SUPREME COURT OF THE UNITED STATES

No. 20–1088

DAVID CARSON, as parent and next friend of O. C., et al., PETITIONERS *v.* A. PENDER MAKIN

on writ of certiorari to the united states court of appeals for the first circuit

[June 21, 2022]

Chief Justice Roberts delivered the opinion of the Court.

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

I

A

Maine's Constitution provides that the State's legislature shall "require . . . the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools." 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."…

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…

The "nonsectarian" requirement for participation in Maine's tuition assistance program remains in effect today.

…

The Free Exercise Clause of the First Amendment protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988). In particular, we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits…

We have recently applied these principles in the context of two state efforts to withhold otherwise available public benefits from religious organizations. In *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. ___ (2017), we considered a Missouri program that offered grants to qualifying nonprofit organizations that installed cushioning playground surfaces made from recycled rubber tires. The Missouri Department of Natural Resources maintained an express policy of denying such grants to any applicant owned or controlled by a church, sect, or other religious entity. The Trinity Lutheran Church Child Learning Center applied for a grant to resurface its gravel playground, but the Department denied funding on the ground that the Center was operated by the Church.

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

Two Terms ago, in *Espinoza*, we reached the same conclusion as to a Montana program that provided tax credits to donors who sponsored scholarships for private school tuition….

We again held that the Free Exercise Clause forbade the State's action. The application of the Montana Constitution's no-aid provision, we explained, required strict scrutiny because it "bar[red] religious schools from public benefits solely because of the religious character of the schools." *Espinoza*, 591 U. S., at ___ (slip op., at 9).

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 ___ (slip op., at 10). By "condition[ing] the availability of benefits" in that manner, Maine's tuition assistance program—like the program in *Trinity Lutheran*—"effectively penalizes the free exercise" of religion. *Ibid.* (quoting *McDaniel*, 435 U. S., at 626 (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 ___ (slip op., at 20). A law that operates in that manner, we held in *Espinoza*, must be subjected to "the strictest scrutiny." *Id.*, at ___–___ (slip op., at 11–12).

To satisfy strict scrutiny, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 546 (1993) (quoting *McDaniel*, 435 U. S., at 628 (plurality opinion)). "A law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases." 508 U. S., at 546.

This is not one of them. As noted, a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause. See *Zelman*, 536 U. S., at 652–653. Maine's decision to continue excluding religious schools from its tuition assistance program after *Zelman* thus promotes stricter separation of church and state than the Federal Constitution requires.

…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 7 (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 4 (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 ___ (slip op., at 20).

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Justice Breyer, with whom Justice Kagan joins, and with whom Justice Sotomayor joins except as to Part I–B, dissenting.

…

The First Amendment's two Religion Clauses together provide that the government "shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof." Each Clause, linguistically speaking, is "cast in absolute terms." *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970). The 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. The apparently absolutist nature of these two prohibitions means that either Clause, "if expanded to a logical extreme, would tend to clash with the other." *Id.*, at 668–669. Because of this, we have said, the two Clauses "are frequently in tension," *Locke* v. *Davey*, 540 U.S. 712, 718 (2004), and "often exert conflicting pressures" on government action, *Cutter* v. *Wilkinson*, 544 U.S. 709, 719 (2005).

On the one hand, the Free Exercise Clause " 'protect[s] religious observers against unequal treatment.' " *Trinity Lutheran*, 582 U. S., at ___ (slip op., at 6) (quoting *Church of Lukumi Babalu Aye*, *Inc.* v. *Hialeah*, 508 U.S. 520, 542 (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. ___, ___ (2020) (slip op., at 9); see *Trinity Lutheran*, 582 U. S., at ___–___ (slip op., at 9–10).

On the other hand, the Establishment Clause "commands a separation of church and state." *Cutter*, 544 U. S., at 719. 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 (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 (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 (1968). "This prohibition," we have cautioned, "is absolute." *Ibid.* See, *e.g.*, *McCollum*, 333 U.S. 203 (no weekly religious teachings in public schools); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (no prayers in public schools); *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203 (1963) (no Bible readings in public schools); *Epperson*, 393 U.S. 97 (no religiously tailored curriculum in public schools); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985) (no period of silence for meditation or prayer in public schools); *Lee* v. *Weisman*, 505 U.S. 577 (1992) (no prayers during public school graduations); *Santa Fe Independent School Dist.* v. *Doe*, 530 U.S. 290 (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. Together they attempt to

chart a "course of constitutional neutrality" with respect to government and religion. *Walz*, 397 U. S., at 669. 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. 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; see also *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 795–796 (1973).

…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. 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 (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.

…

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 10 (citing *Zelman*, 536 U. S., at 652–653). 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.

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.”

…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 (“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 (“[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 (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.

… 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 (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….

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. 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 4. 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 ___ (slip op., at 6) (quoting *Locke*, 540 U. S., at 718). 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. 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, 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.

…

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.

B

In my view, Maine's nonsectarian requirement is also constitutional because it supports, rather than undermines, the Religion Clauses' goal of avoiding religious strife. Forcing Maine to fund schools that provide the sort of religiously integrated education offered by Bangor Christian and Temple Academy creates a similar potential for religious strife as that raised by promoting religion in public schools. It may appear to some that the State favors a particular religion over others, or favors religion over nonreligion. Members of minority religions, with too few adherents to

establish schools, may see injustice in the fact that only those belonging to more popular religions can use state money for religious education. Taxpayers may be upset at having to finance the propagation of religious beliefs that they do not share and with which they disagree. And parents in school districts that have a public secondary school may feel indignant that only *some* families in the State—those families in the more rural districts without public schools—have the opportunity to give their children a Maine-funded religious education.

…

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

This is a situation ripe for conflict, as it forces Maine into the position of evaluating the adequacy or appropriateness of the schools' religiously inspired curriculum….

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..