

No. 25-581

IN THE
Supreme Court of the United States

ST. MARY CATHOLIC PARISH, LITTLETON, COLORADO,
ET AL.,

Petitioners,

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS EXECUTIVE
DIRECTOR OF THE COLORADO DEPARTMENT OF EARLY
CHILDHOOD, ET AL.,

Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit**

**Brief Of *Amici Curiae* Stephanie Barclay And
Mark Storslee In Support Of Petitioners**

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Interest of *Amici Curiae*

Amici are legal scholars who have researched and written extensively on the original meaning of the Religion Clauses of the First Amendment. Stephanie Barclay (Georgetown Law) and Mark Storslee (University of North Carolina School of Law) both teach, research, and publish in the fields of constitutional history and religious freedom. *Amici* are committed to a view of free exercise that protects all religious individuals and institutions and seeks to reconcile this Court’s jurisprudence with the original meaning and purpose of the Free Exercise Clause.¹

Introduction and Summary of Argument

This Court has recently and repeatedly held that once a state decides to “subsidize private education,” the Free Exercise Clause commands that the state “cannot disqualify some private schools solely because they are religious” or exclude schools “on the basis of their religious exercise.” *Carson v. Makin*, 596 U.S. 767, 785, 789 (2022) (quoting *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464, 487 (2020)). This Court has also held that the Establishment Clause does not prohibit including religious schools in neutral funding programs. *Id.* at 781. *Amici* write to provide the Court additional information about the original meaning of the Free Exercise Clause relevant to this case, and to rebut mistaken characterizations of that history that have been brought before this Court.

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief’s preparation or submission. Academic affiliations are provided for identification purposes only.

In a recent case, a group of scholars contended that during the Founding and antebellum periods, state and local governments often declined requests from religious schools for public funding and were understood to be entitled to do so within the boundaries of free exercise. Brief of Historians and Legal Scholars as *Amici Curiae* in Support of Respondent, *Oklahoma Statewide Charter Sch. Bd. v. Drummond*, Nos. 24-394 & 24-396 (U.S. Apr. 7, 2025) at 9–17. They argued “that ‘denial of funding was thought to be consistent with constitutional free-exercise principles even by religious school leaders themselves,’ and thus, outside the scope of the Free Exercise Clause today.”²

That argument rests on an incomplete account of the historical record. As a starting place, the Founders did not view public funding of religious schools as a form of religious establishment. But even more, the best reading of the historical record refutes the idea that Founding-era Americans understood the Free Exercise Clause to permit the government to withhold funding or other public benefits based on religion or its exercise.

I. The story begins with disestablishment. At and around the time of the First Amendment’s ratification, nearly every state that ended church taxes (consistent with the principles underlying the Establishment Clause) continued to provide financial support to religious schools. Church taxes involved using coercive power to fund religion *qua* religion, in a way equivalent to coerced tithes and thus coerced religious

² Mark Storslee, *Free Exercise and Funding*, 101 Notre Dame L. Rev. 101, 104 (2026) (forthcoming, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6978698) (quoting Brief of Historians, *supra*, at 17).

exercise. But where religious institutions provided public services like education, Founding-era Americans understood funding for those endeavors as different in kind than coercive religious assessments, even if schools may have also used the funds for religious activities. This same pattern held true across northern, middle, and southern states, the federal government, and schools affiliated with majority and minority religions.

II. The early history surrounding free exercise is the flip side of the coin and suggests a symmetrical understanding of the Establishment and Free Exercise Clauses. Just as government could not extract funds solely to fund religion in a way that resembled a religious tithe, neither could it deny subsidies or other forms of assistance based on a recipient's religious practice.

A. In the early republic, efforts to selectively exclude some religious schools from funding or other forms of aid were rare. When they did arise, however, Founding-era Americans firmly rejected those efforts.

In New York, for instance, a Jewish school protested and prevailed after arguing that attempts to deprive denominational schools of funding violated the state's free-exercise clause by conditioning funding on "a distinction in religious worship." And around the same period, James Madison and Thomas Jefferson articulated a similar understanding, assuring a group of nuns that the "principles of the constitution" precluded denying them government support, "whatever diversity of shade may appear in the religious opinions of our fellow citizens." This evidence is not without ambiguity. But on the best reading of the historical record, the evidence suggests that Founding-era Americans viewed disestablishment and free

exercise as complementary: Just as government was forbidden from extracting funds solely to finance religion, so it was also forbidden from *denying* funding where the denial was based on religion or its exercise.

B. Later in the nineteenth century, religious conflict and anti-Catholic bigotry eclipsed these earlier understandings. As the common-school movement gained momentum, Protestant majorities began to argue that funding so-called “sectarian” schools was a form of religious establishment, even though their own schools conducted Protestant Bible reading and religious exercises while receiving government funds. And eventually, those majorities successfully leveraged those arguments to deny funding to Catholic schools and those of other religious minorities.

