FREE EXERCISE RENEWAL AND CONDITIONS ON GOVERNMENT BENEFITS

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When the government puts a condition on funding or other benefits that it provides, can it impose that condition on a recipient (organization or individual) whose religious character or tenets conflict with the condition? That question arises in some of today's most prominent religious-freedom controversies, actual and potential. Conditions accompanying certain federal contracts and funding programs prohibit discrimination based on religion or sexual orientation; those conditions may prevent a recipient organization from requiring that its leaders or employees affirm or live consistently with its religious tenets. Even the highly uncertain prospect that the federal government might someday strip tax exemptions from organizations that discriminate against same-sex couples became an issue in the 2016 presidential election, increasing religious conservatives' fear of a Democratic victory.[1]

At the same time as these controversies have multiplied, recent Supreme Court decisions have increasingly protected the free exercise of religion under both the First Amendment and federal religious-freedom statutes. Free exercise has seen a renewal, one that seems likely to continue.

This Essay briefly assesses what the next steps in the free exercise renewal may mean for upcoming questions about government benefits. After explaining the doctrines that have invigorated free exercise, I discuss two categories of conditions: (1) those that formally

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1 *See* David Bernstein, Opinion, *The Supreme Court Oral Argument That Cost Democrats the Presidency*, WASH. POST (Dec. 7, 2016, 4:29 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/07/the-supreme-court-oral-argument-that-cost-democrats-the-presidency/ [https://perma.cc/KWZ5-AXQN].

discriminate against religious recipients or exercise, and (2) those that substantially burden religious exercise without formally disfavoring it. Both kinds of conditions can seriously harm religious freedom; both deserve close judicial scrutiny. With respect to each, I suggest the next steps the Court is likely to take as it continues renewing the protection of free exercise.

I. FREE EXERCISE RENEWAL

Free exercise renewal has involved at least two recent lines of decisions. The first holds that when the state provides a "generally available benefit,"[2] it cannot disqualify otherwise eligible recipients "solely because of their religious character."[3] The first two decisions in that line held it invalid to single out day-care centers and schools for exclusion from aid simply because they were religiously affiliated.[4] The third in that line, *Carson v. Makin*, held it equally invalid to exclude schools because they "used" the funds for religious purposes—that is, because they included religious teaching in the education that the funds supported.[5] "[E]ducating young people in their faith," *Carson* explained, is a "responsibilit[y] . . . at the very core of the mission of a private religious school."[6] In other words, "free exercise" means—as the words suggest—the right not just to have a religious identity but to act on it.

The second line of decisions holds that strict scrutiny applies not just when a law singles out religion, but also when a law "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[7] This rule applies, presumptively requiring a religious exemption, when even a small number of comparable nonreligious interests are exempted or otherwise favored. These decisions give real force to the requirement that a law burdening religious exercise be neutral and generally applicable.[8] Two decisions approved injunctions against COVID-based restrictions on religious worship when the state, in the Court's words, "treat[ed] *any* comparable secular activity more favorably than

2 Carson v. Makin, 142 S. Ct. 1987, 1997 (2022).

3 *Id.* (quoting Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2021 (2017)).

4 *See Trinity Lutheran*, 137 S. Ct. at 2019; Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2263 (2020).

5 *Carson*, 142 S. Ct. at 2000–02.

6 *Id.* at 2001 (first alteration in original) (quoting Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064 (2020)).

7 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021).

8 *See* Emp. Div. v. Smith, 494 U.S. 872, 879 (1990).

religious exercise."[9] And in *Fulton v. City of Philadelphia*, the Court unanimously forbade Philadelphia to terminate its contract with Catholic Social Services (CSS) on the ground that CSS would decline to certify same-sex couples as foster parents, where the contract had a provision allowing the relevant official to grant exceptions to its nondiscrimination rule "in his/her sole discretion."[10] If the government is willing to consider exceptions for other reasons, it can't refuse exceptions in cases of religious hardship without proving a compelling interest.[11]

The following two Parts discuss two kinds of conditions on government benefits: those that discriminate against religion and those that are generally applicable. Each Part discusses the next steps that this Court, committed to free exercise renewal, might take in protecting religious exercise against penalties from the denial of government benefits.

