' community that their government is constitutionally prohibited from condemning the plaintiffs' religion, and that any such condemnation is itself to be condemned." *Catholic League*, 624 F.3d at 1053.

The Court concludes that the individual plaintiffs have standing to bring these claims.

4. Associational Standing

In some instances, organizations may bring suit on behalf of their members. To establish associational standing, the organization must show that: (1) its members would have standing to sue on their own behalf; (2) the interests it seeks to safeguard are germane to the organization's purpose; and (3) neither the claim asserted nor the requested relief necessitate the participation of individual members. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

JGMCC seeks associational standing as a church with many LGBT members and a community service ministry that promotes LGBT+ equality. Because members of the church have standing to bring suit on their own behalf—at least two of its members are individual plaintiffs—the first element of associational standing is satisfied. Ensuring that its members are not discriminated against on the basis of sexual orientation, gender identity, or religion is undoubtedly germane to its purpose. And JGMCC's facial challenge does not require the participation of individual members. JGMCC has associational standing.

The same is true for CSE. That organization also has a member participating in this lawsuit, is aligned with the arguments and relief sought in this suit, and need not have additional members to assert its particular cause of action. It has associational standing. *Accord CSE I*, 64 F.Supp.3d at 918; *CSE III*, 175 F.Supp.3d at 707–08, 2016 WL 1306202, at *11.

B. *Ex Parte Young*

The next issue is whether these defendants are properly named in this suit.

1. Legal Standard

Under the Eleventh Amendment, citizens cannot sue a state in federal court. U.S. Const. amend. XI; *see Hutto v. Finney*, 437 U.S. 678, 699, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). In *Ex parte Young*, however, the Supreme Court carved out a narrow exception to this rule. 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The resulting *Ex parte Young* "fiction" holds that "because a sovereign state cannot commit an unconstitutional act, a state official enforcing an unconstitutional act is not acting for the sovereign state and therefore is not protected by the Eleventh Amendment."

Okpalobi v. Foster, 244 F.3d 405, 411 (5th Cir.2001) (en banc). When a plaintiff sues a state official in his official capacity for constitutional violations, the plaintiff is not filing suit against the individual, but instead the official's office, and can proceed with the constitutional claims. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

The *Ex parte Young* fiction requires that the state officer have "some connection with the enforcement of the act" or be "specially charged with the duty to enforce the statute," and also that the official indicate a willingness to enforce it. *Ex parte Young*, 209 U.S. at 157, 158, 28 S.Ct. 441. The officer's authority to enforce the act does not have to be found in the challenged statute itself; it is sufficient if it falls within the official's general duties to enforce related state laws.

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (quotation marks, citation, and brackets omitted).

2. Discussion

All four defendants—the Governor, the Attorney General, the Executive Director of the Department of Human Services, and the Registrar of Vital Records—are state officials sued in their official capacities. These suits are effectively brought against their various offices. All four defendants also have a connection to the enforcement of HB 1523.

Although Governor Bryant is the chief executive of the State, *Ex parte Young* does not permit a suit against a governor solely on the theory that he is "charged with the execution of all of its laws." *Ex parte Young*, 209 U.S. at 157, 28 S.Ct. 441. A more specific causal connection is required. *Id.* That connection is satisfied here. The Governor is the manager and supervisor of his staff, so he is personally required to enforce HB 1523's terms prohibiting adverse action against any of his employees who exercise a § 2 belief. Since the Governor has also indicated his willingness to enforce HB 1523 to the full extent of his authority, he is a proper defendant. *See* CB Condez, *Mississippi Governor: Christians Would Line up for Crucifixion Before Abandoning Faith*, The Christian Times, June 2, 2016 ("'[HB 1523's critics] don't know that if it takes crucifixion, we will stand in line before abandoning our faith and our belief in our Lord and Savior Jesus Christ,' [Governor Bryant] said.").[35]

In Establishment and Equal Protection Clause cases in particular, governors are often properly included as named defendants. *See Romer,* 517 U.S. at 620, 116 S.Ct. 1620 (Gov. Roy Romer); *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (Gov. Edwin W. Edwards); *Wallace*, 472 U.S. at 38, 105 S.Ct. 2479 (Gov. George C. Wallace); *Croft v. Perry*, 624 F.3d 157 (5th Cir.2010) (Gov. Rick Perry, as the sole defendant) [hereinafter *Croft II*]; *Croft I*, 562 F.3d at 735 (same).

General Hood is the state's chief law enforcement officer, but his general duty to represent the state in litigation is inadequate to invoke the *Ex parte Young* exception. Like the Governor, though, HB 1523 prohibits General Hood from taking any action against one of his employees who acts in

[35] The Governor's remarks are reminiscent of what Circuit Judge Tom P. Brady, later Mississippi Supreme Court Justice Brady, warned in his infamous Black Monday Speech. Judge Brady called on others to disobey *Brown v. Board of Education* by saying, "We have, through our forefathers, died before for our sacred principles. We can, if necessary, die again." Stephen J. Whitfield, A Death in the Delta: The Story of Emmett Till 10 (1988).

accordance with a § 2 belief. The Attorney General's Office employs hundreds of people across Mississippi, so he may very well be confronted with an HB 1523 issue.

Executive Director Davis, until authority is formally transferred to the new Department of Child Protective Services, is responsible for administering a variety of social programs. *See* Miss. Code Ann. § 43-1-51. HB 1523 has at least two sections that fall under his purview. *See* HB 1523 § 3(2)-(3). Under HB 1523, for example, DHS cannot take action against a foster or adoptive parent who violates DHS policies based on a § 2 belief. Davis's attorneys have given every impression that he will fully enforce his duties under HB 1523.

As discussed above, Registrar Moulder is responsible for executing state laws concerning registration of marriages. *See* Miss. Code Ann. § 51-57-43. HB 1523 adds a new responsibility to her existing obligations: she must record the recusal of any circuit clerk who refuses to issue a marriage license because of a § 2 belief. HB 1523 § 3(8)(a). Thus, she has a connection with HB 1523's enforcement. Her counsel has also indicated her intent to comply with her new duties.

Lastly, the plaintiffs' requested relief also satisfies the Eleventh Amendment and *Ex parte Young*. In both cases, they have requested declaratory and prospective injunctive relief that would enjoin the enforcement of HB 1523 and prevent state officials from acting contrary to well-established precedent. Courts frequently grant this type of relief against state officials in constitutional litigation. *See, e.g.*, *Romer*, 517 U.S. at 620, 116 S.Ct. 1620; *Wallace*, 472 U.S. at 38, 105 S.Ct. 2479.

Accordingly, the *Ex parte Young* exception to the Eleventh Amendment applies and these suits may proceed to seek declaratory and injunctive relief against these defendants.

IV. MOTION FOR PRELIMINARY INJUNCTION

A. Legal Standard

To receive a preliminary injunction, the movant must show "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest." *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir.2012) (citation omitted). "Each of these factors presents a mixed question of fact and law." *Id.* (citation omitted).

"A preliminary injunction is an extraordinary remedy. It should only be granted if the movant has clearly carried the burden of persuasion on all four ... prerequisites." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir.1985).

"The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir.1974).

B. Substantial Likelihood of Success on the Merits

The movant's likelihood of success is determined by substantive law. *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir.1997). "To successfully mount a facial challenge, the plaintiffs must show that there is no set of circumstances under which [HB 1523] is constitutional. If the plaintiffs successfully show [it] to be unconstitutional in every application, then that provision will be struck down as invalid." *Croft II*, 624 F.3d at 164.

1. The Equal Protection Clause

Under the Fourteenth Amendment, a state may not "deprive any person of life, liberty, or property, without due process of the law; nor deny any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Equal Protection Clause of this Amendment means that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (citation omitted). The primary intent of the Equal Protection Clause was to require states to provide the same treatment for whites and freed slaves concerning personhood and citizenship rights enumerated in the Civil Rights Act of 1866.[36]

The Equal Protection Clause is no longer limited to racial classifications. That is not because racial discrimination and racial inequality have ceased to exist. Rather, as discrimination against groups becomes more prominent and understood, we turn to the Equal Protection clause to attempt to level the playing field. *Compare Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 21 L.Ed. 442 (1872) (denying women equal protection of the laws) *with United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (recognizing that women are entitled to equal protection of the laws). "A prime part of the history of our Constitution ... is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557, 116 S.Ct. 2264; *see* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988) ("The Equal Protection Clause ... has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding."). One hundred and fifty years after its passage, the Fourteenth Amendment remains necessary to ensure that all Americans receive equal protection of the laws.

Sexual orientation is a relatively recent addition to the equal protection canon. In 1996, the Supreme Court made it clear that arbitrary discrimination on the basis of sexual orientation violates the Equal Protection Clause. *See Romer*, 517 U.S. at 635, 116 S.Ct. 1620. Seven years later, the Court held that the Constitution protects LGBT adults from government intrusion into their private relationships. *See Lawrence v. Texas*, 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

"After *Romer* and *Lawrence*, federal courts began to conclude that discrimination on the basis of sexual orientation that is not rationally related to a legitimate governmental interest violates the Equal Protection Clause." *Gill v. Devlin*, 867 F.Supp.2d 849, 856 (N.D.Tex.2012). Now, *Obergefell* makes clear that LGBT citizens have "equal dignity in the eyes of the law. The Constitution grants them that right." 135 S.Ct. at 2608.

a. Animus

"The Constitution's guarantee of equality must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot justify disparate treatment of that group." *Windsor*, 133 S.Ct. at 2693 (citation omitted). Laws motivated by "an improper animus" toward such a group require special scrutiny. *Id.*

When examining animus arguments, courts look at "the design, purpose, and effect" of the

---

[36] United States Senator Jacob Howard introduced the Fourteenth Amendment in the Senate. "This abolishes all class legislation in the States and does away with the injustice subjecting one caste of persons to a code not applicable to another," he said. "It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man ... the equal protection of law?" Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

challenged laws. *Id.* at 2689; *see also Romer*, 517 U.S. at 627–28, 116 S.Ct. 1620. The *Windsor* Court, for example, considered DOMA's title, one House Report from the bill's legislative history, and the law's "operation in practice." *Windsor*, 133 S.Ct. at 2693–94. From these it found that DOMA has a "principal purpose ... to impose inequality," places same-sex couples in second-tier relationships, "demeans the couple, whose moral and sexual choices the Constitution protects," and "humiliates tens of thousand of children now being raised by same-sex couples." *Id.* at 2694. The Court concluded that "the history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages ... was more than an incidental effect of the federal statute. It was its essence." *Id.* at 2693.

Animus was also a critical part of the Court's analysis in *Romer*, where plaintiffs brought a pre-enforcement facial challenge to Amendment 2 of the Colorado Constitution. 517 U.S. at 623, 116 S.Ct. 1620. "[T]he impetus for the amendment and the contentious campaign that preceded its adoption came in large part from [anti-discrimination] ordinances that had been passed in various Colorado municipalities." *Id.* Voters approved Amendment 2 to invalidate those ordinances and preclude "all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on the homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Id.* at 620, 116 S.Ct. 1620. In striking down Amendment 2 as an unconstitutional act of majority animus against a minority group, the Supreme Court wrote that "[a] state cannot so deem a class of persons a stranger to its laws." *Id.* at 635, 116 S.Ct. 1620.

The State argues that the plaintiffs have failed to show that the motivation behind the passage of HB 1523 was driven by "animus," "irrational prejudice," or "desire to harm" anyone. Docket No. 30, at 36, in *Barber*. Certainly, discerning the actual motivation behind a bill can be treacherous. But *Romer* and *Windsor* are instructive. This Court need only apply *Romer* and *Windsor* to ascertain that the design, purpose, and effect of HB 1523 is to single out LGBT and unmarried citizens for unequal treatment under the law.

1. Design and Purpose

The State says the primary motivating factor behind HB 1523 was to address the denigration and disfavor religious persons felt in the wake of *Obergefell.* Tr. of June 24 at 324, 327. The sponsors of the bill presented it to their respective chambers as post-*Obergefell* legislation.[37] A number of news articles confirmed the same.[38]

HB 1523's title, the "Protecting Freedom of Conscience from Government Discrimination Act,"

---

[37] Representative Gipson said HB 1523 would merely "add an additional layer of protection that currently does not exist in the post-*Obergefell*" world. H.B. 1523, Debate on the Floor of the Mississippi House of Representatives, at 6:24 (Feb. 19, 2016) (statement of Rep. Andy Gipson). Senator Branning introduced HB 1523 as "post-*Obergefell* balancing legislation ... presenting a solution to the crossroads we find ourselves in today as a result of *Obergefell v. Hodges*." Senate Floor Debate at 2:16, 32:20. She later added that although Mississippians may have religious beliefs against gambling, the death penalty, alcohol, and payday loan interest rates, HB 1523 is "very specific to same-sex marriage." *Id.* at 37:20.

[38] As Speaker Gunn said shortly after the decision was handed-down, "I don't care what the Supreme Court says. Marriage will always be between one man and one woman in holy matrimony." Emily Wagster Pettus, *House Speaker Protested by Flag Supporters at Neshoba*, Hattiesburg American, July 30, 2015. Representative Andy Gipson agreed. "What the Supreme Court's decision does not and cannot change is the firmly held conviction of faith of myself and most Mississippians. We still believe that marriage is defined by God as the union of one man and one woman." Pender, *supra*. Representative Gipson is correct: the Supreme Court cannot change his beliefs, nor does it intend to.

obviously implies that the purpose of the legislation was to halt governmental discrimination.

The legislative debate fleshes out the intended meaning of that title. Senator Willie Simmons asked whether the government was discriminating against religious citizens. Senate Floor Debate at 28:44. Senator Branning responded, "it potentially could." *Id.* at 28:44. Later, though, she wholeheartedly agreed with one of her colleagues that the government does not want to protect people of faith, and that it is time for people of faith to say, 'enough is enough.' *Id.* at 50:30. She agreed that the bill would ensure that LGBT citizens would not be able to sue a baker, florist, or other business for declining to serve them. *Id.* at 53:36. She agreed that the intent of the bill was to "level the playing field," ensure that certain groups had equal rights but not "special rights," and not "reverse discriminate against people." *Id.* at 54:15 (quoting Sen. Filingane).

The Senate debate also revealed another purpose of HB 1523. Senator Simmons asked if a Baptist college's refusal to employ lesbian and gay citizens was a form of discrimination. *Id.* at 31:29. Senator Branning responded, "if this bill passed, it would not be." *Id.* at 31:29.