Those developments were clear deviations from the original meaning of the Establishment and Free Exercise Clauses. And they took root over the repeated objection of Catholics and others, who continued to espouse the original understanding of their right to free exercise. As such, nineteenth-century history “born of bigotry” provides no legitimate basis to support states’ violations of the free-exercise rights of religious schools today. *Espinoza*, 591 U.S. at 482 (citation and internal quotation marks omitted).

III. On the best reading of the evidence, Founding-era history supports the Court’s holding in *Carson* and the application of *Carson*’s principles to this case. But even absent specific historical analogues, *Carson* and the principles it announced would still be a faithful effort to apply the original meaning of the Free Exercise Clause to new circumstances. At the Founding, government funded almost nothing in the private sector. But today, subsidies and other government bene-

fits create powerful tools to influence behavior. Denying states the ability to condition those benefits on religion or its exercise preserves the Constitution’s ban on punishing or discouraging religious practice today.

Argument

I. **Disestablishment prohibited coerced tithes, not funding for religious schools.**

The historical record establishes a widespread and unobjected-to practice of funding religious schools around the time of the Founding. That practice was principled and reflected a basic conviction: while coercing individuals to effectively pay a tithe was prohibited, funding other goods was not, even if recipients might use the money for something religious.

At the Founding, overwhelming historical evidence demonstrates that Americans who opposed religious establishments principally objected to religious assessments and taxes that were earmarked for religious functions. The Establishment Clause prohibited schemes that funded religion *qua* religion—especially coercive exactions of money solely to finance the religious function of ministers and churches.³ Exactions like those effectively coerced a type of religious observance. Indeed, church taxes were explicitly described as problematic coerced tithes by multiple observers at the Founding. *See* Barclay et al., *Original Meaning and the Establishment Clause*, *supra*, at

³ Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. Pa. L. Rev. 111, 182–83 (2020); Stephanie H. Barclay, Brady Earley & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 Ariz. L. Rev. 505, 550–51 (2019); Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 Harv. L. Rev. 133, 144–45 (2017).

548–49. These descriptions of coerced tithes were equated to one type of “establishment of religion.” *Id.*

In 1764, for example, James Murray described church taxes paid in the early colonies as a burdensome “tithe[]” that dissenters from the established church “could not conscientiously pay, and for the refusal of which they have so greatly suffered.” Barclay et al., *Original Meaning and the Establishment Clause, supra*, at 544 (citing 4 James Murray, *The History of Religion: Particularly of the Principal Denominations of Christians* 240 (London, C. Henderson et al. 1764)).

Alexander Hamilton in 1775 similarly described these taxes as a type of tithe to the “established church.” Barclay et al., *Original Meaning and the Establishment Clause, supra*, at 549 (citing Alexander Hamilton, *Remarks on the Quebec Bill: Part Two*, Rivington’s N.Y. Gazetteer, June 22, 1775, reprinted in Founders Online, <https://founders.archives.gov/documents/Hamilton/01-01-02-0059>). Hamilton also pointed to an additional constitutional issue with them: government assessment of tithes involved interference with church affairs by determining whether the church was “owed” the tithe by parishioners or not. *Id.*

And concern about coerced religious tithes seems to have been a central part of Madison’s objection to the religious assessments proposed in Patrick Henry’s bill that led to his famous Memorial and Remonstrance. Barclay et al., *Original Meaning and the Establishment Clause, supra*, at 512, 518 (citing James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶¶ 3–4 (June 20, 1785), in 8 *The Papers of James Madison* 295, 298–304 (William T.

Hutchinson eds., 1973)); Storslee, *Church Taxes*, *supra*, at 125–28. Madison described the bill as imposing a “compulsive support” of religious teachers that should “depend[] on the voluntary rewards of their flocks.” Madison, *Memorial and Remonstrance*, *supra*, ¶¶ 4, 7. In other words, coercing the religious observance of a tithe was closely associated with both an established religion and simultaneously a violation of religious exercise.

In contrast to those specific and problematic types of church taxes, where a program served a public good and “d[id] not treat the religious aspect of a beneficiary’s conduct as an independent basis for funding,” it was not seen as a coerced tithe, and thus was not an establishment of religion. Storslee, *Church Taxes*, *supra*, at 119, 182–83.

In the years surrounding the ratification of the First Amendment, virtually every state that ended church taxes also provided tax money to religious schools—including schools directly affiliated with churches. Storslee, *Church Taxes*, *supra*, 150–63. “Yet as far as we know, proponents of religious freedom did not object to that practice.” *Id.* at 118. “Rather, they seem to have actively supported it.” *Id.*; *see also id.* at 147–50. And the same was true of the federal government after the Establishment Clause was ratified. *Id.* at 163–69.