II. CONDITIONS DISCRIMINATING AGAINST RELIGIOUS RECIPIENTS OR ACTIVITY

A. Discrimination and Strict Scrutiny

When a condition in question facially discriminates against religion, the denial of benefits based on that condition triggers strict scrutiny. This is the holding of the decisions, culminating in *Carson v. Makin*, that forbid excluding religious entities "solely because of their religious character."[12] In each case the Court did not question whether the denial of funds imposed a serious enough burden to trigger strict scrutiny. The discrimination alone triggered it.

So too in *Fulton*. There, Philadelphia argued that its termination of CSS's contract should receive deference because it was acting in its capacity as manager of its own program.[13] That capacity was largely a matter of funding. But the Court refused to defer, noting that Philadelphia itself had conceded that "principles of neutrality and general

9 Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam)).

10 *Fulton*, 141 S. Ct. at 1878 (quoting Supplemental Appendix to City Respondents' Brief on the Merits at 16–17, *Fulton*, 141 S. Ct. 1868 (2021) (No. 19-123)).

11 *Id.* at 1872. Finally—although the details of this point are outside this paper's scope—the compelling-interest test, when it applies, is stringent and "provide[s] very broad protection for religious liberty." *See* Holt v. Hobbs, 574 U.S. 352, 356 (2015) (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014)).

12 Carson v. Makin, 142 S. Ct. 1987, 2001 (2022) (quoting Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2021 (2017)); *see supra* notes 2–5 and accompanying text.

13 *Fulton*, 141 S. Ct. at 1873.

applicability still constrain the government in its capacity as manager"[14]: "We have never suggested that government may discriminate against religion when acting in its managerial role."[15] Even in its role as a funder or manager, the government may not discriminate against religion.

B. The Next Application? Conditions Forbidding Religion-Based Hiring

Nondiscrimination conditions on benefits sometimes conflict with a recipient religious organization's interest in ensuring that its leaders or staff adhere to its religious beliefs and standards of conduct. Sometimes the relevant condition is a prohibition on sexual-orientation or gender-identity discrimination. But sometimes, even when LGBTQ-rights issues lurk in the background, the discrimination prohibited is discrimination based directly on religion—that is, on the organization's requirement that leaders and staff affirm its religious beliefs.[16]

Conditions that prohibit religious organizations from requiring that their staff adhere to religious beliefs and conduct should trigger strict scrutiny and should be presumed invalid. Requiring nonreligious organizations to make leadership or membership open to persons of all religious views is uncontroversial and justified. But imposing that requirement on groups organized around religious beliefs is discriminatory, unfair, and unconstitutional. The Court may be willing to reach that conclusion among its next steps.

Religions are themselves beliefs and viewpoints. A prohibition on religious discrimination singles out religious beliefs and viewpoints as the only kind that an organization may not enforce through its standards for leadership or membership. A prohibition singling out religious nondiscrimination does not tell the Sierra Club or a student environmentalist organization to accept climate-change skeptics as leaders or members. It allows the vast range of ideological groups to preserve their animating ideology. "For a religious social service, religious faith is its ideology, and for it to 'discriminate' on that basis is to exercise the same capacity that other funding recipients enjoy."[17] Thus, a

14 *Id.* at 1878 (quoting Brief of Respondents at 11–12, *Fulton*, 141 S. Ct. 1868 (2021) (No. 19-123)).

15 *Id.*

16 *See, e.g.*, Intervarsity Christian Fellowship/USA v. Univ. of Iowa, 5 F.4th 855, 861–62 (8th Cir. 2021).

17 Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J.L. & PUB. POL'Y 165, 189 (2009).

condition prohibiting religious discrimination, when applied to religious groups, singles them out for discrimination by government.

One cannot dismiss the discrimination against religious groups as simply a disparate impact from a religiously neutral condition. A prohibition on considering religion in employment itself explicitly mentions religion; it is facially nonneutral toward religion. The current Court, committed to giving religious freedom real substance, seems likely to call such a condition discriminatory. Consider *Carson v. Makin*, where the state tried to tell schools that received funds: "You can be religious, but you can't teach your religion." The Court found that preposterous: "offensive to the Free Exercise Clause."[18] It is just as preposterous to tell a funded entity: "You can be religious, but you can't prefer to employ people who share your religion."

Carson also rejected the state's argument that it aided only secular private schools because it was providing "the rough equivalent of [a Maine] public school education," which in turn must be secular.[19] The majority noted that Maine's public schools differed from secular private schools in their features and in the regulations governing them; virtually their only "equivalen[ce]" was that both were secular.[20] The Court said that to allow the state to "'recast a condition on funding' in this manner" would reduce "the First Amendment . . . to a simple semantic exercise."[21] It invoked the principle that courts "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."[22] Applying a rule that prevents religious organizations alone from ensuring their employees' ideological commitment likewise produces a "gerrymander" disfavoring religion.