The title, text, and history of HB 1523 indicate that the bill was the State's attempt to put LGBT citizens back in their place after *Obergefell*. The majority of Mississippians were granted special rights to not serve LGBT citizens, and were immunized from the consequences of their actions. LGBT Mississippians, in turn, were "put in a solitary class with respect to transactions and relations in both the private and governmental spheres" to symbolize their second-class status. *Romer*, 517 U.S. at 627, 116 S.Ct. 1620. As in *Romer*, *Windsor*, and *Obergefell*, this "status-based enactment" deprived LGBT citizens of equal treatment and equal dignity under the law. *Romer*, 517 U.S. at 635, 116 S.Ct. 1620.

2. Effect

Next up is the impact HB 1523 will have on LGBT Mississippians. Although the bill is far-reaching and could have consequences in many areas of daily life, *Romer* suggests that this Court should devote attention to HB 1523's effect on existing anti-discrimination laws and policies. The Court turns to that narrow issue now.

As a state law, HB 1523 would preempt, or invalidate, all city, county, and public school ordinances and policies that prohibit discrimination on the basis of sexual orientation or gender identity. *See* HB 1523 § 8(2)-(3). The same was true in *Romer*.

The plaintiffs submitted two policies that HB 1523 would invalidate in part: the City of Jackson's recent anti-discrimination ordinance and USM's anti-discrimination policy. Docket Nos. 32-17 and 32-18, in *Barber*. Both protect citizens from sexual orientation and gender identity discrimination in a variety of contexts.

HB 1523 would have a chilling effect on Jacksonians and members of the USM community who seek the protection of their anti-discrimination policies. If HB 1523 goes into effect, neither the City of Jackson nor USM could discipline or take adverse action against anyone who violated their policies on the basis of a § 2 belief.

The State attempts to distance HB 1523 from Amendment 2 in *Romer* by arguing that HB 1523 does not "expressly prohibit[ ] any law meant to protect gay or lesbian citizens from discrimination." Docket No. 30, at 40, in *Barber*. Sentences later, though, the State identifies the problem with its argument: "H.B. 1523 would invalidate local ordinances only to the extent those ordinances do not provide the same level of protection for religious freedom and free exercise as provided by H.B. 1523." *Id.* at 41. But no other local ordinance or policy purports to do what HB 1523 does. The State has not pointed to any existing anti-discrimination ordinance or policy that would survive HB 1523's

preemptive reach.

In a last-gasp attempt to distinguish HB 1523 from Amendment 2, the State then contends that HB 1523 "is actually strikingly similar" to Jackson and USM's policies because they all prohibit discrimination on the basis of religion. *Id.* at 40-41. The argument ignores the critical difference: Jackson and USM's anti-discrimination policies provide equal protection regardless of religion, sexual orientation, or gender identity. HB 1523 draws a stark line, with LGBT and unmarried-but-sexually-active citizens on one side, and everyone else on the other.

As in *Romer* and *Windsor,* the effect of HB 1523 would demean LGBT citizens, remove their existing legal protections, and more broadly deprive them their right to equal treatment under the law.

b. Scrutiny

This brings the Court to whether the government has a legitimate basis for HB 1523. While most laws classify and make distinctions, all laws do not violate equal protection. *Romer*, 517 U.S. at 631, 116 S.Ct. 1620. The Supreme Court has attempted to reconcile this dilemma by holding that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.* (citation omitted).

"When social or economic legislation is at issue, the Equal Protection Clause allows States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (citation omitted). "But we would not be faithful to our obligations under the Fourteenth Amendment if we apply so deferential a standard to every classification. ... Thus we have treated as presumptively invidious those classifications that disadvantage a suspect class, or that impinge upon the exercise of a fundamental right." *Plyler*, 457 U.S. at 216–17, 102 S.Ct. 2382.

Neither the Supreme Court nor the Fifth Circuit "has recognized sexual orientation as a suspect classification or protected group; nevertheless, a state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims."[39] *Johnson v. Johnson*, 385 F.3d 503, 530–31 (5th Cir.2004) (citation and brackets omitted). "Rational basis review places the burden of persuasion on the party challenging a law, who must disprove every conceivable basis which might support it." *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir.2012) (quotation marks and citations omitted). "So the party urging the absence of any rational basis takes up a heavy load." *Id.* This means the government usually prevails.

Even under this generous standard, HB 1523 fails. The State contends that HB 1523 furthers its "legitimate governmental interest in protecting religious beliefs and expression and preventing citizens from being forced to act against those beliefs by their government." Docket No. 30, at 37-38,

---

[39] In *CSE I*, this Court discussed the doctrinal instability on the proper standard of review. 64 F.Supp.3d at 928. "The circuit courts of appeal are divided on which level of review to apply to sexual orientation classifications. In the Second Circuit, homosexuals compose a quasi-suspect class that is subject to heightened scrutiny. In this circuit, sexual orientation classifications are subject to rational basis review." *Id.* (quotation marks, citations, and brackets omitted). Then as now, the Court questions whether sexual orientation should be afforded rational basis review. *Id.* ("If this court had the authority, it would apply intermediate scrutiny to government sexual orientation classifications."). *Obergefell* did not resolve the dispute. When Judge Jordan examined *Obergefell* earlier this year, however, he concluded that "the [Supreme] Court applied something greater than rational-basis review." *CSE III*, 175 F.Supp.3d at 710, 2016 WL 1306202, at *13. As this Court is bound by Fifth Circuit precedent, it will consider HB 1523 under rational basis review.

in *Barber*. This is a legitimate governmental interest, but not one with any rational relationship to HB 1523.

The Supreme Court "has long recognized that the government may accommodate religious practices without violating the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 713, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (citations and ellipses omitted). The First Amendment, the Mississippi Constitution, and Mississippi's RFRA all protect Mississippi's citizens' religious exercise—and in a broader way than HB 1523. Mississippi's RFRA in particular states that the government "may substantially burden a person's exercise of religion *only* if it demonstrates that application of the burden to the person: (i) Is in furtherance of a compelling governmental interest; and (ii) Is the least restrictive means of furthering that compelling governmental interest." Miss. Code Ann. § 11-61-1(5)(b) (emphasis added). Its plain language provides substantial protection from governmental discrimination on the basis of religious exercise.

Mississippi's RFRA grants *all* people the right to seek relief from governmental interference in their religious exercise, not just those who hold certain beliefs. This critical distinction between RFRA and HB 1523 cannot be overlooked.

Although states are permitted to have more than one law intended to further the same legitimate interest, HB 1523 does not advance the interest the State says it does. Under the guise of providing additional protection for religious exercise, it creates a vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity. It is not rationally related to a legitimate end.

The State then claims that HB 1523 "is about the people of conscience who need the protection of H.B. 1523, and does not 'target' Plaintiffs."[40] Docket No. 30, at 3, in *Barber*. The argument is unsupported by the record. It is also inconceivable that a discriminatory law can stand merely because creative legislative drafting limited the number of times it mentioned the targeted group. The Court cannot imagine upholding a statute that favored men simply because the statute did not mention women.

The State next focuses on marriage licenses. It contends that because HB 1523 does not allow the denial, delay, or impediment of marriage licenses, that licenses are issued on the same terms as opposite-sex couples. Thus, the State argues, there is no differential treatment that would constitute a violation of the Equal Protection Clause. *Id.* at 6. The only way a same-sex couple could be treated differently, it says, is if the issuance of their marriage license was "*impeded or delayed as a result of any recusal.*" *Id.*

To the contrary, the recusal provision itself deprives LGBT citizens of governmental protection from separate treatment. "A law declaring that in general it shall be more difficult for one group of citizens to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer*, 517 U.S. at 633, 116 S.Ct. 1620. There cannot be one set of employees to serve the preferred couples and another who is 'willing' to serve LGBT citizens with a "clear conscience," as Senator Branning put it. Such treatment viscerally confronts same-sex couples with the same message of inferiority and second-class citizenship that was rejected in *Romer*, *Lawrence*, *Windsor*, *CSE I*, *Obergefell*, and *CSE II*.

On this point, it is important to note that HB 1523's supposed protection against any delayed service applies only to marriage licenses and some health care issues. Tr. of June 24 at 339. The

[40] Rather than protect its citizens from "government discrimination," HB 1523 could actually subject more citizens to federal civil rights lawsuits. Persons feeling emboldened by HB 1523 may not understand that the law provides immunity only from State sanctions.

other areas of permissible discrimination—counseling, fertility services, etc.—do not place any duty on the recusing individual to ensure that LGBT citizens receive services.[41]

The State is correct that no one can predict how many LGBT citizens may be denied service under HB 1523. But it cannot be disputed that the broad language of the bill "identifies persons by a single trait and then denies them protection across the board." *Romer,* 517 U.S. at 633, 116 S.Ct. 1620. Thus, the State cannot prevail on its argument that HB 1523's plain language does not create a separate system designed to diminish the rights of LGBT citizens.

The deprivation of equal protection of the laws is HB 1523's very essence. *See Windsor*, 133 S.Ct. at 2693. It violates the Fourteenth Amendment.

2. The Establishment Clause

a. General Principles

The First Amendment begins with the words, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ...." U.S. Const. amend. I.

"The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). The Supreme Court has "struggled" to chart a path respecting both of them. *Id.* It is a thankless task. Part of the difficulty lies in the fact that each Clause is "cast in absolute terms" and would "clash with the other" if taken to its logical conclusion. *Id.* at 668–69, 90 S.Ct. 1409; *see also Lynch v. Donnelly*, 465 U.S. 668, 678, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984).

The Supreme Court has repeatedly rejected the notion that *states* may establish religion because the text of the Establishment Clause only references *Congress*. *See Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8, 67 S.Ct. 504, 91 L.Ed. 711 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). In truth, "[t]he very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and the final language instead extended [the] prohibition to state support for religion in general." *McCreary Cnty.*, 545 U.S. at 878, 125 S.Ct. 2722 (quotation marks and citation omitted).

Another popular misconception holds that the Establishment Clause is in error since the Constitution does not contain the phrase "separation of Church and State." Adherents of this belief have read the text correctly but missed its meaning. "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated." *Zorach v. Clauson*, 343 U.S. 306, 312, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

Nor was the Establishment Clause forced upon the sovereign states by an overreaching federal government. Far from being a federal mandate, the Clause "was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people." *McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., Ill.*, 333 U.S. 203, 215–16, 68 S.Ct. 461, 92 L.Ed. 649 (1948) (Frankfurter, J., concurring).

In any event, the Supreme Court has emphasized that "there is room for play in the joints" between the two Clauses. *Locke v. Davey*, 540 U.S. 712, 718, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) (quotation marks and citation omitted). It has sought to "chart a course that preserve[s] the autonomy

[41] There is an almost endless parade of horribles that could accompany the implementation of HB 1523. Although the Court cannot imagine every resulting factual scenario, HB 1523's broad language "identifies persons by a single trait and then denies them protection across the board." *Romer,* 517 U.S. at 633, 116 S.Ct. 1620.

and freedom of religious bodies while avoiding any semblance of established religion." *Walz*, 397 U.S. at 672, 90 S.Ct. 1409.

b. Historical Context

America as a whole is "a rich mosaic of religious faiths." *Town of Greece, N.Y. v. Galloway*, —— U.S. ——, 134 S.Ct. 1811, 1849, 188 L.Ed.2d 835 (2014) (Kagan, J., dissenting). Here, 80% of Mississippians identify as Christians.[42] Tr. of June 24 at 250.

Given the pervasiveness of Christianity here, some Mississippians might consider it fitting to have explicitly Christian laws and policies. They also might think that the Establishment Clause is a technicality that lets atheists and members of minority religions thwart their majority (Christian) rule.[43]

The public may be surprised to know the true origins of the Establishment Clause. As chronicled by the Supreme Court, history reveals that the Clause was not originally intended to protect atheists and members of minority faiths. It was written to protect Christians from other Christians. *See Wallace*, 472 U.S. at 52 & n. 36, 105 S.Ct. 2479. Only *later* were other faith groups protected.

The story behind this begins with the colonists.[44] "It is a matter of history that [the] practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America." *Engel v. Vitale*, 370 U.S. 421, 425, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). For decades at a time in 16th- and 17th-century England, Christian sects fought each other to control the Book of Common Prayer, in order to amend it and advance their particular beliefs. *Id.* at 425–27, 82 S.Ct. 1261. The fighting was disruptive and deadly. *Id.* at 426, 82 S.Ct. 1261. Those in power occasionally executed their opponents. *Id.* at 427 n. 8, 82 S.Ct. 1261. Some of the persecuted fled to America. *Id.* at 425, 82 S.Ct. 1261.

The Puritans, for example, were originally a religious minority in England that "rejected the power of the civil government to prescribe ecclesiastical rules." C. Scott Pryor & Glenn M. Hoshauer, *Puritan Revolution and the Law of Contracts*, 11 Tex. Wesleyan L. Rev. 291, 309 (2005). They specifically opposed the monarch's "requirement that clergy wear particular vestments while celebrating the liturgy." *Id.* at 308 n.94 (quotation marks and citation omitted). Today it is *inconceivable* that the *government* could require clergy to wear particular clothing.[45] But the Puritans

---

[42] A full 30% of Mississippians are white evangelical Christians. Tr. of June 24 at 250.

[43] The feeling is understandable. Headlines trumpet perceived anti-Christian conduct, inflaming passions. *See, e.g.*, Kate Royals, *Brandon Band Reportedly Not Allowed to Perform Christian Hymn*, The Clarion-Ledger, Aug. 22, 2015. But, of course, "[t]he First Amendment is not a majority rule." *Town of Greece*, 134 S.Ct. at 1822.

[44] "History provides enlightenment; it appraises courts of the subtleties and complexities of problems before them." *Jaffree v. Wallace*, 705 F.2d 1526, 1532 (11th Cir.1983).

[45] In seeing the Establishment Clause as a sword wielded against the majority, we forget that the Establishment Clause is actually a shield protecting religion from governmental meddling. Who wants the government dictating their priest, rabbi, or imam's clothing? It's difficult to imagine a greater violation of American law and custom. *See, e.g.*, *McCollum*, 333 U.S. at 232, 68 S.Ct. 461 ("If nowhere else, in the relation between Church and State, 'good fences make good neighbors.'") (Frankfurter, J., concurring); *Engel*, 370 U.S. at 430, 82 S.Ct. 1261 ("the people's religions must not be subjected to the pressures of government"); *Engel*, 370 U.S. at 431, 82 S.Ct. 1261 ("[The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government

were disparaged for their opposition and other beliefs. *Id.* at 309. Thousands left.

In the New World, several colonies established their particular Christian beliefs as their official religion. *Engel*, 370 U.S. at 427–28, 82 S.Ct. 1261; *see also McCollum*, 333 U.S. at 214, 68 S.Ct. 461 (Frankfurter, J., concurring). That again proved unsatisfactory.