In Virginia, where resistance to church taxes was the fiercest, the legislature passed Thomas Jefferson’s “Bill for Establishing Religious Freedom”—which prohibited compelling anyone to “support any religious worship, place, or ministry whatsoever”—and then continued to fund religious schools seemingly without

comment or controversy.⁴ But “no one argued” that this funding “violated Jefferson’s bill” because there appears to have been no perceived “conflict between them.” Storslee, *Church Taxes, supra*, at 133. Rather than a “targeted effort to finance worship,” the program “provid[ed] educational opportunity to a rural part of the state.” *Id.* Such a program “did not force anyone to ‘support’ religion in a way the law actually prohibited.” *Id.*

The same pattern unfolded across the country. In Maryland, where opponents of a general assessment had condemned church taxes as “robbery for burnt offerings,” the legislature continued to fund Washington College—“a school authorized to instruct students in subjects ‘useful ... for the service of their country in church and state,’ including divinity”—without objection. Storslee, *Church Taxes, supra*, at 151–53 (quoting Act of Apr. 1782, ch. VIII Md. Laws). Later, in 1819, the state provided funding to two Protestant Sunday schools and a Roman Catholic school for orphans alike; “[a]ll three provided religious instruction and worship, but received funds as a matter of course.” *Id.* at 153–54. And in 1826, the legislature passed a measure declaring that the school fund for Frederick County be “dispersed to the pastor of St. John Catholic church for the use of the church’s female free school.” *Id.* at 154.

⁴ See Storslee, *Church Taxes, supra*, at 129 (quoting An Act for Establishing Religious Freedom (1786)); *id.* at 130 (citing Act of Dec. 13, 1787, ch. XCVI) (1787 Virginia legislature ordering one-sixth of the surveyor fees collected in the district of Kentucky to be redirected to Transylvania Seminary, a Presbyterian school); *id.* at 131 (citing Act of Dec. 31, 1787, ch. XCV) (1787 Virginia legislature awarding portion of surveyor fees to Randolph Academy, a Presbyterian school).

Practice in the other southern states confirms that same understanding. In North Carolina, church taxes ended in 1776, but soon thereafter the legislature transferred an Episcopal church built with taxpayer funds to a Presbyterian academy. Storslee, *Church Taxes, supra*, at 155. A “similar pattern” occurred in the remaining southern states, South Carolina and Georgia. *Id.* at 156–57.

The middle states followed the same practice. New York, New Jersey, Delaware, and Pennsylvania all banned church taxes but continued to use government funds for religious education. New York, for example, ended its church tax in the established Anglican counties in 1777. Storslee, *Church Taxes, supra*, at 157. But starting in 1795, New York provided annual funding for education, and the legislature specifically named religious entities, including the Episcopal church, the Presbyterian church, and the Baptist church, as beneficiaries. *Id.* at 158. New York later extended school funds to a Catholic school and school run by the Shearith Israel Congregation, a Jewish synagogue. *Id.*; *infra* at 12–15.

Delaware and New Jersey explicitly banned church taxes in their post-Revolutionary constitutions, yet they too funded religious schools. Storslee, *Church Taxes, supra*, at 161. And in Pennsylvania, the state enacted what was likely the country’s first voucher program, allowing poor families to send their children to “any school in their neighborhood”—including church schools—with the government reimbursing the cost. *Id.* at 162 (quoting Act of Mar. 1, 1802, ch. MMCCXLVII, § 1, 17 Statutes at Large of Pennsylvania 81, 81 (1915)).

The consistency and breadth of this evidence suggest that “[f]unding for religious schools was not a

mistake, or explainable by a lack of resolve.” Storslee, *Church Taxes, supra*, at 163. Funding for religious schools “was done even in states like Virginia and Pennsylvania where resistance to church taxes was especially strong.” *Id.* “Judged by their practice, citizens in these states believed that” requiring taxpayers to pay a tax solely used to fund “an institution’s religious function was prohibited”—“[b]ut the same was not true of programs providing funds for things like education, even if recipients might also use those funds for religion.” *Id.*

The federal government continued the same practice. “Less than a year after the Establishment Clause was ratified, the Washington administration authorized payment of \$1,500 annually to support a Presbyterian school among the Iroquois and Stockbridge Indians.” Storslee, *Church Taxes, supra*, at 168. And under President Jefferson, the federal government provided annual payments for a Catholic priest to instruct Native American children “in the rudiments of literature” while carrying out “the duties of his office.” *Id.* (quoting A Treaty Between the United States of America and the Kaskaskia Tribe of Indians, Kaskaskia Tribe-U.S., art. III, Aug. 13, 1803, 7 Stat. 78, 78–79 (1803)). Congress continued funding religious schools among the tribes that were supervised by Methodists, Baptists, Presbyterians, Episcopalians, Quakers, and Catholics alike, “more or less uninterrupted until as late as 1870.” *Id.* at 168–69; *see also* Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 Notre Dame L. Rev. 677 (2020).