On top of that, the Court—as already noted—finds discrimination against religion even when the law does not target or mention religion and serves legitimate secular purposes. A law is discriminatory, and not generally applicable, when it exempts even a few secular activities that pose similar risk of harm as the religious activity.[23] If a few secular exceptions in a law show discrimination and presumptively require a religious exemption, that is even more so with a law that allows all

18 Carson v. Makin, 142 S. Ct. 1987, 2001 (2022).

19 *Id.* at 1998 (quoting Carson v. Makin, 979 F.3d 21,44 (1st Cir. 2020), *rev'd* 142 S. Ct. 1987 (2022)).

20 *Id.* at 1999.

21 *Id.* (quoting Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 215 (2013)).

22 *Id.* at 2000 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

23 *See supra* notes 7–11 and accompanying text.

secular groups, but not religious groups, to require belief commitments from their staff.

III. BURDENS FROM NONDISCRIMINATORY OR GENERALLY APPLICABLE CONDITIONS

However, the next round of questions about government benefits will likely involve conditions that are generally applicable or at least do not target religious recipients. For example, what if a state forbids sexual-orientation discrimination by all tax-exempt organizations, including but not limited to religious organizations? The question then is whether formal nondiscrimination against religion exhausts the protections of the Free Exercise Clause when government benefits are involved.

A. Substantive Choice, not Just Formal Nondiscrimination

Free exercise should demand more. Formal nondiscrimination does not exhaust constitutional religious-liberty protections in general. On the free exercise side, the ministerial exception and other doctrines give religious organizations special protection for their internal governance decisions.[24] On the establishment side, there are special limits on government imposition of religious activities, limits that do not apply to nonreligious ideas or activities.[25]

It's more helpful to explain Religion Clause doctrine, across the various areas, in terms of a second foundational value: not preventing facial nondiscrimination, but rather protecting the ability of people and groups to make choices in matters of religion. As Douglas Laycock has argued: "[T]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. . . . [R]eligion [should] be left as wholly to private choice as

24 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–90 (2012).

25 Recent Establishment Clause decisions increasingly allow government to advance or endorse religious ideas, a trend that treats religion more like other ideas that government has power to promote. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022) (rejecting the *Lemon* test, which prohibited advancement of religion, and the related no-endorsement test); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080–82 (2019) (Alito, J.) (plurality opinion) (same); *id.* at 2101–02 (Gorsuch, J., joined by Thomas, J., concurring in the judgment). But even under these decisions, the government still can't compel someone to engage in religious acts. *Kennedy*, 142 S. Ct. at 2428–29. And that protection remains unique to religion. As to other ideas, the only constitutional bar is on compulsion to express the idea (by virtue of the Free Speech Clause).

anything can be. It should proceed as unaffected by government as possible."[26]

Over the years this value has been labeled as "substantive neutrality," as "voluntarism," and also as "'incentive neutrality,' because it requires neutral government incentives with respect to religion."[27] It is distinct from "formal neutrality,"[28] also known as "category neutrality,"[29] which forbids religious categories in government programs. Formal neutrality is another word for "no discrimination based on religion." Substantive neutrality or voluntarism, on the other hand, sometimes require different treatment of religion from other activities in order to minimize government's incentive effects on people's independent, voluntary religious choices. As the Court has put it, the goal of the Religion Clauses is for religion in America to "flourish [or decline] according to the zeal of its adherents and the appeal of its dogma."[30]

Voluntarism—substantive or incentive neutrality—explains why government must sometimes treat religion the same as other activities but also why it can or must sometimes treat religion differently. It also easily explains why singling out religion for exclusion from otherwise available benefits is presumptively unconstitutional. When a program excludes religious options while including nonreligious alternatives, it creates a clear inducement or incentive to choose the nonreligious over the religious. Targeting religion is formally nonneutral but also substantively nonneutral.

When the Court speaks of nondiscrimination and neutrality in funding programs, it often highlights the connection to individuals' choice as well. In holding that the inclusion of religious providers in voucher-type programs satisfies the Establishment Clause, the Court said that a program whose terms are "neutral with respect to religion" creates no "financial incentive for parents to choose a religious school" over a nonreligious one.[31] The "government aid reaches religious

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26 Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001–02 (1990) (footnote omitted).