For one, state-established religion was perceived as a *British* custom—not something independent, revolutionary Americans would want to retain. *Engel*, 370 U.S. at 427–28, 82 S.Ct. 1261. Baptists especially "chafed under any form of establishment." *Larson v. Valente*, 456 U.S. 228, 244 & n.19, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). They argued that if the British had no right to tax Americans, then it was also unjust for them to be taxed to support an official religion they denied. *Id.*

And then there was the division-of-power problem. In Virginia, the established Episcopal Church became a minority when the Presbyterians, Lutherans, Quakers, and Baptists banded together "into an effective political force." *Engel*, 370 U.S. at 428, 82 S.Ct. 1261. Faced with the prospect of losing power, James Madison and Thomas Jefferson persuaded the Virginia Assembly to pass its famous "Virginia Bill for Religious Liberty." *Everson*, 330 U.S. at 12, 67 S.Ct. 504.[46]

> By the time the Constitution was adopted, therefore,
> there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. ... The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the ... Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.

Engel, 370 U.S. at 429–30, 82 S.Ct. 1261; *see Lee v. Weisman*, 505 U.S. 577, 591–92, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) ("in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce").

This history involved disputes between Christians. Americans were weary of the British and then Colonial back-and-forth between Catholics and Protestants, Episcopalians and Presbyterians, and so on. It was better to have a neutral government than to constantly struggle for power—or live under the yoke of a rival sect for decades at a time.

"[T]he Establishment Clause must be interpreted by reference to historical practices and understandings." *Town of Greece*, 134 S.Ct. at 1819 (quotation marks and citation omitted). The essential insight from history is that the First Amendment was originally enacted to prohibit a state from creating second-class Christians. And while the law has expanded to protect persons of other faiths, or no faith at all, the core principle of government neutrality between religious sects has

---

and to degrade religion."); *see also Lee v. Weisman*, 505 U.S. 577, 589–90, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

[46] "Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference." *Larson*, 456 U.S. at 245, 102 S.Ct. 1673.

remained constant through the centuries.[47, 48]

---

[47] In 1833, Justice Joseph Story wrote that "[t]he real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating christianity; but to exclude all rivalry among christian sects." *Wallace*, 472 U.S. at 52 n.36, 105 S.Ct. 2479 (quoting 2 J. Story, Commentaries on the Constitution of the United States § 1877, at 594 (1851)). (Despite the 1851 date, the Commentaries were first published in 1833.)In 1870, "Judge Alphonso Taft, father of the revered Chief Justice, ... stated the ideal of our people as to religious freedom as one of 'absolute equality before the law, of all religious opinions and sects.'" *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 214–15, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).In 1871, the Court found that American "law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728, 20 L.Ed. 666 (1871).

In 1890, the Court held that the First Amendment was intended "to prohibit legislation for the support of any religious tenets." *Davis v. Beason*, 133 U.S. 333, 342, 10 S.Ct. 299, 33 L.Ed. 637 (1890), *abrogated by Romer*, 517 U.S. at 620, 116 S.Ct. 1620.

In 1871, the Court found that American "law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728, 20 L.Ed. 666 (1871).

In 1890, the Court held that the First Amendment was intended "to prohibit legislation for the support of any religious tenets." *Davis v. Beason*, 133 U.S. 333, 342, 10 S.Ct. 299, 33 L.Ed. 637 (1890), *abrogated by Romer*, 517 U.S. at 620, 116 S.Ct. 1620.

In 1952, the Court wrote that Americans "sponsor an attitude on the part of government that shows no partiality to any one group. ... The government must be neutral when it comes to competition between sects." *Zorach*, 343 U.S. at 313–14, 72 S.Ct. 679.

In 1968, the Court held that a state could not "aid, foster, or promote one religion *or religious theory* against another," and that the First Amendment "forbids ... the preference of a religious doctrine." *Epperson*, 393 U.S. at 104, 106, 89 S.Ct. 266 (emphasis added). That case in particular concluded that Arkansas and Mississippi's "anti-evolution" statutes violated the Establishment Clause by giving preference to "a particular interpretation of the Book of Genesis by a particular religious group." *Id.* at 101, 103 & n. 11., 89 S.Ct. 266.

In 1971, the Court found that "as a general matter it is surely true that the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Gillette v. United States*, 401 U.S. 437, 450, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) (upholding religious exemption law where "no particular sectarian affiliation or theological position is required.").

In 1982, the Court wrote that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244, 102 S.Ct. 1673.

In 1985, Justice Sandra Day O'Connor wrote that the Establishment Clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Wallace*, 472 U.S. at 70, 105 S.Ct. 2479 (O'Connor, J., concurring).

In 1987, the Court invalidated a Louisiana law giving "preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator." *Edwards*, 482 U.S. at 593, 107 S.Ct. 2573.

In 1989, the Court said it had "come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization." *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 590, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), *abrogated by Town of Greece*, 134 S.Ct. at 1811. "Whatever else the Establishment Clause may mean ..., it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed." *Id.* at 605, 109 S.Ct. 3086.

Also in 1989, the Court wrote that it was "settled jurisprudence that the Establishment Clause prohibits government from ... [placing] an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8–9, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989) (quotation marks and citations omitted).

In 1992, the Court held that "the central meaning of the Religion Clauses of the First Amendment ... is that all creeds must be tolerated and none favored." *Lee*, 505 U.S. at 590, 112 S.Ct. 2649.

In 1994, the Court reaffirmed that "proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696, 114 S.Ct.

c. HB 1523

The question now is whether, in light of history and precedent, HB 1523 violates the Establishment Clause. The Court concludes that it does in at least two ways.

i. HB 1523 Establishes Preferred Religious Beliefs

First, HB 1523 establishes an official preference for certain religious beliefs over others.

Under applicable precedent, "when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions" or "differentiate[s] among sects." *Hernandez v. C.I.R.*, 490 U.S. 680, 695, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (citation omitted).

"We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). In an Establishment Clause challenge, though, a court must also take consider "the context in which the statute was enacted and the reasons for its passage." *Salazar v. Buono*, 559 U.S. 700, 715, 130 S.Ct. 1803, 176 L.Ed.2d 634 (2010); *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 473 (5th Cir.2001).

Section 2 of HB 1523 begins, "[t]he sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that: ...." HB 1523 § 2. It then enumerates three beliefs entitled to protection. In the remainder of the bill, every protection from discrimination is explicitly tied to the § 2 beliefs.

On its face, HB 1523 constitutes an official preference for certain religious tenets. If three specific beliefs are "protected by this act," it follows that every other religious belief a citizen holds is *not* protected by the act. Christian Mississippians with religious beliefs contrary to § 2 become

---

2481, 129 L.Ed.2d 546 (1994) (quotation marks and citations omitted). *Kiryas Joel* struck down a New York statute that delegated state authority "to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally." *Id.*

In 1995, the Court held that the Establishment Clause is satisfied "when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 839, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

In 2005, the Court wrote that there is "[m]anifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the understanding, reached after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens." *McCreary Cnty.*, 545 U.S. at 860, 125 S.Ct. 2722 (quotation marks, citations, and ellipses omitted).

In 2010, the Court justified a cross on public property in part by noting that its placement "was not an attempt to set the *imprimatur* of the state on a particular creed." *Salazar v. Buono*, 559 U.S. 700, 715, 130 S.Ct. 1803, 176 L.Ed.2d 634 (2010).

All in all, "[i]t is firmly established that the government violates the establishment clause if it discriminates among religious groups." Erwin Chemerinsky, Constitutional Law § 12.2.2 (5th ed. 2015).

[48] The Arkansas law struck down in *Epperson* was adapted from a Tennessee law that had already been repealed. One commenter had this to say about the Tennessee law:Much wonder has been expressed both in this country and in Europe as to the factors which made such legislation possible. These factors were three in number: (1) an aggressive campaign by a militant minority of religious zealots of the "Fundamentalist" faith; (2) lack of knowledge of modern scientific and religious thought in the rural districts which control Tennessee politically; (3) political cowardice and demagogy. William Waller, *The Constitutionality of the Tennessee Anti-Evolution Act*, 35 Yale L.J. 191 (1925).

second-class Christians. Their exclusion from HB 1523 sends a message "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members." *McCreary Cnty.*, 545 U.S. at 860, 125 S.Ct. 2722. The same is true for members of other faith groups who do not subscribe to the § 2 beliefs.

The State suggests that the bill is neutral because it does not name a denomination. The argument is foreclosed by *Larson*, which struck down a Minnesota statute that had made "explicit and deliberate distinctions between different religious organizations" without identifying any denomination by name. 456 U.S. at 246 n. 23, 102 S.Ct. 1673.

For Reverends Barber, Burnett, Fortenberry, and Hrostowski (who are Presbyterian, United Methodist, United Methodist, and Episcopalian, respectively), their religious values cause them to believe that same-sex couples may marry in a Christian ceremony blessed by God. They also believe that same-sex couples may consummate that marriage as any other. As Rev. Dr. Hrostowski testified, "sex is a gift from God, and it is precious and wonderful and should be treated as such," but § 2's definition of sex is "incomplete because now holy matrimony is available to again both straight and gay couples." Tr. of June 23 at 126.

The Reverends, however, are not entitled to any of the protections of HB 1523. The bill instead shows the State's favor for the exact *opposite* beliefs by giving special privileges to citizens who hold § 2 beliefs. In so doing the State indicates that the Reverends hold disfavored, minority beliefs, while citizens who hold § 2 beliefs are preferred members of the majority entitled to a broad array of special legal immunities. *See McCreary Cnty.*, 545 U.S. at 860, 125 S.Ct. 2722.[49]

The First Amendment prohibits states from putting their thumb on the scales in this way. Laws must make religious rights and protections available "on an equal basis to both the Quaker and the Roman Catholic." *Larson*, 456 U.S. at 245, 246 n. 23, 102 S.Ct. 1673. "[L]egislators—and voter—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id.* at 245, 246 n. 23., 102 S.Ct. 1673 But HB 1523 favors Southern Baptist over Unitarian doctrine, Catholic over Episcopalian doctrine, and Orthodox Judaism over Reform Judaism doctrine, to list just a few examples.[50]

---

[49] One of the more unique conflicts between religious belief and § 2 was elicited during Rabbi Jeremy Simons' testimony. He explained that as early as 1800 years ago, Judaism recognized "four distinct genders that are possible, male, female, then a category called tumtum, which is someone whose gender is essentially ambiguous, unable to be ascertained and then androgenous, someone who displays both sex characteristics." Tr. of June 23 at 105. Rabbi Simons said that rabbis in that era "truly struggle[d] with it, in what to do in these cases where it is ambiguous. But what you don't see is them condemning the child or saying that this child cannot be a part of the community or is any less human or holy than anyone else." *Id.*

[50] *See* Southern Baptist Convention, Position Statements ("We affirm God's plan for marriage and sexual intimacy—one man, and one woman, for life. Homosexuality is not a 'valid alternative lifestyle.'"); Unitarian Universalist Association, Marriage Equality ("UU congregations and clergy have long recognized and celebrated same-sex marriages within our faith tradition."); U.S. Conference of Catholic Bishops, Issues and Action, Same Sex Unions, Backgrounder on Supreme Court Marriage Cases ("The USCCB supports upholding the right of states to maintain and recognize the true meaning of marriage in law as the union of one man and one woman."); Docket No. 2-1, at 11-13, in *CSE IV* (letter from the Bishop of The Episcopal Church in Mississippi permitting same-sex religious marriage as of June 3, 2016); Tr. of June 23 at 97-110 (expert testimony on views of same-sex marriage and transgender persons among Jewish denominations); Seth Lipsky, *U.S. Gay Marriage Ruling Puts Orthodox Jews on Collision Course With American Law*, Haaretz, June 28, 2015; *see generally* Docket No. 2-2, at 7, in *CSE IV* (resolution of the United Church of Christ supporting same-sex religious marriage); Brief for President of the House of Deputies of the Episcopal Church, et al. as Amici Curiae Supporting Petitioners, Obergefell v. Hodges, 135 S.Ct. 2584 (2015) (Nos. 14–556,

Some Jewish and Muslim citizens may sincerely believe that their faith prevents them from participating in, recognizing, or aiding an interfaith marriage. *See, e.g.*, Alex B. Leeman, *Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Positions*, 84 Ind. L.J. 743, 755-56 (2009) (relaying that under "classical Shari'a regulations: a Muslim man may marry a Christian or Jewish woman but no other unbeliever; a Muslim woman may not marry a non-Muslim under any circumstances. ... Some Muslim clerics ... have discouraged interfaith unions altogether."); Zvi H. Triger, *The Gendered Racial Formation: Foreign Men, "Our" Women, and the Law*, 30 Women's Rts. L. Rep. 479, 520 (2009) ("Interfaith marriage is not simply prohibited by Judaism; it is also not recognized (if performed elsewhere) due to its categorization as an inherently meaningless act. ... Although Israeli law does not allow interfaith marriages regardless of the sex of the Jewish partner, Israeli culture[ ] disproportionately scorns Jewish women who cohabit with or marry non-Jewish men."). Why should a clerk with such a religious belief not be allowed to recuse from issuing a marriage license to an interfaith couple, while her coworkers have the full protections of HB 1523?

The State argues that there is no religious preference because some members of *all* religious traditions are opposed to same-sex marriage. That is, because some Unitarians, some Episcopalians, and some Reform Jews oppose same-sex marriage, HB 1523 is neutral between religious sects. *See* Docket No. 38-2, at 2, in *Barber*.

Every group has its iconoclasts. The larger the group, the more likely it will have someone who believes the sun revolves around the Earth, a doctor who thinks smoking unproblematic, or a Unitarian opposed to same-sex religious marriage. But most people in a group share most of that group's beliefs. That is the point of being in a *group*. And in the HB 1523 context, the State has favored certain *doctrines*, regardless of how many individuals deviate from official doctrine on an issue.[51]

The State's *we-prefer-some-members-of-all-religions* argument also fails to understand another function of the Establishment Clause. "Intrafaith differences ... are not uncommon among followers of a particular creed," the Supreme Court once wrote, in its typical understated fashion. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715–16, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *see Holt v. Hobbs*, —— U.S. ——, 135 S.Ct. 853, 862, 190 L.Ed.2d 747 (2015). It is precisely because those internal disputes are common—and contentious—that the framers long ago decided that the government should stay out of those battles, for the benefit of both sides. *See, e.g.*, Sarah McCammon, *Conservative Christians Grapple With Whether 'Religious Freedom' Includes Muslims*, National Public Radio, June 29, 2016 (describing one ongoing internal debate).

Rev. Burnett's testimony illustrates the problem nicely. She said her church, the United

---

14–562, 14–571, 14–574); Brief for Major Religious Organizations as Amici Curiae Supporting Respondents, Obergefell v. Hodges, 135 S.Ct. 2584 (2015) (Nos. 14–556, 14–562, 14–571, 14–574). To be clear, Rabbi Simons' testimony indicated that the term "Orthodox" encompasses a variety of different sects of Judaism, some of which may permit same-sex marriage. Tr. of June 23 at 108-09. Most Jews in Mississippi belong to the Reform denomination and support same-sex marriage, he said. *Id.* at 96.