Nor was this federal practice limited to Indian territories. “In 1804, Congress ordained a municipal government for Washington, D.C. and provided it with

authority to” establish schools. Storslee, *Church Taxes, supra*, at 164. Under that delegated authority, and across the next several decades, the city provided support to a Lancasterian school, Presbyterian schools, and a Catholic school without a record of anyone raising an Establishment Clause objection. *Id.* at 164–66.

In short, “providing funds to support a public good like education was well within the government’s power” at the Founding. Storslee, *Free Exercise and Funding, supra*, at 108.

II. Historical evidence confirms that the Free Exercise Clause forbids the government from denying otherwise available support based on religion or its exercise.

The historical record also suggests that *denying* funds to religious schools based on religion or religious exercise was understood to violate the Free Exercise Clause. By all indications, efforts to exclude religious organizations from funding or other benefits were rare in the years immediately surrounding the Founding. But the early historical examples that exist point toward a “symmetr[y]” between early understandings of free exercise and disestablishment. Storslee, *Free Exercise and Funding, supra*, at 104. Just as the government could not provide funds solely to support religious observances, neither could the government refuse otherwise available support for goods like education based on religion or its exercise.

Developments later in the nineteenth century broke that unity apart. Protestant efforts to establish common schools and anti-Catholic animus prompted a movement to defund so-called “sectarian” schools while retaining funding for schools run by the

Protestant majority. That movement was inconsistent with the earliest understandings of disestablishment and free exercise. And as such, it provides no proper guide for interpreting the First Amendment today.

A. Early controversies demonstrate that the Free Exercise Clause prohibits refusing funds based on religion or its exercise.

Founding-era controversies over selective funding demonstrate the early American understanding of symmetry between disestablishment and free exercise. On this understanding, government lacked the power to fund religious exercise for its own sake. But it also lacked the power to *deny* funding supporting education or other public goods where the reason for denying funding was a recipient's religion or the recipient's religious exercise. See Storslee, *Free Exercise and Funding*, *supra*, at 104.

“The earliest and most notable episode involving free exercise and funding occurred in New York.” Storslee, *Free Exercise and Funding*, *supra*, at 110. As described above, the New York legislature began providing funds to support schools “without regard to their religious persuasions” as early as 1795. *Id.* In the early years, those funds were disbursed “equally to schools run by Baptists, Presbyterians, Episcopalians, and others.” *Id.* In 1806, the legislature started to “extend[] that benefit to” New York City’s “religious minorities”—specifically, to a Catholic school and a school “operated by the Shearith Israel Congregation, the country’s oldest Jewish synagogue.” *Id.*

“[N]ot everyone was satisfied with that arrangement.” Storslee, *Free Exercise and Funding*, *supra*, at

110. The New York Free School Society “had operated schools alongside the city’s denominational schools” since 1805. *Id.* at 111. The Free Schools were nonsectarian, but not secular: they “aimed to ‘inculcate the sublime truths of religion and morality contained in the Holy Scriptures,’ but ‘without observing the peculiar forms of any religious Society.’” *Id.* (quoting the Society’s 1805 address to the public). In 1812, the Free School Society “began a campaign to discontinue state financial support for denominational schools,” seeking “exclusive control of education funds in New York City.” *Id.*

Shearith Israel contested this campaign by appealing to the state’s free-exercise clause. Among other provisions, New York’s 1777 constitution guaranteed “the free exercise and enjoyment of religious profession and worship, without discrimination or preference.” N.Y. Const. of 1777, art. XXXVIII. Shearith Israel argued that, under that provision, the Free School Society “was ‘justly entitled to a share of the interest of the School Fund, in common with other Charity Schools in this city,’” but that the Society had “no claim ... to the exclusive patronage of the state bounty.” Storslee, *Free Exercise and Funding*, *supra*, at 111–12 (quoting Memorial of Trustees of the Congregation of Shearith Israel to Legislature of the State of N.Y. at 92–93 (Jan. 10, 1813)). According to Shearith Israel, such a proposal was “at variance with the liberal spirit of our constitution, which recognizes no distinction in religious worship.” Memorial of Trustees of the Congregation of Shearith Israel, *supra*, at 95.⁵

⁵ A “memorial” in this context is a formal petition or letter to a legislature.