27 Thomas C. Berg & Douglas Laycock, Espinoza*, Government Funding, and Religious Choice*, 35 J.L. & RELIGION 361, 372 (2020) (footnote omitted) (quoting Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 37–38 (1989)). Portions of this Section draw on the analysis in the Berg and Laycock article. *See* Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 703–07 (1997) (delineating "voluntarism").

28 Laycock, *supra* note 26, at 999–1001.

29 *See* McConnell & Posner, *supra* note 27, at 37–38.

30 Zorach v. Clauson, 343 U.S. 306, 313 (1952).

31 Zelman v. Simmons-Harris, 536 U.S. 639, 652, 654 (2002); *accord, e.g.*, Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487–88 (1986).

schools only as a result of the genuine and independent choices of private individuals."[32] The same point holds under the Free Exercise Clause; the purpose of protecting religious choice means that excluding religious options from funding is not just unnecessary but invalid. Thus, one of the recent free exercise decisions emphasized that families have a constitutional right to choose religious schools and that the state of Montana's exclusion "penalizes that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one."[33]

The difference is that substantive religious choice, unlike formal nondiscrimination, calls for protection against some generally applicable conditions as well. The prospect of losing funding or other benefits can be a powerful disincentive to adhering to one's religious beliefs. Denials of benefits can have severe effects, whether the relevant condition is generally applicable or not. The core example is *Sherbert v. Verner*,[34] which held that the state could not deny unemployment benefits to persons who refused work because it conflicted with their religious convictions (in *Sherbert*, convictions about resting on the Sabbath).[35] Forcing such a choice between following convictions and receiving benefits, the Court said, "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[36] The point generalizes beyond unemployment benefits. As Professor Laycock and I have written:

> Protection from religiously burdensome funding conditions is essential to religious liberty in the modern state. Governments spend enormous amounts of money; they would have extraordinary power to buy up constitutional rights if they were allowed to withhold government contracts or social-welfare benefits from those who persist in exercising their religion.[37]

As a matter of legal doctrine, substantial burdens from conditions on federal benefits trigger application of the Religious Freedom Restoration Act (RFRA) and so must satisfy strict scrutiny.[38] More than

32 *Zelman*, 536 U.S. at 649 (first citing Mueller v. Allen, 463 U.S. 388 (1983); then citing *Witters*, 474 U.S. 481; and then citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993)).

33 Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020).

34 374 U.S. 398 (1963).

35 *Id.* at 409–10.

36 *Id.* at 404.

37 Berg & Laycock, *supra* note 27, at 378.

38 *See* 42 U.S.C. § 2000bb-1 (2018).

thiry states have their own religious-liberty protections.[39] And under the Free Exercise Clause itself, the Court's recent decisions apply strict scrutiny when the law in question gives more favorable treatment to even a few secular activities—perhaps to "*any* comparable secular activity."[40] The Court is almost, if not quite, at the point of applying strict scrutiny to truly generally applicable laws.

Under the principle of promoting religious choice, religious exemptions from conditions on benefits should not create an affirmative incentive to practice religion. But in many cases, exemptions create little or no such incentive for anyone not already inclined to engage in the practice on religious grounds. It's hard to imagine a secular private school or adoption agency seeking to discriminate against LGBTQ persons and adopting or feigning a religious belief in order to claim exemption. It's true that some rules about benefits have essentially the same effect on religious and secular providers and so should apply equally to both. Beneficiaries shouldn't receive more in funding because they're religious or receive exemption from conditions that impose only administrative burdens with no religious significance. But many conditions on benefits at issue today have great religious significance, and protecting religious recipients serves the fundamental goals of incentivizing neutrality and religious choice.

B. "Substantial Burdens" and Denial of Benefits

When, therefore, does a denial of benefits, even pursuant to a generally applicable condition, constitute a "substantial burden" on religious exercise—an imposition on religious choice that triggers, or should trigger, strict scrutiny?

Certainly, a key factor is the size or importance of the benefit denied—or more broadly, the effect of the denial on the recipient individual or organization. The denial of unemployment compensation placed substantial pressure on Adele Sherbert's religious choice; as Ira Lupu and Robert Tuttle have observed, claimants such as her likely "depend on such benefits for subsistence."[41] But to be "substantial," the burden need not go so far as to threaten subsistence. In its next

39 *Federal & State RFRA Map (List View)*, BECKET, https://www.becketlaw.org/research-central/rfra-info-central/map/ [https://perma.cc/HD8Q-3AFE] ("21 states have a RFRA + 10 states have a RFRA-like protection in their state constitutions.").