[51] The Supreme Court has rejected this kind of sophistry: "the Establishment Clause forbids subtle departures from neutrality, religious gerrymanders, as well as obvious abuses." *Gillette v. United States*, 401 U.S. 437, 452, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971). Courts are expected to look beyond superficial explanations. *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (per curiam); *see Edwards v. Aguillard*, 482 U.S. 578, 585–86, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (invalidating Louisiana statute under the Establishment Clause although the statute's "stated purpose" was "to protect academic freedom").

Methodist Church, opposes same-sex religious marriage but is in the process of reconsidering its position. Tr. of June 23 at 158. Rev. Burnett objected to what she perceived as the State of Mississippi's attempt to weigh in on that doctrinal debate via HB 1523. *Id.* at 159.

Governor Bryant is also a member of the United Methodist Church. *See* David Brandt, *Mississippi Church a Window into National Gay Rights Debate*, Assoc. Press, Apr. 12, 2016. There are same-sex couples in his congregation. *Id.*

HB 1523 violates the Establishment Clause because it chooses sides in this internal debate. In so doing it says persons like Gov. Bryant are favored and persons like Rev. Burnett are disfavored. So the fact that some members of all religions oppose same-sex marriage does not mean the State is being neutral. It means the State is inserting itself into any number of intrafaith doctrinal disputes, tipping the scales toward some believers and away from others. That is something it cannot do. "[T]he people's religions must not be subjected to the pressures of government." *Engel*, 370 U.S. at 430, 82 S.Ct. 1261.

The State then argues that HB 1523 is defensible as supporting moral values, not religious beliefs. As the testimony in this case showed, however, religious beliefs are inextricably intertwined with moral values. Plus, the Free Exercise Clause only protects "beliefs rooted in *religion*." *Thomas*, 450 U.S. at 713, 101 S.Ct. 1425 (citations omitted and emphasis added). So the State cannot simultaneously contend that HB 1523 is a reasonable accommodation of religious exercise and that it protects only moral beliefs. If HB 1523 was passed to encourage exclusively moral values, it was not passed to further the free exercise of religion.

Because § 2 "clearly grants denominational preferences of the sort consistently and firmly deprecated in [Supreme Court] precedents," the law must be treated as "suspect" and subject to strict scrutiny. *Larson*, 456 U.S. at 246–47, 102 S.Ct. 1673. That means § 2 "must be invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that interest." *Id.* The *Lemon* test need not be applied. *Id.* at 252, 102 S.Ct. 1673 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)); *see also Hernandez*, 490 U.S. at 695, 109 S.Ct. 2136; *Corp. of Presiding Bishop of Church of Jesus Christ of Latter–day Saints v. Amos*, 483 U.S. 327, 339, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987).[52]

"For an interest to be sufficiently compelling to justify a law that discriminates among religions, the interest must address an identified problem that the discrimination seeks to remedy. [The government] must identify an actual concrete problem—mere speculation of harm does not constitute a compelling state interest." *Awad*, 670 F.3d at 1129 (quotation marks, citations, and brackets omitted).

As mentioned, the State says HB 1523 is justified by a compelling government interest in accommodating the free exercise of religion. The underlying premise of this interest is that members of some religious sects believe that any act which brings them into contact with same-sex marriage or same-sex relationships makes the believer complicit in the same-sex couples' sin, in violation of the believer's own exercise of religion. *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2522-23 & n.23 (2015). The idea is that baking a cake for a same-sex wedding "makes a baker complicit in a

[52] The Court need not consider the bill's "secular purpose." *See Doe*, 240 F.3d at 468; Chemerinsky § 12.2.2 (noting similarities between neutrality analysis and elements of the *Lemon* test). If it did, however, it would conclude that HB 1523 "was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose," for the reasons listed in *Wallace*, 472 U.S. at 56, 105 S.Ct. 2479. *See also Edwards*, 482 U.S. at 592, 107 S.Ct. 2573.

same-sex relationship to which he objects." *Id.* at 2519.

The problem is that the State has not identified any actual, concrete problem of free exercise violations. Its defense speaks in generalities, but "Supreme Court case law instructs that overly general statements of abstract principles do not satisfy the government's burden to articulate a compelling interest." *Awad*, 670 F.3d at 1130 (collecting cases). Mississippi has run into the same hurdle Oklahoma did in *Awad*: its attorneys have not identified "even a single instance" where *Obergefell* has led to a free exercise problem in Mississippi. *Id.*

In this case, moreover, it is difficult to see the compelling government interest in favoring three enumerated religious beliefs over others. "[T]he goal of basic 'fairness' is hardly furthered by the Act's discriminatory preference" for one set of beliefs. *Edwards*, 482 U.S. at 588, 107 S.Ct. 2573. It is not within our tradition to respect one clerk's religious objection to issuing a same-sex marriage license, but refuse another clerk's religious objection to issuing a marriage license to a formerly-divorced person. The government is not in a position to referee the validity of Leviticus 18:22 ("Thou shalt not lie with mankind, as with womankind: it is abomination.") versus Leviticus 21:14 ("A widow, or a divorced woman, or profane, or an harlot, these shall he not take.").[53, 54]

Even if HB 1523 had encouraged the free exercise of *all* religions, it does not actually contribute anything toward that interest. Again, as discussed above, a clerk with a religious objection to same-sex marriage may invoke existing constitutional and statutory defenses without HB 1523. *E.g.*, *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 140, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987). The State has not identified a purpose behind HB 1523 "that was not fully served by" prior laws. *Wallace*, 472 U.S. at 59, 105 S.Ct. 2479.

Finally, the State claims that HB 1523 is akin to a federal statute permitting persons to opt-out of performing abortions. The comparison is inapt. For one, that statute is neutral to the extent it prohibits retaliation against doctors who decline to provide abortions as well as doctors who choose to provide abortions. *See* 42 U.S.C. § 300a-7(c)-(e). HB 1523 is not so even-handed. Tr. of June 24 at 327.

It is true that part of the abortion statute permits individuals or entities to opt-out of performing all abortions. *Id.* § 300a-7(b). That still is not analogous to HB 1523. If doctors can opt-out of all abortions, the apples-to-apples comparison would let clerks opt-out of issuing all marriage licenses. A clerk who transfers from the marriage licensing division to the court filings division, for example, would be honoring her religious beliefs by declining to be involved in a same-sex marriage, but would not be picking and choosing which persons to serve.

The Court now turns to why that kind of selective service is unlawful.

ii. HB 1523's Accommodations Injure Other Citizens

HB 1523 also violates the First Amendment because its broad religious exemption comes at the expense of other citizens.

Supreme Court precedent has repeatedly upheld "legislative exemptions [for religion] that did

---

[53] All quotes from and citations to the Bible are drawn from the King James Version.

[54] We do not single out religious beliefs in this way. No state law explicitly allows persons to decline to serve a payday lender based on a religious belief that payday lending violates Deuteronomy 23:19. No state law explicitly allows recusals because of a belief that wearing "a garment mingled of linen and wool[]" is forbidden. *Leviticus* 19:19. If a marriage license was withheld for "foolish talking" or "jesting," *see* Ephesians 5:4, we would undoubtedly have many fewer marriages.

not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n. 8, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989) (collecting cases). A religious accommodation which does no harm to others is much more likely to survive a legal challenge than one which does.

Estate of Thornton v. Caldor is a good example of this principle at work. In that case, a Connecticut statute gave workers an "absolute right not to work on their chosen Sabbath." 472 U.S. 703, 704–05, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985). Donald Thornton invoked the statute and chose not to work on Sundays. The resulting conflict with his employer led Thornton to quit. Litigation ensued.

The Supreme Court invalidated the Connecticut law. The statute violated the Establishment Clause by requiring that "religious concerns automatically control over all secular interests at the workplace." *Id.* at 709, 105 S.Ct. 2914. The statute did not take into account "the imposition of significant burdens on other employees required to work in place of the Sabbath observers." *Id.* at 710, 105 S.Ct. 2914. "Other employees who have strong and legitimate, but non-religious, reasons for wanting a weekend day off have no rights under the statute," the Court found, and it was wrong to make them "take a back seat to the Sabbath observer." *Id.* at 710 n. 9, 105 S.Ct. 2914. Because "[t]he statute has a primary effect that impermissibly advances a particular religious practice," it violated the First Amendment. *Id.* at 710, 105 S.Ct. 2914.

HB 1523 fails this standard. The bill gives persons with § 2 beliefs an absolute right to refuse service to LGBT citizens without regard for the impact on their employer, coworkers, or those being denied service. Like *Caldor*, it contains "no exception [for] when honoring the dictates of [religious] observers would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the [religious] observers." *Caldor*, 472 U.S. at 709–10, 105 S.Ct. 2914.

Burwell v. Hobby Lobby confirms this 'do no harm' principle. In that case, the Court relieved three closely-held corporations from federal contraceptive regulations which substantially burdened the corporate owners' religious beliefs. 134 S.Ct. at 2759. At first blush that sounds analogous to HB 1523: if the corporate owners could opt-out of the federal regulation, why can't clerks opt-out of serving same-sex couples? The difference is that the *Hobby Lobby* Court found that the religious accommodation in question would have "precisely zero" effect on women seeking contraceptive coverage, and emphasized that corporations do not "have free rein to take steps that impose disadvantages on others." *Id.* at 2760 (quotations marks, citation, and ellipses omitted). The critical lesson is that religious accommodations must be considered in the context of their impact on others. *See also Bullock*, 489 U.S. at 14, 109 S.Ct. 890 (striking down Texas law requiring non-religious periodicals to subsidize religious periodicals).

Unlike *Hobby Lobby*, HB 1523 disadvantages recusing employees' coworkers and results in LGBT citizens being personally and immediately confronted with a denial of service. The bill cannot withstand the *Caldor* line of cases. As Judge Learned Hand once said, "[t]he First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Caldor*, 472 U.S. at 710, 105 S.Ct. 2914 (quotation marks, citation, and ellipses omitted).

For these reasons, the plaintiffs are substantially likely to succeed on their claim that HB 1523

violates the First and Fourteenth Amendments.[55, 56]

C. Irreparable Harm

The plaintiffs are then required to demonstrate "a substantial threat of irreparable harm if the injunction is not granted." *Opulent Life Church,* 697 F.3d at 288. They must show "a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir.1986). "An injury is irreparable only if it cannot be undone through monetary remedies." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir.1981) (citation omitted).

The plaintiffs have sufficiently shown that HB 1523 represents an imminent and "substantial threat to [their] First Amendment rights. Loss of First Amendment freedoms, even for minimal periods of time, constitute irreparable injury." *Ingebretsen*, 88 F.3d at 280 (citations omitted). This applies with equal force to the Equal Protection claim, since the plaintiffs are substantially likely to be irreparably harmed by the unequal treatment HB 1523 sets out for them. *CSE I*, 64 F.Supp.3d at 950.

As a result, this element is satisfied. *Accord Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir.1993).

D. Balance of Hardships

Here, the plaintiffs must show that the injuries they will suffer if HB 1523 goes into effect outweigh any harm that an injunction may do to the State. If a court has found irreparable harm, a party opposing injunctive relief will "need to present powerful evidence of harm to its interests" to prevent the scales from weighing in the movant's favor. *Opulent Life Church*, 697 F.3d at 297. On the other hand, "the injunction usually will be refused if the balance tips in favor of defendant." 11A Charles A. Wright et al., Fed. Prac. & Proc. § 2948.2 (3d ed.).

The State contends that granting an injunction will result in the "irreparable harm of denying the public interest in the enforcement of its laws." Docket No. 28, at 34, in *CSE IV* (quotation marks and citation omitted). This argument will be taken up with the public interest factor.

The State also says that enjoining HB 1523 would impose a hardship on conscientious objectors who are presently being denied the free exercise of their religion. Even setting aside the State's lack of support for this contention, the Fifth Circuit has not looked favorably upon this argument in similar Establishment Clause litigation. An injunction that enjoins HB 1523 will preserve the status quo, so it "would not affect [citizens'] existing rights to the free exercise of religion and free speech. Therefore, [citizens] continue to have exactly the same constitutional right to pray as they had before

---

[55] A point of clarification is in order. The Establishment Clause claim brought by all of the plaintiffs is substantially likely to succeed in declaring § 2 of the bill unconstitutional. The *Barber* plaintiffs' Equal Protection Clause claim is also substantially likely to secure that result as to § 2, but may in fact enjoin the entire bill, as in *Romer*. The question is moot at this juncture because an injunction as to § 2 renders every other section inoperable as a matter of law. The result is that the HB 1523 is entirely "immobilized." *Shelby Cnty., Ala. v. Holder*, —— U.S. ——, 133 S.Ct. 2612, 2632 n. 1, 186 L.Ed.2d 651 (2013) (Ginsburg, J., dissenting).

[56] In Establishment Clause cases, a finding of substantial likelihood of success on the merits has led the Fifth Circuit to suggest that the final three factors of preliminary injunctive relief require only cursory review. *See Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir.1993). Nevertheless, the Court will proceed to the conclusion of the formal legal analysis.

the statute was enjoined." *Ingebretsen*, 88 F.3d at 280. Since *Ingebretsen* was decided, moreover, Mississippi has exacted its own RFRA to provide additional protection to religious Mississippians.

The Court concludes that the plaintiffs' constitutional injuries outweigh any injury the State suffers from an injunction that preserves the status quo.

E. Public Interest

Lastly, the plaintiffs must show that a preliminary injunction will not disserve the public interest. "Focusing on this factor is another way of inquiring whether there are policy considerations that bear on whether the order should issue." Wright et al. § 2948.4.

The State argues that the public interest is served by enforcing its democratically adopted laws. The government certainly has a powerful interest in enforcing its laws. That interest, though, yields when a particular law violates the Constitution. In such situations "the public interest is not disserved by an injunction preventing its implementation." *Opulent Life Church*, 697 F.3d at 298 (citations omitted); *accord Ingebretsen*, 88 F.3d at 280.

In this case, it is also relevant that Mississippi has been subjected to widespread condemnation and an economic boycott as a result of HB 1523's passage. *See*, Docket Nos. 32-11 (letter to Mississippi's leaders from nearly 80 CEOs urging HB 1523's repeal as "bad for our employees and bad for business"); 32-12 (statement of Mississippi Manufacturers Association opposing HB 1523); 32-13 (statement of Mississippi Economic Council opposing HB 1523); 32-19 (newspaper article indicating opposition to HB 1523 from nearly every Mayor on the Mississippi Gulf Coast); 32-20 (statement of the Gulf Coast Business Council describing "the growing list of negative impacts" of HB 1523 on the State economy), all in *Barber*; *see also* Sherry Lucas, *MS Theater Groups Worry About HB 1523 Fallout*, The Clarion-Ledger, June 13, 2016 (reporting that copyright holders are presently prohibiting Mississippians from performing West Side Story, Footloose, Wicked, Godspell, and Pippin). The public interest is served by bringing this boycott to an end.