Shearith Israel's appeal to free exercise shared strong parallels with arguments made by New York City's Catholics just a few years earlier. Storslee, *Free Exercise and Funding*, *supra*, at 113. In 1806, Catholic leaders associated with St. Peter's Church (New York City's only Catholic parish at the time) protested the state's test oath for public officials, "which required renouncing allegiance to every foreign monarch or potentate 'in all matters ecclesiastical as well as civil' as a condition for holding office." *Id.* at 112–13. The oath's language "had the clear effect of forcing Catholics either to perjure themselves or renounce their allegiance to the pope in order to serve in government." *Id.* at 113. A letter from Catholic leaders to the legislature argued that "the test-oath violated the 'liberal principle' of the state's free-exercise clause, by operating as an 'oppressive disqualification[] on the score of religion.'" *Id.* (quoting Leo Raymond Ryan, *Old St. Peter's: The Mother Church of Catholic New York (1795–1935)* 84–85 (1935)). "Shearith Israel's memorial offered a parallel, nearly verbatim argument, now in the context of school funds." *Id.* at 113.

Shearith Israel's position prevailed in the legislature. Having considered Shearith Israel's memorial alongside others, the New York legislature rejected the Free School Society's proposal and instead mandated funds for schools on a per capita basis. Storslee, *Free Exercise and Funding*, *supra*, at 113. "And in the final version of the law, the legislature went even further—mandating funds not only for *existing* denominational schools in the city, but also for other denominational schools that might be established in the future." *Id.* (citing Act of Mar. 12, 1813, ch. LII, § IV, 1813 N.Y. Laws 53, 54–55).

To our knowledge, the controversy over school funds in New York represents the earliest effort anywhere in the country to deny government funds to church- or synagogue-run schools. And at minimum, this episode “suggests that, far from viewing selective funding as ‘consistent with constitutional free-exercise principles,’ at least some (and likely many) supporters of denominational schools in this period believed something closer to the opposite.” Storslee, *Free Exercise and Funding, supra*, at 114. Rather than validating selective funding, this episode indicates that on the earliest understanding, free exercise stood against denials of funding or other benefits that were premised on “a distinction in religious worship.” Memorial of Trustees of the Congregation of Shearith Israel, *supra*, at 95.

And indeed, at least one additional “early episode” reflects similar principles. Storslee, *Free Exercise and Funding, supra*, at 114. When New Orleans became part of the United States following the Louisiana Purchase in 1803, Catholic nuns in the Ursuline Order who operated a free school for destitute children wrote to John Carroll, America’s first Catholic bishop, about the “status of the school and its property.” *Id.* at 114–15. The Ursuline nuns were particularly concerned that their land may have passed to the federal government or be subject to federal confiscation. Carroll “promptly passed along their concerns to James Madison, then Secretary of State,” who assured the nuns that President Jefferson “fully supported ‘the public benefit’” of their school, “a sentiment that applied ‘to those of all religious persuasions.’” *Id.* at 115 (quoting Letter from James Madison to John Carroll (July 20, 1804), reprinted in 2 Peter Guilday, *The Life and Times of John Carroll 1735–1815*, at 482 (1922)).

The nuns also appealed to President Jefferson directly. Storslee, *Free Exercise and Funding, supra*, at 115. In response, Jefferson likewise reassured the nuns and invoked constitutional principles of free exercise. He first assured them “that ‘the principles of the constitution’ provided a sure guarantee that the nuns’ property would be ‘preserved to you inviolate.’” *Id.* (quoting Letter from Thomas Jefferson to the Ursuline Nuns of New Orleans (July 13, 1804), reprinted in 44 *The Papers of Thomas Jefferson* 78, 78 (James P. McClure, Martha J. King, Tom Downey, W. Bland Whitley, Andrew J.B. Fagal, & Merry Ellen Scofield eds., 2019)). He added that those same constitutional principles would ensure that their school would be “permitted to govern itself according to [its] own voluntary rules, without interference from the civil authority.” Letter from Thomas Jefferson to the Ursuline Nuns, *supra*. And he “observed that ‘whatever diversity of shade may appear in the religious opinions of our fellow citizens,’ the nun’s charitable endeavors ‘cannot fail to ensure ... the patronage of the government it is under.’” Storslee, *Free Exercise and Funding, supra*, at 116 (quoting Letter from Thomas Jefferson to the Ursuline Nuns, *supra*).

On the most straightforward reading, Jefferson and Madison’s response to the Ursuline nuns points to the same basic principle espoused by Shearith Israel. Like denominational schools in New York, the nuns expressed concern that government would deny them a form of public patronage based on their religious practice. And in response, Jefferson indicated that the “principles of the constitution” prohibited that result, whatever the “diversity of shade may appear in the religious opinions of our fellow citizens.”

Storslee, *Free Exercise and Funding, supra*, at 116 (quoting Letter from Thomas Jefferson to the Ursuline Nuns, *supra*). Here, as in Shearith Israel’s case, Jefferson appears to have understood free-exercise principles to forbid government from denying the nuns a form of aid “where doing so was based solely on their religious exercise.” *Id.* In other words, Jefferson believed that these constitutional principles not just permitted but required a “sure guarantee” that even-handed government support of this religious ministry would continue “without interference.”⁶

B. Later deviations from these principles reflected Protestant majoritarianism and anti-Catholic bigotry, not the original understanding of the Free Exercise Clause.