40 *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (emphasis added).

41 IRA C. LUPU & ROBERT W. TUTTLE, THE STATE OF THE LAW 2008: A CUMULATIVE REPORT ON LEGAL DEVELOPMENTS AFFECTING GOVERNMENT PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS 36 (2008).

decision overturning the denial of unemployment benefits, *Thomas v. Review Board*, the Court said that a substantial burden exists

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs . . . . While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[42]

Loss of an "important" benefit can be enough to pressure recipients to modify their behavior and violate their beliefs. That is enough to be "substantial."

In 2007, the Office of Legal Counsel (OLC) in the Bush Justice Department applied this standard to conclude that World Vision, the evangelical Christian relief agency, would be substantially burdened under RFRA if it were to lose a $1.5 million federal grant, funding its programs mentoring and training at-risk youth, because it required all its employees to be practicing Christians.[43] The OLC memorandum said that the benefit "undoubtedly is important to World Vision" since it "represents approximately 10% of the entire budget for World Vision's domestic community-based programs, and approximately 75% of the public funding the organization received domestically," and since its loss would require that the youth program "be 'drastically reduced.'"[44]

Professors Lupu and Tuttle critique the OLC memo on the ground that any particular benefit may not be as important to an organization as to an individual like Adele Sherbert or Eddie Thomas. "World Vision can reduce the scope of its youth program," they observe, "or try to raise private funds to substitute for the government grant. World Vision is also free to pursue other government grants, which do not impose conditions on hiring freedom, for related social service programs."[45] The observations may be true, but they do not dispose of the "substantial burden" problem. For a religious social-service provider, reducing the service in question or shifting to another one is itself a burden on religious exercise, not an avoidance of the

42 Thomas v. Rev. Bd., 450 U.S. 707, 717–18 (1981).

43 Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juv. Just. & Delinq. Prevention Act, 31 Op. O.L.C. 178 (2007).

44 *Id.* at 178 (quoting Letter from Brian K. Vasey, Associate General Counsel, World Vision, Inc., to Marie E. Burke, Off. of Just. Programs (Sept. 8, 2005)).

45 LUPU & TUTTLE, *supra* note 41, at 36.

burden. After all, the entity typically undertook that service in the first place because of religious motivation and mission.

It's also far more than a minor inconvenience to have to raise funds, especially to sustain a current program that has been premised on public aid.[46] "Fundraising is by far the biggest challenge for the [nonprofit] sector, even for the most successful organizations," says one *Harvard Business Review* article; in that author's survey of 200 leaders of social-service organizations, "81% of them identified access to capital as their most serious concern."[47] The religious organization might not secure funds elsewhere, and even if it does so, the effort distracts it from its prime mission of providing services to others. When those services would ordinarily warrant government support, but the organization loses that support because it acts in accordance with its beliefs (the same beliefs that inspire its service), the burden can easily be substantial. Although no one is entitled to the benefit in the first place, to lose it because of one's religious exercise is burdensome.

However, in various constitutional decisions, the Court has used a different, often more restrictive criterion for so-called unconstitutional conditions. Here "the relevant distinction," as a recent decision puts it, "is between conditions that define the limits of the government spending program . . . and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."[48] For example, the Court upheld the ban on political activities by § 501(c)(3) tax-exempt charities but noted they could pursue such activities through an associated § 501(c)(4) entity;[49] and it upheld restrictions on the use of Medicaid or family-planning funds for abortions or abortion counseling on the ground that recipients could still fund those activities from other sources.[50] But the Court invalidated other restrictions—a ban on editorializing by publicly funded broadcasters and

46 Scholarship concerning unconstitutional conditions on government benefits has long recognized that, other things being equal, withdrawals of benefits previously provided tend to be more burdensome than refusals to provide new benefits. *See, e.g.*, Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1359–63 (1984).

47 Kathleen Kelly Janus, *Using Design Thinking to Help Nonprofits Fundraise*, HARV. BUS. REV. (June 7, 2018), https://hbr.org/2018/06/using-design-thinking-to-help-nonprofits-fundraise [https://perma.cc/5VFQ-K36C].