F. Other Considerations

The plaintiffs have made other First Amendment arguments and noted a preemption theory concerning 42 U.S.C. § 1983. In light of the substantive claims addressed above, and appreciating "the haste that is often necessary" in preliminary injunction proceedings, the Court declines to take up those other theories of relief at this time. *Monumental Task Comm., Inc v. Foxx*, 157 F.Supp.3d 573, 582, 2016 WL 311822, at *3 (E.D.La. Jan. 26, 2016).

V. Conclusion

Religious freedom was one of the building blocks of this great nation, and after the nation was torn apart, the guarantee of equal protection under law was used to stitch it back together. But HB 1523 does not honor that tradition of religion freedom, nor does it respect the equal dignity of all of Mississippi's citizens. It must be enjoined.

The motions are granted.

It Is Hereby Ordered that the defendants; their officers, agents, servants, employees, and attorneys; and any other persons who are in active concert or participation with the defendants or their officers, agents, servants, employees, or attorneys; are hereby preliminarily enjoined from enacting or enforcing HB 1523.

So Ordered, this the 30th day of June, 2016.

ROGERS v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, 466 F.Supp.3d 625 (D.S.C. 2020)

[The plaintiffs were represented by, inter alia, Lambda Legal Defense and Education Fund Inc., the national American Civil Liberties Union, and the ACLU of South Carolina.]

ORDER

TIMOTHY M. CAIN, United States District Judge

Plaintiffs Eden Rogers ("Rogers") and Brandy Welch ("Welch") (collectively, "Plaintiffs") filed this suit alleging various constitutional violations based on their inability to serve as foster parents through a private child-placement agency, Miracle Hill Ministries ("Miracle Hill"), because of their religion and sexual orientation.[57] *See generally* (ECF No. 1). Plaintiffs contend that Miracle Hill receives government funding and is state-licensed and, therefore, should not be able to discriminate and deny them the ability to foster with its programs based on their religion or sexual orientation. *See id.* Pertinent to this action, Plaintiffs allege that Defendant Henry McMaster ("McMaster") and Defendant Michael Leach ("Leach") (collectively the "State Defendants") enabled, sanctioned, and failed to implement adequate safeguards against such discrimination by seeking a waiver from the Department of Health and Human Services ("HHS") to permit South Carolina's faith-based child-placement agencies ("CPAs") to discriminate in violation of 45 C.F.R. §§ 75.300(c) and (d), while still receiving government funding, and by McMaster issuing Executive Order No. 2018-12, directing the South Carolina Department of Social Services ("DSS") to permit faith-based CPAs to associate only with "'foster parents and homes who share the same faith'" as the subgrantee "'in recruiting, training, and retaining foster parents'" and to not deny licensure to faith-based CPAs on such basis. *Id.* at 19–21. Plaintiffs further contend that Defendants HHS, Alex Azar ("Azar"), the Administration for Children and Families, Lynn Johnson ("Johnson"), and Steven Wagner ("Wagner") (collectively the "Federal Defendants") have enabled, sanctioned, and failed to provide adequate safeguards against such discrimination by granting the South Carolina Foster Care Program an exemption from the religious anti-discrimination component of 45 C.F.R. § 75.300(c). *Id.* at 19–23.

This matter is before the court on the Defendants' various motions to dismiss. (ECF Nos. 50, 54, 57). The State Defendants filed separate motions to dismiss,[58] (ECF Nos. 54, 57), and the Federal Defendants filed a joint motion to dismiss (ECF No. 50). Plaintiffs filed a joint response in opposition to all three of Defendants' motions to dismiss. (ECF No. 61). The State Defendants filed separate replies[59] (ECF Nos. 66, 67), and the Federal Defendants filed a joint reply (ECF No. 68). These motions to dismiss are now ripe for review. After carefully reviewing the record and the parties' extensive briefings, the court concludes a hearing is unnecessary to decide this matter. *See*

[57] The court notes that Miracle Hill is not a party to this action.

[58] Leach indicates that he should be dismissed from the case for the same reasons as stated in McMaster's motion and that he "incorporates by reference" McMaster's motion to dismiss (ECF No. 57) and its attachments (ECF Nos. 57-1, 57-2, 57-3). (ECF No. 54).

[59] In Leach's reply, he again relies upon McMaster's reply and incorporates it by reference. (ECF No. 67).

Local Rule 7.08 (D.S.C.). For the reasons set forth below, the court grants Defendants' motions as to Plaintiff's equal protection claim for religious discrimination and denies the motions as to Plaintiff's remaining claims for violation of the Establishment Clause and equal protection based on sexual orientation discrimination.

I. BACKGROUND AND PROCEDURAL HISTORY[60]

South Carolina has faced an increasing need for foster homes over the past seven years, and South Carolina has been unable to meet the demand, leaving almost two thousand children without home placement. *See* (ECF No. 1 at 7–8). In an attempt to meet these growing needs, DSS contracts with private CPAs, who receive licenses from the state, as well as state and federal funding, to "recruit prospective foster parents and screen them for their suitability to obtain a foster care license." (ECF No. 1 at 8). Pursuant to Title IV-E of the Social Security Act, South Carolina receives reimbursement from HHS for a portion of the state's foster care expenditures, which the state then uses to partially reimburse the CPAs for their services. *Id.* at 10; *see also* S.C. Code Ann. § 63-9-30(5); S.C. Code Regs. § 114-4910.

DSS typically issues one-year licenses to CPAs that meet all regulatory and DSS requirements. (ECF No. 1 at 9) (citing S.C. Code Regs. § 114-4930(E)). DSS then monitors those CPAs to ensure that they continue to comply with federal and state law requirements and regulations. *Id.* (citing S.C. Code Regs. § 114-4920(E)). If a CPA is temporarily unable to comply with a state foster-care regulation, DSS may grant the agency a temporary license if the agency provides DSS with "a written plan to correct the areas of noncompliance within the probationary period." *Id.* (citing S.C. Code Regs. § 114-4930(F)). Further, if a CPA fails to comply with licensing regulations and DSS concludes that compliance cannot be accomplished within a set or reasonable time, DSS may deny or revoke the CPA's license. *Id.* (citing S.C. Code Regs. § 114-4930(G)).

DSS's Human Services Policy and Procedure Manual (the "DSS Manual") sets forth its recruitment polices and requirements. *See id.* at 10. In particular, the Manual provides that DSS "is committed to the exercise of non-discriminatory practice, and shall provide equal opportunities to all families and children, without regard to their race, color, and national origin, and religion, state of residence, age, disability, political belief, sex or sexual orientation." *Id.* (quoting DSS Manual § 710). The DSS Manual further mandates "that 'no individual shall be denied the opportunity to become a foster or adoptive parent on the basis of race, color, national origin, religion, state of residence, age, disability, political belief, sex, or sexual orientation.'" *Id.* (quoting DSS Manual § 710).

In addition to the State policies and regulations, DSS and any CPAs with which it contracts must also comply by federal statutory and regulatory requirements in order to receive federal funding under Title IV-E of the Social Security Act. *See id.* Although faith-based organizations like Miracle Hill are entitled to participate in HHS-funded foster care programs, HHS explicitly prohibits any organization participating in its programs from "'discriminat[ing] against a program beneficiary or prospective program beneficiary on the basis of religion, a religious belief, a refusal to hold a

[60] These facts are taken from Plaintiffs' Complaint, as the court must accept Plaintiffs' factual allegations as true for purposes of motions to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The court, however, is "not bound to accept as true a legal conclusion couched as a factual allegation," *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986), nor must the court "accept as true unwarranted inferences, unreasonable conclusions, or arguments," *E. Shore Mkts. Inc. v. J.D. Assocs., LP*, 213 F.3d 175, 180 (4th Cir. 2000).

religious belief, or a refusal to attend or participate in a religious practice.'" *Id.* at 11 (quoting 45 C.F.R. § 87.3(d)). Title IV-E also provides that, in order for a state to receive federal funding for its foster care system, "'neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may—(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person ....'" *Id.* at 12 (quoting 42 U.S.C. § 671(a)(18)). Additionally, as a part of its contracts with the state foster care systems, HHS requires "'that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as ... religion ... or sexual orientation.'" *See id.* at 12–13 (quoting 45 C.F.R. § 75.300(c)).

Miracle Hill is one of the CPAs in Greenville, South Carolina, and it serves the counties of Abbeville, Anderson, Cherokee, Greenville, Greenwood, Laurens, Newberry, Oconee, Pickens, and Spartanburg (known as "Region 1"). *Id.* at 13–14. Miracle Hill is a faith-based ministry, and it is the largest CPA in both the state and the upstate South Carolina region. *Id.* at 13–15. As a CPA, Miracle Hill provides comprehensive services to foster families and children, including assisting prospective foster parents through the licensing process, conducting regular home visits, and accompanying foster parents to all court hearings. *Id.* at 14. However, Miracle Hill works exclusively with prospective foster parents who subscribe to the evangelical Protestant Christian faith and expressly refuses to accept anyone who does not share its religious beliefs, including same-sex couples. *Id.* at 16–17.

In reviewing Miracle Hill's 2018 application to renew its license as a CPA, DSS discovered that Miracle Hill's website mentioned the "'recruitment of specifically Christian foster parents/families'" and that foster-care applicants were asked to provide information regarding their families' religious beliefs and practices. *See id.* at 18–19. DSS further determined that Miracle Hill "instructs its workers to inquire as to a family's particular religious belief and practices." *Id.* at 18. DSS followed up with Miracle Hill to determine the purpose of such inquiries and confirmed that Miracle Hill used the religious information "to refuse to provide its services as a licensed CPA to families who are not specifically Christians from a Protestant denomination[.]" *Id.*

Accordingly, DSS determined that Miracle Hill's practices constituted discrimination on the basis of religion, in violation of several state and federal policies and regulations, including DSS's own policy statement prohibiting such discrimination. *Id.* Therefore, on January 27, 2018, DSS issued Miracle Hill only a temporary six-month CPA license under S.C. Code Reg. § 114-4930(F). *Id.* at 19. DSS notified Miracle Hill that it had thirty days to address DSS's concerns and issue a written plan of compliance. *Id.* To Plaintiffs' knowledge, Miracle Hill has not issued a written plan of compliance to date. *Id.*

On February 27, 2018, McMaster, in his capacity as Governor of South Carolina, wrote a letter to Defendant Wagner, the then-Acting Secretary for the Administration of Children and Families within HHS, requesting that HHS provide South Carolina with a "deviation or waiver from [HHS's] current policy to recoup grant funds from DSS if [HHS] determines the new regulations are violated by any DSS CPA contracts due to religiously held beliefs[.]" *Id.* at 20. After sending the letter requesting the waiver, on March 13, 2018, McMaster issued Executive Order No. 2018-12, directing DSS to permit faith-based foster-care child-placement subgrantees to associate only with "foster parents and homes who share the same faith ... in recruiting, training, and retaining foster parents," and ordering DSS not to deny licensure of faith-based programs based on these actions. *Id.* at 20–21. The Executive Order further dictated that DSS "not directly or indirectly penalize religious identity

or activity" when applying the state's requirements for licensure for foster care. *Id.* at 21.

On January 23, 2019, HHS conditionally granted the South Carolina Foster Care Program an exemption from the antidiscrimination requirement of 45 C.F.R. § 75.300(c) (the "HHS Waiver"). *Id.* at 22. In granting the exemption, Defendant Wagner stated that the South Carolina Foster Care Program subgrantees, like Miracle Hill, could use "religious criteria in selecting among prospective foster care parents," on the condition that any subgrantee making use of the exception must refer potential foster parents that do not adhere to the subgrantee's religious beliefs to other CPAs or to DSS itself. *Id.* Subsequently, relying on the HHS Waiver, DSS reissued a standard CPA license to Miracle Hill and has taken no further action to prevent Miracle Hill or any other religiously-affiliated CPA from rejecting prospective foster parents based on their religious beliefs or sexual orientation. *Id.* at 22–23.

As it pertains to this case, Plaintiffs desired to foster children through Miracle Hill Ministries, in hopes of allowing "more children to know what it feels like to be unconditionally loved and to be part of a loving family[.]" *Id.* at 24. Plaintiffs are a same-sex couple who were married in South Carolina on November 28, 2015, and they have two daughters. *Id.* at 23, 24. On April 10, 2019, Plaintiffs called Miracle Hill and left a voicemail indicating their interest in becoming foster parents. *Id.* at 24. The next day, Welch received a call back from one of Miracle Hill's representatives. *Id.* However, according to Plaintiffs, when the representative from Miracle Hill learned that Plaintiffs are a same-sex couple, the representative told them to complete the online inquiry form and advised to read about Miracle Hill on its website. *Id.* The representative also repeatedly stated that "Miracle Hill is a Christian ministry that follows Christian values." *Id.*

On April 28, 2019, Plaintiffs completed and submitted Miracle Hill's online inquiry form for prospective foster parents, identifying themselves as a same-sex couple and members of the local Unitarian Universalist Church. *Id.* A few days later, on May 1, 2019, Miracle Hill's Foster Care Licensing Supervisor emailed Plaintiffs and rejected them as potential foster parents because their faith "does not align with traditional Christian doctrine." *Id.* at 25. Specifically, the email stated that, because Miracle Hill "feel[s] a religious obligation to partner with foster parents who share [its] beliefs and who are active in a Christian church[,] ... Miracle Hill would not be a good fit to assist [Plaintiffs] in [their] quest to secure state licensure to become foster parents." *Id.*

Plaintiffs allege that their inability to become foster parents through Miracle Hill was directly caused by the actions of the State Defendants and Federal Defendants because they have affirmatively enabled the discrimination against Plaintiffs by authorizing Miracle Hill and other religiously-affiliated CPAs to use religious criteria to reject prospective foster parents. *Id.* at 26. Additionally, Plaintiffs contend that Defendants have failed to consider the best interests of the children and have "limit[ed] the diversity of family placement options for children in State custody[,]" *id.* at 27, "den[ied] children access to loving families," *id.* at 29, thereby exacerbating South Carolina's foster-care crisis, *see id.* at 26–29.

In their Complaint, Plaintiffs assert causes of action for violation of the Establishment Clause of the First Amendment against all Defendants, and violation of the Equal Protection clauses of the Fifth and Fourteenth Amendments by the Federal and State Defendants, respectively. *Id.* at 29–38.