In the nineteenth century, Protestant hegemony and the push for common schools began to break earlier understandings of the symmetry between disestablishment and free exercise. Rather than complementing free exercise, misguided disestablishment rhetoric became “a sword to vanquish it.” Storslee, *Free Exercise and Funding, supra*, at 122.

Here again, New York provides one of the earliest examples. In 1840, as “Catholic migration transformed” New York City, a new dispute over selective funding arose. Storslee, *Free Exercise and Funding,*

⁶ See Stephanie Barclay, *Spheres of Liberty and Free Exercise: Lessons for Fulton from Jefferson’s Correspondence with Ursuline Nuns*, The Volokh Conspiracy (Nov. 2, 2020), <https://reason.com/volokh/2020/11/02/spheres-of-liberty-and-free-exercise-lessons-for-fulton-from-jeffersons-correspondence-with-ursuline-nuns>.

supra, at 118. Catholic groups again objected by invoking free exercise arguments similar to those previously made by Shearith Israel. For example, the Catholic groups appealed to “the principles of the Constitution, which secures equal civil and religious rights to all,” *id.* at 118–19 (quoting a resolution from a meeting of Catholic leaders on July 20, 1840), and sought “a just proportion of the public funds” for denominational schools, *id.* at 119.

Opponents of Catholic schools resisted this argument, relying in part on a new claim to constitutional authority: “[P]roviding funds to denominational schools was incompatible with the ‘entire separation of Church and State’ that underlay ‘our political compact.’” Storslee, *Free Exercise and Funding*, *supra*, at 120 (quoting Robert C. Cornell, Reply of the Trustees of the Public School Society to the Address of the Roman Catholics (Aug. 27, 1840)). “In New York, the Free School Society first advanced this argument in 1824.” *Id.* By 1840, the argument was “commonplace.” *Id.* Yet even as these disputes proliferated in other states, “the basic understanding of free exercise articulated by Shearith Israel and endorsed by Catholic petitioners in New York persisted in debates over schools and funding well into the nineteenth century.” *Id.* at 123 (citing examples in Michigan, New Jersey, D.C., and Philadelphia).

Following the Civil War, Catholic parochial schools became a flashpoint amid rising Catholic-Protestant tensions. See Charles L. Glenn, *The American Model of State and School* 154–55 (2012). Many Protestants viewed Catholic parochial schools and the Catholic Church in general as “a menacing limitation upon national unity and progress.” *Id.* at 155. And accordingly, opponents “hammered away at the idea

that schools operated by the religious communities taught a perverted doctrine inimical to modern ideas.” *Id.* (quotation marks omitted). “Protestant theologian Horace Bushnell warned against the influence of Catholic schools, as a menace to society,” in which “the children of immigrants ‘will be instructed mainly into the foreign prejudices and superstitions of their fathers.’” *Id.* at 156.

That animosity was a consistent presence in public life until well into the 20th century. It animated the failed “Blaine Amendment” to the federal Constitution, which would have outlawed any use of public money to fund sectarian education. Glenn, *American Model*, *supra*, at 157; *see also Espinoza*, 591 U.S. at 498–99 (Alito, J., concurring) (noting the “well-known” history of the Blaine Amendment, which “was prompted by virulent prejudice against immigrants, particularly Catholic immigrants”). And it similarly animated the many copycat state laws and constitutional amendments.

The idea that funding “sectarian” schools amounted to a form of religious establishment had no basis in Founding-era practice or understanding. *See supra* at 12–17. But the idea allowed proponents of emerging Protestant common schools “to do something they had [previously] failed to do—respond to their opponents’ free-exercise arguments with newly minted claims to constitutional authority.” Storslee, *Free Exercise and Funding*, *supra*, at 121. That dynamic was especially notable considering the larger context of these early disputes. Opponents of denominational schools presented their disestablishment arguments as matters of constitutional command. But in many cases, they did not object to funding religious education as such; instead, they objected to funding

what they labeled as “sectarian” education. See Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, *supra*, at 145. In fact, in many places around the country, “a Protestant majority” was “mobiliz[ed]” to “[d]efend[] the use of the Bible in public schools” at the very same time that many Protestant groups rallied against public funding of Catholic schools. Glenn, *American Model*, *supra*, at 161.

Put differently, “Protestant political leaders and voters” occupied a position that does not neatly fit into contemporary debates on funding for religious schools: they “insist[ed] that public schools should continue to have a Protestant character,” even as they simultaneously were “equally adamant that ‘sectarian’ schooling was unAmerican.” Glenn, *American Model*, *supra*, at 162. “[I]t was an open secret that [in the 1870s] ‘sectarian’ was code for ‘Catholic.’” *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

In short, “[t]he claim that funding religious schools is or should be unconstitutional did not emerge until long after the Founding, and in response to intense Protestant-Catholic conflict.” Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, *supra*, at 145. Accordingly, that history bears little weight in understanding the meaning of the Religion Clauses today.