48 Agency for Int'l Dev. v. All. for Open Soc'y Int'l Inc., 570 U.S. 205, 214–15 (2013).

49 *See* Regan v. Tax'n with Representation of Wash., 461 U.S. 540, 544–45 (1983).

50 Maher v. Roe, 432 U.S. 464, 466, 474 (1977) (addressing the exclusion of abortion from healthcare funds); Rust v. Sullivan, 500 U.S. 173, 192–93 (1991) (addressing the exclusion of abortion counseling from federal family-planning funds, and reasoning that Congress had "merely chosen to fund one activity to the exclusion of the other").

a requirement that funded organizations adopt a policy opposing prostitution—on the ground that the restriction extended to the entire entity, even to its activities supported by private funds.[51] In the latter set of cases, the government leveraged its specific funding to try to control the entity's overall behavior.

The Court recognizes this distinction, but sometimes it has applied it in ways that allow the government great leeway to define the program and substantially affect recipients' overall behavior. In *Rust v. Sullivan*, for example, the restrictions on family-planning funds prevented doctors in funded programs from even discussing abortion and required funded organizations to maintain physical, not just financial, separation from their abortion-providing affiliates.[52] The "defining the program" approach can make for weak protection against burdensome conditions on benefits.

This weak protection should not extend to conditions that affect religious exercise. Rather, the courts should take a realistic approach—one that recognizes the real impact of the funding restriction even if the restriction could be said to be simply "defining the funded program." The realistic approach is more consistent with the Religious Freedom Restoration Act, the governing authority for challenges to federal programs, and with the decision that RFRA incorporates, *Sherbert v. Verner*.[53] Under RFRA's text, strict scrutiny applies whenever government "substantially burden[s] a person's exercise of religion"[54]—a phrase focused on real effects, not formal distinctions between funded programs and other activities. In *Sherbert* and later unemployment cases, it was enough that the loss of unemployment benefits would place "substantial pressure" on adherents to violate their religious tenets or forgo their religious practices.[55]

This more protective approach also coincides with the substantive neutrality—"incentive neutrality" or voluntarism—at the heart of the Religion Clauses. Withholding an important benefit because of a recipient's religiously motivated practice can create a powerful incentive on the recipient to change or abandon the practice. It creates that incentive whether the funding denial can be seen as defining the scope of the funding or not. The purpose of the Religion Clauses, as already

51 FCC v. League of Women Voters of California, 468 U.S. 364, 399–400 (1984); *Agency for Int'l Dev.*, 570 U.S. at 218–20.

52 *Rust*, 500 U.S. at 209–10, 214–15 (Blackmun, J., dissenting).

53 374 U.S. 398 (1963).

54 42 U.S.C. § 2000bb-1 (2018).

55 Thomas v. Rev. Bd., 450 U.S. 707, 718 (1981).

discussed,[56] is to keep government from imposing such pressures on people's choices in matters of religion—whether it is pressure to practice religion or to forgo practicing it.

The question whether the condition simply defines the specific program or affects the whole entity can serve as a component of a realistic "substantial burden" analysis. If the condition applies solely to a specific funding vehicle, not the entity as a whole, it's more realistic to say that the entity's "recourse is to decline the funds."[57] But that factor should not be conclusive. Even a condition governing a single funding program may impose a substantial burden if that funding is important enough that the recipient would face "substantial pressure" to forgo acting on its beliefs in order to retain the funding.

C. Examples

How should this approach apply in a few situations that appear on judicial dockets or in public debate?

1. Tax exemptions. If the government (federal or state) were to withdraw tax-exempt status from organizations that discriminated based on their religious beliefs against same-sex marriage, the Court should—and likely would—deem it a substantial burden. The loss of tax-exempt status has "disastrous consequences" for a charitable nonprofit.[58] The organization must pay taxes on its income, including perhaps back taxes, and donors are unable to deduct contributions.[59] The Supreme Court stated in *Bob Jones University v. United States*[60] that the IRS's revocation of exemption for private religious schools would "inevitably have a substantial impact on the operation of [those] schools."[61] The Court recognized the impact, although it went on to hold that revoking exemption for racially discriminatory schools was justified by the compelling ("fundamental, overriding") interest in "eradicating racial discrimination in education."[62] Moreover, in the race-discrimination case, the denial of tax exemption is not limited to

56 *See supra* Section III.A.

57 Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214 (2013).