As to these claims, Plaintiffs seek for this court to (1) declare that the State Defendants have violated and continue to violate the First and Fourteenth Amendments to the Constitution by authorizing state-contracted, government-funded CPAs to use religious criteria to exclude prospective foster parents and families; (2) declare that the Federal Defendants have violated and continue to violate the First and Fifth Amendments of the Constitution by granting the HHS Waiver

to South Carolina and enabling the use of religious criteria to reject prospective foster families by state-contract, government-funded CPAs; (3) enter a permanent injunction prohibiting State Defendants from contracting with, licensing, and funding any CPA that discriminates against prospective foster parents on the basis of religion, sex, sexual orientation, or exercise of the fundamental right to marry a person of the same sex; (4) enter a permanent injunction ordering Federal Defendants to rescind the HHS Waiver and prohibiting them from granting any future waivers that would enable discrimination based on religion or sexual orientation in any state's federally-funded child welfare system; (5) enter a permanent injunction requiring State Defendants to ensure all prospective foster parents in South Carolina are treated equally, regardless of religion or sexual orientation, by state-contracted, government-funded CPAs; (6) award Plaintiffs attorneys' fees, costs, and disbursements incurred as a result of this action; and (7) award such further and additional relief as the court deems just and proper. *Id.* at 38–39.

The State Defendants have filed motions to dismiss, arguing that Plaintiffs lack standing to assert their claims and that they have failed to allege sufficient facts to constitute cognizable causes of action. (ECF Nos. 54, 57). Specifically, as to standing, the State Defendants assert that Plaintiffs have not alleged a cognizable injury; that any injury they suffered is a result of the conduct of Miracle Hill and/or Plaintiffs and is, therefore, not fairly traceable to State Defendants; and that Plaintiffs' alleged injuries would not be redressed by the relief they seek. (ECF No. 57 at 8–18, 19–22). Furthermore, State Defendants assert that, to the extent Plaintiffs assert taxpayer standing as to their Establishment Clause claim, such argument fails because the Executive Order and the request for the HHS Waiver were the "result [of] Governor McMaster's executive discretion[,]" and, therefore, are not legislative appropriations that can be challenged via taxpayer standing. *Id.* at 18–19. As to the merits of Plaintiffs' claims, State Defendants argue that such claims should be dismissed because Plaintiffs have failed plausibly to allege interference with a fundamental right in the face of "numerous legitimate government purposes" for State Defendants' actions, *id.* at 23–27; that State Defendants' actions did not discriminate among religions, *id.*; that these sorts of actions have been "historically permissible," *id.* at 28–31; and that the government's "accommodation of faith-based child welfare providers is not only permitted by the First Amendment, it is required by decades of Supreme Court precedent, state and federal law, and the First Amendment itself," *id.* at 35 (emphasis omitted). Plaintiffs responded to these motions to dismiss (ECF No. 61), and State Defendants filed replies (ECF Nos. 66, 67).

Federal Defendants filed a separate motion to dismiss, also asserting that Plaintiffs lack standing to bring their claims against Federal Defendants because Plaintiffs cannot show that their alleged injuries are traceable to them or that the relief Plaintiffs seek will redress their alleged injuries. (ECF No. 50-1 at 10–16). Federal Defendants also assert that Plaintiffs lack taxpayer standing because "Plaintiffs have not identified any act of Congress that appropriates funds specifically for faith-based organizations under the Title IV-E program," and no act of Congress "expressly contemplates, let alone requires, the involvement of faith-based organizations in the program." *Id.* at 16–18. Finally, Federal Defendants assert that Plaintiffs have failed to raise cognizable constitutional claims because Plaintiffs have failed to identify a state action for which Federal Defendants can be held responsible; the HHS waiver was driven by a secular purpose with the primary effect of neither advancing nor inhibiting religion and did not excessively entangle church and state; the exemption was not fatally arbitrary; and the exemption is rationally related to legitimate government interests. *Id.* at 19–30. Plaintiff responded to the motion (ECF No. 61), and Federal Defendants replied (ECF No. 68). The motions to dismiss are now ripe for review.

II. LEGAL STANDARD

Article III of the Constitution restricts federal courts' jurisdiction to the adjudication of cases and controversies. *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997). One element of the case-or-controversy requirement is that a plaintiff must have standing to sue, or, in other words, that the plaintiff is the proper party to bring suit. *See id.* The standing doctrine upholds this restriction by "ensur[ing] that a plaintiff has a personal stake in the outcome of a dispute, and that judicial resolution of the dispute is appropriate." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 396 (4th Cir. 2011) ("*Gaston II*"). Thus, "[t]o meet the constitutional requirement for standing, a plaintiff must prove that: 1) he or she suffered an 'injury in fact' that is concrete and particularized, and is actual or imminent; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) the injury likely will be redressed by a favorable decision." *Id.* Such alleged injury must be particularized to that plaintiff, and courts have consistently held that "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not have an Article III case or controversy." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 573–74, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Additionally, to be "fairly traceable" to the defendant, there must be a "causal connection between the injury and the conduct complained of" and the injury must not be the result of "the independent action of some third party not before the court." *Id.* at 561, 112 S.Ct. 2130. Furthermore, the Plaintiffs must show more than mere conjecture or speculation as to the redressability of their alleged injury should they prevail on the merits of their case.

The party invoking federal jurisdiction bears the burden of establishing the three elements of standing. *Id.* Because standing is not a pleading requirement but rather an "indispensable part of the plaintiff's case" that speaks directly to whether the claims establish a "case or controversy" within the parameters of federal court jurisdiction, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof" at that stage in the litigation. *Id.* Accordingly, here, the court considers Plaintiffs' burden regarding standing with the same scrutiny that it would within the context of a motion to dismiss at the pleading stage.

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint or pleading. *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). "[T]he legal sufficiency of a complaint is measured by whether it meets the standard stated in Rule 8 [of the Federal Rules of Civil Procedure] ... and Rule 12(b)(6) (requiring that a complaint state a claim upon which relief can be granted)." *Id.* Rule 8(a)(2) requires that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This pleading standard requires that a complaint contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

In *Ashcroft v. Iqbal*, the United States Supreme Court stated that to survive a 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). "A claim has facial plausibility when [a party] pleads factual content that allows the court to draw the reasonable inference that the [opposing party] is liable for the misconduct alleged." *Id.* The plausibility standard "asks for more than a sheer possibility that a [party] has acted unlawfully." *Id.* Rather, "[i]t requires [a party] to articulate facts, when accepted as true, that 'show' that [the party] has stated a claim entitling [them] to relief[.]"

Francis, 588 F.3d at 193 (*quoting Twombly*, 550 U.S. at 557, 127 S.Ct. 1955). Such "factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. "Determining whether a complaint states [on its face] a plausible claim for relief [which can survive a motion to dismiss] will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937. However, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'"—"'that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

III. ANALYSIS

A. Plaintiffs Have Adequately Alleged General Article III Standing for Their Establishment Clause and Equal Protection Claims.

Before the court can address the merits of Plaintiffs' Complaint to determine if they have set forth cognizable claims for relief, the court must first consider whether Plaintiffs have standing to bring this action. *See Raines*, 521 U.S. at 818, 117 S.Ct. 2312 (recognizing that standing is jurisdictional because without standing, there is no "case-or-controversy"); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."). As noted above, Plaintiffs bear the burden of proving the following elements with sufficient factual allegations as would survive a motion to dismiss: (1) a particularized injury in fact; (2) traceability of that injury to the defendants; and (3) the likelihood that the injury will be redressed by a favorable decision of this court. *See Lujan,* 504 U.S. at 560–61, 112 S.Ct. 2130.

1. Injury in Fact

In the Complaint, Plaintiffs allege the following injuries: (1) that "Defendants' actions have created a public child welfare system in South Carolina, funded by taxpayer dollars, in which the suitability of prospective foster parents is assessed based on religious requirements[;]"[61] and (2) that they were "den[ied] ... the same opportunities [to foster or volunteer with foster children] that are afforded to families that meet Miracle Hill's religious test[,]" such that Defendants have "create[d] a practical barrier to fostering ... and also stigmatize[d] [Plaintiffs], branding them as inferior and less worthy of serving as foster parents." (ECF No. 1 at 3, 4). In their response to the motions to

[61] Although Plaintiffs assert that they do not rely on their status as taxpayers to bring their claims, (ECF No. 61 at 3 n.3, 10 n.5), to the extent their allegation in the Complaint regarding the government's use of taxpayer dollars to support faith-based CPAs can be construed to raise taxpayer standing, the court finds such injury is not particularized to Plaintiffs and cannot support standing. Courts have consistently held that "plaintiff[s] raising only a generally available grievance about government—claiming only harm to [their] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more tangibly benefits [them] than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573–74, 112 S.Ct. 2130. Plaintiffs' alleged injury involving tax dollars being used to support faith-based CPAs is separate and distinct from their alleged injuries of stigmatization and practical barriers to their participation in the foster-parent program, and is not particularized to Plaintiffs but could apply to every other taxpaying citizen in the public at large. Therefore, the court finds Plaintiffs' alleged injury regarding the government's use of their tax dollars to fund religiously-discriminatory CPAs, to the extent they raise such an argument, is insufficient to establish standing.

dismiss, Plaintiffs clarify their injuries as "(1) the stigma resulting from the discrimination they suffered based on their religion and sexual orientation when they sought to participate in the South Carolina foster care system; and (2) the practical barriers to participation in that government program imposed by that discrimination." (ECF No. 61 at 10). For purposes of their motions to dismiss, the Federal Defendants do not contest that Plaintiffs have satisfied the first element of standing by sufficiently alleging an injury in fact. *See* (ECF Nos. 50-1 at 12–16 (addressing traceability and redressability, but assuming injury in fact has been satisfied); 61 at 10, 10 n.6). The State Defendants, on the other hand, attempt to recharacterize Plaintiffs' stated injury as denial of "their ability to foster through a specific, private CPA of their choice[,]" and argue that "there is no constitutionally protected right to become a foster parent by means of volunteering with a CPA of one's own choosing." (ECF No. 57 at 12 (emphasis omitted)).

The court first notes that, at this stage in the litigation, it must accept the well-pled allegations in the Complaint as true. *King v. Rubenstein*, 825 F.3d 206, 212 (4th Cir. 2016). Accordingly, the court must accept Plaintiffs' characterization of their injuries—namely, the stigma resulting from the discrimination Plaintiffs' suffered and the practical barriers to their participation in the South Carolina state foster care program—and disregard the State Defendant's recharacterization of such injuries as the ability to foster specifically through Miracle Hill. Additionally, to the extent the State Defendants contend that the Plaintiffs' stated injuries fail to satisfy the injury in fact element of standing, this argument must also fail.

As the United States Supreme Court has explained, stigmatic injury "accords a basis for standing ... to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct[.]" *Allen v. Wright*, 468 U.S. 737, 755, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (quoting *Heckler v. Mathews*, 465 U.S. 728, 740, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984)). Indeed, the Supreme Court has recognized that "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler*, 465 U.S. at 739–40, 104 S.Ct. 1387. Similarly, the Fourth Circuit has held that "[f]eelings of marginalization and exclusion are cognizable forms of injury" in the context of Establishment Clause claims, "because one of the core objections of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion 'that they are outsiders, not full members of the political community.'" *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) (quoting *McCreary Cty. v. ACLU*, 545 U.S. 844, 860, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005)). In this case, Plaintiffs allege stigmatic injury because they were personally turned away by Miracle Hill, a government-funded, faith-based CPA, on the grounds that they did not conform to Miracle Hill's religious standards. Therefore, Plaintiffs have sufficiently alleged an injury-in-fact with respect to both their Equal Protection and Establishment Clause claims.

Plaintiffs also allege that the Defendants' actions have created practical barriers to Plaintiffs' participation in the state foster care program "as not all foster care agencies are equivalent or offer the same services[.]" (ECF No. 1 at 4). Specifically, Plaintiffs allege that, by authorizing discrimination by CPAs providing public foster care services, Defendants have denied Plaintiffs access to "the largest and most well-resourced CPA in the state, which, because of the substantial government funding it receives, can provide comprehensive support to foster families." (ECF No. 61 at 20–21). Plaintiffs need not allege that they have been excluded entirely from participation in

the state foster care program or even that they have been rejected by a majority of CPAs. On the contrary, it is well-established that "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *N.E. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993). In the context of equal protection cases, the injury in fact is nothing more than "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* Plaintiffs allege in the Complaint that Miracle Hill recruits fifteen percent of the foster families in South Carolina. (ECF No. 1 at 13). "Thus it is reasonable to infer that the ability of faith-based agencies [like Miracle Hill] to employ religious criteria as a basis to turn away same-sex couples erects at least a [15]% barrier to the [Plaintiffs'] ability to ... foster a child in the State of [South Carolina]." *Dumont v. Lyon*, 341 F. Supp. 3d 706, 722 (E.D. Mich. 2018). Therefore, Plaintiffs have adequately alleged an injury in fact for both their Establishment Clause and Equal Protection claims.

2. Traceability

With respect to the second element of standing—traceability—both the State and Federal Defendants argue Plaintiffs' injuries are not fairly traceable the Defendants because a third party, Miracle Hill, "declined to assist Plaintiffs in become foster parents because of its own religious beliefs." (ECF No. 50-1 at 13); *see also id.* at 10; (ECF No. 57 at 13–14). In response, Plaintiffs assert that their injuries are directly traceable to the Defendants, because Defendants took affirmative steps to permit Miracle Hill to discriminate against and refuse to work with Plaintiffs because of their religious beliefs and sexual orientation. *See* (ECF No. 61 at 22–26).

For a Plaintiff to establish that her injuries are traceable to the defendant, she must show that there is a "causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. The injury must be fairly traceable to the "challenged action of the defendant[,] ... not the result of independent action of some third party not before the court." *Id.* Nevertheless, the Fourth Circuit has explained that "[i]mposition of the stringent proximate cause standard, derived from principles of tort law, has been held to 'wrongly equate injury fairly traceable to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation.'" *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 315–16 (4th Cir. 2013) (quoting *Bennett v. Spear*, 520 U.S. 154, 168–69, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)) (internal alterations omitted). Accordingly, the relevant inquiry to determine traceability is simply whether the Defendants' alleged actions are "at least in part responsible for" Plaintiffs' injuries. *Id.*

As an initial matter, this court notes—as have courts from other circuits—the potential implications of the Defendants' position. *See Marouf v. Azar*, 391 F. Supp. 3d 23, 34 (D.D.C. 2019). Essentially, according to Defendants, neither a state nor a federal agency can be held accountable for a grantee's known, and *explicitly permitted*, exclusion of persons from a government-funded program based on religious criteria. *See id.*; *see also* (ECF Nos. 50, 57). As the District Court for the District of Columbia explained, "[s]urely, the government would not take this position if, say, Plaintiffs here were excluded from fostering a child based on their gender (both are women), national origin, or *religious faith.*" *Marouf*, 391 F. Supp. 3d at 34 (emphasis added). In this case, that is the same argument Defendants make to defend their actions which allowed Plaintiffs to have been rejected from South Carolina's public foster care program.