III. The Court should approach the First Amendment’s application to school-funding disputes consistent with the original meaning of the Free Exercise Clause.

Some scholars have criticized this Court’s decision in *Carson* and similar cases by arguing that “nineteenth-century history is devoid of evidence linking free exercise and funding.” Storslee, *Free Exercise*

and Funding, supra, at 131. But as demonstrated above, that argument overlooks some of the earliest historical evidence concerning free exercise and funding, not to mention evidence of other groups “arguing that selective school funding violated their right to free exercise” well into the nineteenth century. *Id.* at 104. All of this should inform the Court’s decisions in this area. But even without specific historical analogues, *Carson* faithfully applies the original meaning of the Free Exercise Clause to modern disputes concerning public funding of education.

A. *Carson* faithfully applies the original understanding of the Free Exercise Clause to today’s government programs.

As explained above, in the years immediately after the “adoption of the Religion Clauses” and “well into the nineteenth century,” Catholics and other religious minorities successfully deployed free-exercise arguments in “contexts involving government subsidies of various kinds.” Storslee, *Free Exercise and Funding, supra*, at 131. These arguments appear to have prevailed until “proponents of ‘nonsectarian’ schools subordinated that understanding to a novel theory of church-state separation” later in the nineteenth century. *Id.*

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and other cases, this Court for many years incorrectly “projected this later nineteenth-century view back on to the Founding era.” Storslee, *Free Exercise and Funding, supra*, at 132 (citing *Lemon*). “But the historical evidence does not support that conclusion.” *Id.* Denying funds to religious schools based on establishment concerns was a “nineteenth-century innovation.”

Id. And denying funding to a religious school “based solely on a recipient’s religious exercise” would have been “at variance with the liberal spirit of our constitution, which recognizes no distinction in religious worship.” *Id.* at 132, 104 (quoting Memorial of Trustees of the Congregation of Shearith Israel, *supra*, at 95).

To be sure, at the time of the Founding selective-funding disputes were “relatively rare.” Storslee, *Free Exercise and Funding*, *supra*, at 116. “But that fact makes the examples of Shearith Israel and the Ursuline nuns even more striking.” *Id.* These historical episodes demonstrate that “[i]n the period surrounding the Founding, when government funded almost nothing in the private sector, funding for religious schools was ubiquitous,” and “when proposals to exclude some schools on account of their religious activities arose, the constitutional objection based on free exercise immediately appeared.” *Id.*

Consistent with that historical understanding, *Carson* instructs that “including religious entities in funding programs is not unconstitutional ‘support’ for religion,” but “support for a public good, offered to a variety of recipients based on neutral, non-religious criteria.” Storslee, *Free Exercise and Funding*, *supra*, at 103; *see also Carson*, 596 U.S. at 781. *Carson* further teaches that “denying funding on account of religion is not ... neutral” but “a *penalty* on religious practice” in violation of the Free Exercise Clause. Storslee, *Free Exercise and Funding*, *supra*, at 103; *see also Carson*, 596 U.S. at 780. *Carson* therefore “might well be seen as giving voice to early understandings of free exercise articulated by Shearith Israel and others, now in a different context.” Storslee, *Free Exercise and Funding*, *supra*, at 132.

To be sure, relating this history to modern controversies requires an act of judgment, or what some originalist scholars would refer to as an act of constitutional construction. *See generally* Stephanie Hall Barclay, *Constructing Constitutional Rights*, 138 Harv. L. Rev. F. 140 (2025). Unlike their historical predecessors, modern disputes about government funds for religious schools generally involve state laws that fund only *secular* schools, or (as in this case) deny otherwise available funds based on a recipient’s free exercise. But the Founding-era commitment to religious equality and free exercise applies “just as readily to modern programs that deny funding only to religious private schools while extending it to secular ones.” Storslee, *Free Exercise and Funding*, *supra*, at 132.

Likewise, the nineteenth-century history deviating from those Founding-era commitments is not a reliable guide for the reasons explained above. It was a departure from the original understanding of free exercise, born of nineteenth-century Protestant-Catholic conflict and anti-Catholic bigotry. Just as the Court declined to use history of Jim Crow disarmament laws to interpret appropriate limits on the right to bear arms, *Wolford v. Lopez*, No. 24-1046, 609 U.S. ___ (U.S. June 25, 2026) (slip op. at 23–24), and the Court shouldn’t “use the history of segregation to interpret the Equal Protection Clause now,” Transcript of Oral Argument, *Oklahoma Statewide Charter Sch. Bd. v. Drummond*, Nos. 24-394 & 24-396 (Apr. 30, 2025) at 48:9–10 (Sotomayor, J.), the Court shouldn’t rely on failures to protect religious minorities in the nineteenth century as reliable evidence of the meaning of the Free Exercise Clause today. *Espinoza*, 591

U.S. at 482 (“The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause.”).