58 *Protect Your Nonprofit's Tax-Exempt Status*, NAT'L COUNCIL OF NONPROFITS, https://www.councilofnonprofits.org/tools-resources/protect-your-nonprofit%E2%80%99s-tax-exempt-status [https://perma.cc/PRQ4-AWPU].

59 *Id.*

60 461 U.S. 574 (1983).

61 *Id.* at 603–04.

62 *Id.* at 604.

the specific activity in which the discrimination occurs. Discrimination in any of the entity's activities presumably triggers the denial.[63]

The key question is whether a prohibition on sexual-conduct discrimination, as applied to religious groups, serves an interest just as "fundamental [and] overriding" as the interest in eradicating racial discrimination.[64] Other scholarship has discussed that question in detail; this short Essay will not revisit it. Preventing exclusion and second-class citizenship for LGBTQ people certainly serves compelling purposes. But it seems questionable that this Court will hold that those goals require substantial penalties against every religious organization that acts on its beliefs concerning marriage or sexuality.

2. Grants. In some government grants, conditions apply only to the specific funded program (for example, the condition discussed in the OLC memorandum above[65]). In others, the condition effectively controls the entity's entire operations. For example, after *Carson v. Makin* forbade the state of Maine to deny tuition benefits to students attending religious schools, the state's Attorney General noted that schools that refused to employ LGBTQ persons would still be excluded from the benefits under state nondiscrimination laws.[66] The state will

63 Revocation because the organization commits alleged discrimination is quite different from revocation because the organization engages in prohibited political activity. In the latter case, the organization can set up a § 501(c)(4) "social welfare" organization that can engage in lobbying and even limited election interventions and remain exempt from income taxes (although contributions to it are not deductible). *See supra* notes 48–50 and accompanying text. It's doubtful that such an option would be available for entities determined to be discriminatory. IRS statements suggest that racial discrimination may well trigger denial of § 501(c)(4) status too. *See* Activities That Are Illegal or Contrary to Public Policy, 1985 EO CPE [Exempt Organizations Continuing Professional Education] Text (assimilating § 501(c)(3) and § 501(c)(4) organizations in discussing this topic).

64 *Bob Jones Univ.*, 461 U.S. at 604. I must briefly mention here the Respect for Marriage Act, Pub. L. 117-228, 136 Stat. 2305 (2022), which gives same-sex marriages statutory protection—and simultaneously rejects the analogy between racial discrimination and religious organizations' adherence to opposite-sex-only marriage. The Act finds that such beliefs about marriage (as well as beliefs supporting same-sex marriage) deserve "proper respect," *id.* § 2(2), and it contains several explicit provisions ensuring that the Act does not increase religious organizations' liability, affect their eligibility for federal benefits, or suggest "a compelling interest in overriding religious objections to assisting with or participating in [same-sex] marriages." Douglas Laycock, Thomas C. Berg, Carl H. Esbeck, and Robin Fretwell Wilson, *The Respect for Marriage Act: Living Together Despite Our Deepest Differences*, ILL. L. REV. (forthcoming 2023) (manuscript at 29) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4394618); *see id.* at 4–9 (discussing the Act's finding concerning respect for beliefs about marriage); *id.* at 28–36 (discussing the Act's various explicit protections for religious liberty).

65 *See supra* notes 43–44 and accompanying text.

66 OFF. OF THE ME. ATT'Y GEN., Statement of Maine Attorney General Aaron Frey on Supreme Court Decision in *Carson v. Makin* (June 21, 2022), https://www.maine.gov/ag/news/article.shtml?id=8075979 [https://perma.cc/Y3KT-BNDF].

certainly defend that condition by arguing that its program—funding student tuition at the school—supports every aspect of the school's operations, and so the condition merely defines the funding program and does not extend beyond it. But under the approach advocated here, that answer should not be conclusive. The question is whether exclusion from the tuition program imposes a "substantial burden" on religious choice. It does impose such a burden—especially on families who would have chosen one of the excluded schools. They will face "substantial pressure" to choose a different school: one where they can receive the tuition benefits.

CONCLUSION

Religiously burdensome conditions on government benefits raise complex questions, especially when the condition in question can be seen as generally applicable rather than as targeting religion. This short Essay can only scratch the surface of the complications. But the current Court is committed to protecting the free exercise of religion. It should, and likely will, appreciate the ways in which denials of government benefits can seriously affect that freedom.