Nevertheless, despite Defendants' attempt to pass-the-buck on to Miracle Hill, courts in this circuit have held that "a 'challenged agency action *authorizing* the conduct that allegedly caused' [Plaintiffs'] injuries" is sufficient to establish causation and traceability for purposes of standing. *Mathis v. Geo Group, Inc.*, No. 2:08-CT-21-D, 2010 WL 3835141, at *6 (E.D.N.C. Sept. 29, 2010) (quoting *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) (en banc)) (internal alterations omitted) (emphasis added). Plaintiffs have met that standard. As discussed above, Plaintiffs allege they suffered the stigma resulting from being discriminated against on the basis of their religion and sexual orientation, as well as the practical barriers to their participation in the State foster care program. (ECF Nos. 1 at 4; 61 at 10). To show that the stigma and practical barriers to fostering were the result of the Defendants' conduct, Plaintiffs' Complaint details the progression of events within both the federal and state governments that ultimately lead to McMaster's 2018 Executive Order and the HHS Waiver which they challenge. *See* (ECF No. 1 at 7–23).

To begin, the Complaint sets forth the processes by which CPAs are licensed through DSS, including the requirement that they comply with all State and federal policies and regulations, and reimbursed by DSS with funds from HHS. (ECF No. 1 at 9–10). Both DSS and HHS prohibit government-funded CPAs from discriminating against foster children or prospective foster parents on the bases of religion and sexual orientation. *Id.* at 10, 11, 12–13 (citing DSS Manual; 45 C.F.R. §§ 75.300(c), 87.3). When DSS became aware that Miracle Hill was rejecting prospective foster families who did not meet Miracle Hill's religious criteria, in contravention of both state and federal regulations, DSS declined to renew Miracle Hill's standard CPA license. *Id.* at 18–19. Instead, DSS issued Miracle Hill a temporary six-month license and required that Miracle Hill "issue a written plan of compliance within thirty days[.]" *Id.* at 19. "*If* Miracle Hill failed to address these concerns, DSS would [have] allow[ed] Miracle Hill's temporary CPA license to expire[,] [and] [a]bsent a CPA license, Miracle Hill would no longer be able to provide public child welfare services in South Carolina[,]" subject to its discriminatory criteria. *Id.* As the Complaint explains, however, that is not what happened.

Plaintiffs claim that, "[r]ather than requiring Miracle Hill to comply with the applicable state and federal non-discrimination requirements as DSS had, Governor McMaster sought to create and obtain exemptions from such requirements to enable Miracle Hill to continue excluding prospective foster parents based on its religious criteria." *Id.* Accordingly, McMaster requested that HHS grant South Carolina a waiver from the non-discrimination provisions of 45 C.F.R. § 75.300(c), which would allow "South Carolina's CPAs to engage in religiously motivated discrimination while the State continues to receive federal funding for its foster care program." *Id.* at 20. While awaiting's response, DSS refused to issue a standard CPA license to Miracle Hill "unless and until HHS granted the requested waiver." *Id.* at 21. Only after the HHS Waiver was granted did DSS reissue a standard CPA license to Miracle Hill. *Id.* at 22.

Additionally, before the HHS Waiver was granted, McMaster entered the Executive Order requiring DSS "to review and revise its policies and manuals ... [to] ensure that DSS does not directly or indirectly penalize religious identity or activity[,]" and prohibiting DSS from "deny[ing] licensure to faith-based CPAs solely on account of their ... sincerely held religious beliefs." *Id.* at 20–21. As a result of the Executive Order and the HHS Waiver, "DSS has taken no further steps to prevent discrimination by Miracle Hill against prospective foster parents based on religion or sexual orientation." *Id.* at 23. Thus, Plaintiffs have alleged that the injuries they claim "could not have occurred but for the actions of the State and Federal Defendants in authorizing and enabling the use

of religious eligibility criteria by state-contracted, government-funded foster care agencies providing public foster care services on behalf of the State." (ECF No. 61 at 11–12). Accordingly, the well-pled allegations in the Complaint clearly establish that Defendants are "at least in part responsible for" Plaintiff's alleged injuries, *Judd*, 718 F.3d at 316, and the traceability requirement of standing has been met.

3. Redressability

Finally, the Defendants argue that (1) because Miracle Hill was the cause of Plaintiff's injuries, the relief requested against Defendants "would do nothing more than raise a speculative chance of remedying Plaintiffs' alleged injur[ies];" and (2) since Miracle Hill is not a party to this action, the court cannot issue relief compelling Miracle Hill to refrain from taking actions causing Plaintiffs' injuries or to redress them. (ECF No. 50-1 at 10–11); *see also* (ECF No. 57 at 17–18). In reply, Plaintiffs argue that, "[i]f the State Defendants are no longer permitted to allow CPAs to discriminate based on religion or sexual orientation, there will be no more CPAs that discriminate," thus removing any stigma resulting from the allowance of such discrimination as well as any practical barriers to Plaintiffs' ability to participate in the state foster care program. (ECF No. 61 at 28). Plaintiffs assert the same logic also applies to the relief sought against the Federal Defendants. *See id.* at 29. Plaintiffs allege that, without the HHS waiver, DSS would be required to ensure that all state-licensed CPAs conduct their activities in compliance with federal law. *Id.* Miracle Hill, and other faith-based CPAs, can choose whether to stop discriminating on the bases of religion and sexual orientation or to stop providing public child welfare services; either way, the ultimate result is the same: "Plaintiffs would no longer be turned away from a government program because of their religion or sexual orientation, and would have the same array of agency options available to other families[.]" *Id.*

Again, at this stage of the proceedings, the court must accept the well-pled factual allegations in the Complaint. The Supreme Court has recognized that "[w]hen the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler*, 465 U.S. at 740, 104 S.Ct. 1387 (quoting *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247, 52 S.Ct. 133, 76 L.Ed. 265 (1931)) (emphasis in original). In this case, Plaintiffs ask the court, *inter alia*, to enjoin Defendants from funding or licensing "any CPA that discriminates against prospective foster parents based on their religion, sex, sexual orientation, or exercise of the fundamental right to marry a person of the same sex[.]" (ECF No. 1 at 38–39). In other words, Plaintiffs seek a mandate of equal treatment with respect to participation in South Carolina's public child welfare and foster program. Plaintiffs allege injury by reason of the stigma of discrimination and practical barriers to fostering enabled by the actions of the Defendants. Accepting the factual allegations in the complaint as true, as it must as this stage of the proceedings, the court finds that, for purposes of this order, the remedies Plaintiffs seek would redress the harms alleged.

The Federal Defendants argue that it is purely speculative whether "granting relief against [them] would cause South Carolina to cease licensing Miracle Hill as a [CPA], a decision over which Federal Defendants have no control." (ECF No. 50-1 at 15). Similarly, the State Defendants contend "it is speculative, at best, that the reversal of Governor McMaster's policies challenged by Plaintiffs would lead Miracle Hill to associate with those, like Plaintiffs, who do not share its beliefs[.]" (ECF No. 57 at 14–15); *see also id.* at 17–18. Defendants' arguments might be persuasive if the harm alleged by Plaintiffs was the ability to foster specifically through Miracle Hill. However, that is not

the harm Plaintiffs allege or seek to remedy by the relief requested. For purposes of standing at this stage of the litigation, Plaintiffs have sufficiently alleged that Defendants caused Plaintiffs' injuries by creating a system that permits religiously-affiliated CPAs to use religious eligibility criteria to deny federally- and state-funded public services to prospective foster families. Thus, an order requiring "Defendants to develop a system that removes barriers to same-sex couples becoming foster parents and evaluates their eligibility by the same criteria as any heterosexual couple or person will make Plaintiffs whole." *Marouf*, 391 F. Supp. 3d at 37. The same logic applies to removing religious criteria to evaluate all prospective foster parents on the same bases regardless of their religious beliefs. Accordingly, "'[n]o speculative inferences are necessary here to conclude that the relief requested will result in the Plaintiffs receiving the dignity and equal treatment they seek.'" *Id.* (quoting *Dumont*, 341 F. Supp. 3d at 725).

Therefore, the court concludes, for purposes of the pending motions to dismiss, that Plaintiffs have sufficiently alleged an injury in fact, fairly traceable to the Defendants, which is redressable by the relief sought in the Complaint and, therefore, have established standing to bring their claims.

B. Plaintiffs' Complaint sets forth a claim for violation of the Establishment Clause.

The Establishment Clause requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. 1, cl. 1. When evaluating a claim for violation of the Establishment Clause, the Fourth Circuit has repeatedly indicated that the applicable test is that set forth by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). *See, e.g.*, *Wood v. Arnold*, 915 F.3d 308, 313 (4th Cir. 2019). To pass scrutiny under the *Lemon* test, the government's conduct "'(1) must be driven in part by a secular purpose; (2) must have a primary effect that neither advances nor inhibits religion; and (3) must not excessively entangle church and State.'" *Id.* at 314 (quoting *Moss v. Spartanburg Cty. Sch. Dist. 7*, 683 F.3d 599, 608 (4th Cir. 2012)) (emphasis omitted). Government action violates the Establishment Clause if it fails any of the *Lemon* factors. *Id.* In this case, although the parties dispute whether the Defendants' can identify a secular purpose for their actions under the first prong,[62] the well-pled allegations in the Complaint clearly set forth a cause of action based on Defendants' alleged violation of the second and third prongs of the *Lemon* test.

To satisfy the second *Lemon* factor, the primary effect of the challenged action must neither be to advance nor to inhibit religion. *Wood*, 915 F.3d at 316. "This requirement sets an objective standard, which 'measures whether the principal effect of government action is to suggest government preference for a particular religious view or for religion in general.'" *Id.* (quoting *Mellen v. Bunting*, 327 F.3d 355, 374 (4th Cir.2003)) (internal alterations omitted). When deciding what the primary purpose or effect of the government's conduct is, courts in this circuit "consistently have examined the entire context surrounding the challenged practice, rather than only reviewing the contested portion." *Id.* at 314. Additionally, the Fourth Circuit has included within this objective

[62] Defendants claim the secular purpose for their actions was to maximize the number and diversity of available foster and adoption agencies in the state. (ECF Nos. 50-1 at 25–26; 57 at 32). In response, Plaintiffs argue this is merely a "sham" purpose and that the allegations in the Complaint demonstrate that "allowing CPAs to exclude qualified foster families based on religious criteria unrelated to the ability to care for a child does not maximize the number of families for children but rather, the opposite." (ECF No. 61 at 39). The court need not address this prong however, because it finds that the complaint alleges violation of the two remaining prongs of the *Lemon* test, as discussed below, sufficiently to avoid dismissal at this stage of the case.

analysis the United States Supreme Court's "endorsement test," which considers whether a reasonable, informed observer would conclude that the government's action amounts to the endorsement of a particular religion or religion generally. *Id.* at 316. "Thus, in this Circuit, the primary effect prong asks whether, irrespective of government's actual purpose, a reasonable, informed observer would understand that the practice under review in fact conveys a message of endorsement or disapproval of a religion." *Id.* (quoting *Mellen*, 327 F.3d at 374) (internal quotation marks omitted). In this context, a reasonable, informed observer is presumed to be "'aware of the history and context of the forum in which the [challenged conduct] takes place.'" *Id.* (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001)).

With this standard in mind, at this stage of the proceedings the court must consider only whether, accepting as true the allegations in the Complaint and all reasonable inferences arising therefrom, Plaintiffs have plausibly alleged that Defendants' conveyed a message endorsing religion by allowing state-licensed, government-funded CPAs to reject prospective foster parents based on religious criteria. The court finds that they have.

Specifically, as to the State Defendants, Plaintiffs allege that "[w]hen it came to light that ... Miracle Hill[ ] was excluding prospective foster parents based on religious criteria, [McMaster] took action to ensure that the discrimination could continue despite DSS's recognition that it violated state and federal law and policy[;]" and "[o]nce the HHS Waiver was granted to South Carolina, DSS issued a new standard CPA license to Miracle Hill, with full knowledge that Miracle Hill would continue to exclude prospective foster parents, like [Plaintiffs], based on religious criteria." (ECF No. 1 at 29–30). Similarly, Plaintiffs allege the Federal Defendants "authorized and enabled the use of religious eligibility criteria to discriminate against prospective foster parents, like [Plaintiffs], in the South Carolina public child welfare system by exempting the State from a federal regulation that prohibits such discrimination ... and continuing to provide federal funding to South Carolina for its foster care program, with the knowledge that the State requested the exemption in order to allow Miracle Hill to turn away prospective foster parents who are not evangelical Protestant Christians." *Id.* at 32. Plaintiffs assert that, but for the Federal Defendants' issuance of the HHS Waiver, "the State Defendants would not have provided Miracle Hill with a standard CPA license and authorized its continued use of religious criteria in recruiting and screening prospective foster parents." *Id.* As a result, Plaintiffs claim the effect of Defendants' actions is to "harm prospective foster families whose faith is other than evangelical Protestant Christianity and prospective foster families headed by same-sex couples regardless of their faith, denying them the same opportunities to foster that are available to families that meet Miracle Hill's religious requirements[,] ... [and] coerce prospective foster parents to support the specific religious beliefs of Miracle Hill so that they will be permitted to foster children through the agency." (ECF No. 1 at 30–31, 33).

Although the Defendants dispute these facts, *see* (ECF Nos. 50-1 at 26–28; 57 at 32), the court must assume their veracity based on the present procedural posture. Accepting the truth of the factual allegations above, as well as those set forth in the rest of the Complaint, the court finds that a reasonable, informed observer could conclude that the Defendants' actions were taken in an effort to protect a specific CPA, Miracle Hill, and permit discrimination within South Carolina's foster care program on the basis of Miracle Hill's religious criteria. Other courts have similarly held that where, as Plaintiffs allege occurred in this case, a state's authorization for faith-based CPAs to use religious criteria to exclude prospective foster parents "objectively endorses the religious views of those agencies[,] ... sending a message ... that [those prospective foster parents who are rejected] are outsiders, not full members of the community." *Dumont*, 341 F. Supp. 3d at 734 (internal quotation

marks omitted). Accordingly, taking all facts set forth in the Complaint as true, Plaintiffs have set forth sufficient allegations that Defendants' actions had the primary effect of advancing and endorsing religion and, thereby, violate the *Lemon* test and the requirements of the Establishment Clause.

Moreover, Plaintiffs have also stated a plausible claim for violation of the Establishment clause based on the third prong of the *Lemon* test, which requires courts to determine whether the challenged government action has created "'an excessive entanglement between government and religion,' which 'is a question of kind and degree.'" *Wood*, 915 F.3d at 318. One way in which plaintiffs commonly establish excessive entanglement is to show that the government's action "has 'the effect of advancing or inhibiting religion.'" *Id.* (citing *Agostini v. Felton*, 521 U.S. 203, 232–33, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)). As discussed above, the court has already found that the Defendants' action as alleged in the Complaint had the primary effect of advancing religion. Consequently, Plaintiffs' have sufficiently pled that the challenged actions excessively entangled the government and religion. *See id.* Thus, the well-pled allegations in the Complaint sufficiently assert, for purposes of this order, that Defendants have violated both the second and third prongs of the *Lemon* test and, thereby, set forth a claim for violation of the Establishment Clause.

1. Accommodation vs. Establishment Clause

Both State and Federal Defendants argue that they cannot be liable for violation of the Establishment Clause because their actions merely accommodated Miracle Hill's and other faith-based CPAs' religious beliefs by allowing them to participate in the State child welfare system as CPAs without compromising those sincerely-held beliefs. *See* (ECF Nos. 50-1 at 25–26, 28–29; 57 at 33–35). However, the United States Supreme Court has made it clear that "accommodation is not a principle without limits[.]" *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 706, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994). In this case, "[t]he fact that [the Executive Order and the HHS Waiver] facilitate[ ] the practice of religion is not what renders it an unconstitutional establishment." *Id.* Supreme Court precedent "allow[s] religious communities and institutions to pursue *their own interests* free from governmental interference, but [the Supreme Court] ha[s] never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation." *Id.* (emphasis added); *see also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982) ("Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, but the concept of a 'wall' of separation is a useful signpost. Here that 'wall' is substantially breached by vesting discretionary governmental powers in religious bodies." (internal citations omitted)). As the Supreme Court has explained,

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so.

Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290, 302, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 587, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992)) (internal alterations and quotation marks omitted). This is what Plaintiffs allege in this case: that "[b]y knowingly funding an agency that uses religious eligibility criteria to screen prospective foster parents, Defendants commit[ted] one of the primary 'evils' targeted by the Establishment Clause:

'sponsorship and financial support' of religion." (ECF No. 61 at 34) (quoting *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973)); *see also id.* at 33–34 (arguing that State Defendants delegated a government function to a religious organization and improperly allowed the use of religious criteria in the exercise of that function in violation of the Establishment Clause); (ECF No. 1 at 30–31; 33 (alleging Defendants' actions coerce prospective foster parents to adopt Miracle Hill's religious beliefs in order to be able to foster through that agency)).

"[T]he core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions[.]'" *Larkin*, 459 U.S. at 126, 103 S.Ct. 505 (quoting *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)). According to the Complaint, the system which Defendants' "accommodations" have created "does not by its terms require that [religiously affiliated CPAs'] power be used in a religiously *neutral* way." *Id.* at 125, 103 S.Ct. 505 (emphasis added). Rather, under the Executive Order and the HHS Waiver, religiously-affiliated CPAs' power to accept or reject prospective foster parents is completely "standardless, calling for no reasons, findings, or reasoned conclusions." *Id.* "'The potential for conflict inheres in the situation,'" yet Defendants appear to argue that it is not their responsibility to ensure "that the delegated power '[is] used exclusively for secular, neutral, and nonideological purposes.'" *Id.* (quoting *Levitt v. Comm. for Pub. Ed.*, 413 U.S. 472, 480, 93 S.Ct. 2814, 37 L.Ed.2d 736 (1973); *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973)) (internal alterations omitted). Contrary to Defendants' argument, the Supreme Court has long recognized that the Constitution does not permit "a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Id.* at 127, 103 S.Ct. 505. Therefore, to the extent Defendants' assert that their actions are immune from challenge under the Establishment Clause as "religious accommodation," such argument is directly contrary to the well-pled allegations in the Complaint and long-established federal jurisprudence and must be rejected at this stage of the proceedings.[63]

C. Equal protection.

The Equal Protection Clause of the Fourteenth Amendment provides, in relevant part, that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. In other words, the Equal Protection clause "'keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.'" *Moss v. Spartanburg Cty. School Dist. No. 7*, 676 F. Supp. 2d 452, 459 (D.S.C. 2009) (quoting *Morrison v. Garraghty*, 239

[63] Finally, Defendants also raise a related argument that, had they done nothing and permitted DSS to revoke Miracle Hill's CPA license for failure to comply with state and federal non-discrimination requirements, Miracle Hill's free exercise rights would have been violated. This argument is based solely on speculation regarding what Miracle Hill, a non-party to this action, would have done if its license had been revoked. More importantly, however, such an argument is unsupported by the law. "The Free Exercise Clause does not ... relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Fulton v. City of Philadelphia*, 922 F.3d 140, 152 (3d Cir. 2019) (quoting *Employment Div. v. Smith*, 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)) (internal quotation marks omitted). In other words, Miracle Hill's "religious or conscientious objections do not supersede the basic obligation to comply with generally applicable civil rights laws provided those laws are applied neutrally." *Id.* at 153 (citing *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, —— U.S. ——, 138 S. Ct. 1719, 1727, 201 L.Ed.2d 35 (2018)).

F.3d 648, 654 (4th Cir. 2001)). In order to survive dismissal on an equal protection claim, a plaintiff must allege facts sufficient to show that he was "treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). "Once this showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Id.* Unless the challenged classification violates a fundamental right or is drawn upon a suspect class such as race, religion, or gender, it is presumed valid and need only be rationally related to a legitimate state interest to pass under the Equal Protection clause. *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976)); *Johnson v. Hall*, Civ. A. Nos. 4:08-cv-2726-TLW-TER, 2010 WL 3724746, at *10 (D.S.C. Aug. 23, 2010) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)).

In this case, for purposes of the motions to dismiss, Plaintiffs have met the first hurdle, alleging that Defendants' actions resulted in Plaintiffs being treated differently from other similarly-situated prospective foster parents on the basis of their religion and sexual orientation. *See, e.g.*, (ECF No. 1 at 22) (alleging that "[w]ithout the HHS Waiver, Miracle Hill would not have been granted a standard CPA license" and would not have been able to reject Plaintiffs based on their religion or sexual orientation), 23 (alleging that, due to the Executive Order and HHS Waiver, "DSS has taken no further steps to prevent discrimination by Miracle Hill against prospective foster parents based on religion or sexual orientation"), 36 (alleging that "[b]y authorizing and funding Miracle Hill's discrimination, Defendants subjected Plaintiffs to different and unfavorable treatment based on religion and sexual orientation"). Now the court must consider whether Plaintiffs have alleged a lack of justification for Defendants' action and this disparate treatment under the requisite level of scrutiny. *See Morrison*, 239 F.3d at 654.

1. Religious Discrimination

As noted above, under the Equal Protection Clause, challenged government action that "caus[es] disparate treatment based on a 'suspect classification' such as race or religion ... receives very strict scrutiny by the courts." *Prudential Prop. & Cas. Co. v. Ins. Comm'n of S.C. Dep't of Ins.*, 534 F. Supp. 571, 575–76 (D.S.C. 1982). Plaintiffs argue that the State Defendants' actions "clearly afforded a denominational preference to evangelical Christianity[,]" and, consequently, must be evaluated under strict scrutiny. (ECF No. 61 at 37). The State Defendants,[64] on the other hand, argue that their actions in requesting the HHS Waiver and issuing the Executive Order were "facially neutral with respect to religion and designed to limit South Carolina's interference with religious exercise" and are, therefore, only subject to rational basis review. (ECF No. 57 at 25). In particular, State Defendants argue that their actions treat all religions equally by allowing any religiously-

[64] Although Federal Defendants purport to argue that Plaintiffs failed to state a claim for equal protection violations, Federal Defendants' arguments amount to no more than a recitation of their injury in fact and traceability arguments with respect to standing. *See* (ECF No. 50-1 at 19–24 (arguing that Miracle Hill and the State Defendants are the cause of Plaintiffs' alleged injuries such that the claims cannot properly be brought against Federal Defendants); 30 (arguing Plaintiffs' equal protection claim fails because they have failed to allege a "cognizable injury" and any injury they did suffer was caused by Miracle Hill, not Federal Defendants)). The court has already addressed and rejected these arguments. Nevertheless, although only State Defendants actually challenge whether Plaintiffs have plausibly stated a claim for equal protection, the court analyzes the sufficiency of the claim as against both the State and Federal Defendants.

affiliated CPA to apply its own religious criteria to select prospective foster parents. *See id.* at 23–24. The court agrees with State Defendants.

When government action is "neutral on its face" and "afford[s] a uniform benefit to *all* religions," the proper inquiry is whether the action is rationally related to a legitimate government purpose. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (emphasis in original). The facts set forth in the Complaint, and undisputed by Defendants, establish that the Executive Order and the HHS Waiver do not distinguish between religions, but apply equally to all faith-based CPAs "so that no 'religious organization' would have 'to choose between the tenets of its faith or applying for a CPA license ....'" (ECF No. 57 at 24); *see also* (ECF No. 1 at 20–21, 22). Accordingly, to the extent State Defendants' actions permit religious discrimination in the administration of the State foster care program, their actions need only withstand rational basis review to pass under the Equal Protection Clause. *See Amos*, 483 U.S. at 339, 107 S.Ct. 2862.

"To be irrational in the Constitutional sense, 'the relationship of the classification to its goal' must be 'so attenuated as to render the distinction arbitrary.'" *Johnson*, 2010 WL 3724746, at *10 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992)). Thus, "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970)). Further, the burden is on Plaintiffs "'to negate every conceivable basis which might support'" Defendants' actions. *Johnson*, 2010 WL 3724746, at *10 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973)). In other words, "the State has no obligation to produce evidence to support the rationality of [its challenged action], which 'may be based on rational speculation unsupported by any evidence or empirical data.'" *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) (quoting *FCC v. Beach Comms., Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)).

The dilemma of how this rational basis standard interacts with the dismissal standard under Fed. R. Civ. P. 12(b)(6) was resolved by the Fourth Circuit in *Giarratano*:

> The rational basis standard requires the government to win if any set of facts reasonably may be conceived to justify its classification; the Rule 12(b)(6) standard requires the plaintiff to prevail if relief could be granted under any set of facts that could be proved consistent with the allegations. The rational basis standard, of course, cannot defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard. The latter standard is procedural, and simply allows the plaintiff to progress beyond the pleadings and obtain discovery, while the rational basis standard is the substantive burden that the plaintiff will ultimately have to meet to prevail on an equal protection claim....
>
> While we therefore must take as true all of the complaint's allegations and reasonable inferences that follow, we apply the resulting "facts" in the light of the deferential rational basis standard. To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications.

521 F.3d at 303–04 (quoting *Wroblewski v. City of Washburn*, 965 F.2d 452, 459–60 (7th Cir. 1992)) (internal citations and quotation marks omitted). In that case, the Fourth Circuit held that dismissal was proper because the complaint's "conclusory assertion" that the challenged action "'is not rationally related to any legitimate government interest'" was "insufficient to overcome the

presumption of rationality...." *Id.* at 304. Applying this analysis to the matter at hand, the court finds that dismissal of the equal protections claims regarding religion is also proper in this case.

In support of their equal protection claims against Defendants, Plaintiffs simply allege that the "State Defendants' [and Federal Defendants'] actions fail any level of constitutional scrutiny because they do not rationally advance any legitimate government interest." (ECF No. 1 at 35, 37). This is a legal conclusion, not a factual allegation, and the court need not accept it when ruling on a motion to dismiss. *ACA Fin. Guaranty Corp. v. City of Buena Vista, Va.*, 917 F.3d 206, 212 (4th Cir. 2019). Additionally, in response to Plaintiffs' allegations, Defendants' proffered numerous legitimate government interests rationally related to their actions permitting the use of religious criteria by faith-based CPAs including, *inter alia*, "increasing community support and options for foster child placement by maximizing the number and diversity of CPAs[.]" (ECF No. 57 at 26); *see also* (ECF No. 50-1 at 25–26). Thus, Plaintiffs' "conclusory assertion[s]" are "insufficient to overcome the presumption of rationality" afforded to Defendants' actions which are facially neutral with respect to religion. *See Giarratano*, 521 F.3d at 304. "As long as the [challenged action] chosen by [Defendants] rationally advances a reasonable and identifiable governmental objective, [courts] must disregard the existence of other methods of allocation that [judges], as individuals, perhaps would have preferred." *Schweiker v. Wilson*, 450 U.S. 221, 235, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981). Accordingly, Plaintiffs' equal protection claim for religious discrimination fails as a matter of law and Defendants are entitled to dismissal of that claim.

2. Sexual Orientation Discrimination

As to sexual orientation discrimination, State Defendants merely challenge whether Plaintiffs have sufficiently pled that they were discriminated against because they are a same-sex couple. (ECF No. 57 at 23). The court finds that they have. *See* (ECF No. 1 at 25) (alleging Plaintiffs "were turned away by Miracle Hill ... based on Miracle Hill's religious objection to accepting same-sex couples"); *see also id.* at 16–18 (setting forth Miracle Hill's doctrinal statement which states, in part, that "God's design for marriage is the legal joining of one man and one woman" and citing to numerous public reports supporting allegations that Miracle Hill "will not accept married, same-sex couples as foster parents" and that "DSS has acknowledged that Miracle Hill discriminates based on the sexual orientation of prospective foster parents").

Because State Defendants limit their argument on sexual orientation discrimination to whether Plaintiffs have in fact alleged such discrimination, they provide no argument as to what level of scrutiny would apply should the court find that such discrimination occurred. Although Plaintiffs argue that classifications based on sexual orientations are "presumptively unconstitutional and subject to heightened scrutiny[,]" (ECF No. 61 at 40), neither the Fourth Circuit nor the Supreme Court has expressly recognized sexual orientation as a classification subject to heightened or strict scrutiny. Thus, the classification drawn by McMaster's Executive Order and the HHS Waiver, permitting CPAs to use religious criteria to deny same-sex couples access to South Carolina's state- and federally-funded public foster care program, is governed by rational basis review and will be presumed valid and sustained if it is rationally related to a legitimate state interest. *See Giarratano*, 521 F.3d at 303. However, since neither the State nor Federal Defendants presented any arguments as to how their actions rationally related to a legitimate State purpose, the court concludes that the Complaint has sufficiently alleged that there is no legitimate purpose for Defendants' actions and states a claim under the Equal Protection Clause for sexual orientation discrimination such that dismissal is in appropriate at this time.

IV. CONCLUSION

Accordingly, for the reasons set forth herein, the Defendants' motions to dismiss(ECF Nos. 50, 54, 57) are GRANTED in part and DENIED in part. Defendants' motions are granted with respect to Plaintiffs' claim for violation of the Fourteenth Amendment equal protection based on religious discrimination, which is hereby DISMISSED. However, Defendants' motions are denied as to Plaintiffs' claims for equal protection based on sexual orientation discrimination and violation of the Establishment Clause.

IT IS SO ORDERED.