B. Even without specific historical analogues, *Carson* faithfully applies the original meaning and purpose of the Free Exercise Clause.

Even without the Founding-era examples described above, *Carson* and similar cases would still reflect the correct application of the First Amendment to today’s government programs.

Examples of our Nation’s shortcomings in the protection of free exercise are plenty. For example, “almost every state had blasphemy laws at the Founding and well into the nineteenth century.”⁷ Laws like these were widely criticized by Madison, Jefferson, Adams, and others. See Barclay, *Making Laws*, *supra*, at 5–6. In this vein, Tucker’s 1803 annotated edition of Blackstone described blasphemy laws as running afoul of free exercise principles “contained in the bill of rights.” *Id.* at 7 (citing 5 St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of*

⁷ Michael McConnell, Douglas Laycock, Stephanie Barclay, & Mark Storslee, *The Court Shouldn’t Bruen-ize the Free Exercise Clause*, *The Volokh Conspiracy* (Mar. 8, 2025), <https://reason.com/volokh/2025/03/08/the-court-shouldnt-bruen-ize-the-free-exercise-clause/>; see also Stephanie Barclay, *Making Laws for the Human Mind: The Founding, Free Exercise, and Parental Rights after Mahmoud and Mirabelli* (forthcoming in *Cornell L. Rev.* 2026), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=7016558.

the United States and the Commonwealth of Virginia 59 n.9 (1803)).

Similarly, “teachers caned and expelled Catholic children in public schools for refusing to read the King James Bible—and courts upheld those actions.” *The Court Shouldn’t Bruen-ize the Free Exercise Clause, supra*. Our nation’s “history and tradition includes the long-running persecution of the Mormons,” “attempts to impose Protestant forms of governance on Catholic Churches, to force all children to attend public schools, and to stamp out the Native American sun dance.” *Id.* That we can point to numerous historical analogues of government regulation of religious exercise “does not mean those regulations were living up to the constitutional promise of free exercise.” *Id.*

The Framers themselves recognized that “defenders of [historic] abuses” of free exercise would not “instantly acquiesce” upon the Bill of Rights’ ratification. *The Court Should Not Bruen-ize the Free Exercise Clause, supra*; see also Barclay, *Constructing Constitutional Rights, supra*, at 150 n.68 (citing James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789) in *James Madison: Writings* 437, 448 (Jack N. Rakove ed., 1999)). Madison, on introducing the Bill of Rights, noted that many states already had bills of rights in their own constitutions, and that there were “few particular states in which some of the most valuable articles have not, at one time or other, been violated.” Barclay, *Constructing Constitutional Rights, supra*, at 171 (quoting Cong. Reg. (June 8, 1789), reprinted in 11 *Documentary History of the First Federal Congress of the United States of America, March 4, 1789–March 3, 1791*, at

825 (Charlene Bangs Bickford et al. eds., 1992) (statement of James Madison)). Madison “understood that the new experiment of popular sovereignty that the Founding generation was engaging in often resulted in action that fell short of the constitutional ideal.” *Id.* An interpretive method that looks to “Founding-era regulations as conclusive evidence of what limitations on rights are constitutionally permissible could easily lead an interpreter astray and result in far less protection than was anticipated for important rights like speech and religious exercise.” *Id.*

Understanding and applying the historic meaning of free exercise therefore requires more than an unreasoned appeal to past practice. Instead, understanding the original meaning of the Free Exercise Clause requires “a serious attempt to discern the positive meaning of” the First Amendment, even while “recognizing that the full implications of a constitutional right—even from the moment of its ratification—may not have been immediately accepted or fully understood.” *The Court Shouldn’t Bruen-ize the Free Exercise Clause, supra.* “Sometimes practices flying under the banner of ‘tradition’ are nothing more than flagrant violations, made possible by bigotry or unreflective inertia.” *Id.* (citing Mark Storslee, *History and the School Prayer Cases*, 110 Va. L. Rev. 1619, 1684–91 (2024) (discussing the practice of compelled religious observance in nineteenth century public schools)).

Acknowledging the appropriate role of historical analogues has an important consequence. Rather than looking to historical practices alone, “something like strict-scrutiny analysis” would be a more faithful “doctrinal tool for implementing the Free Exercise

Clause’s historic meaning.” *The Court Shouldn’t Bruen-ize the Free Exercise Clause*, *supra*; see also Stephanie H. Barclay, *Replacing Smith*, Yale L.J. F. 436, 457–58 (2023). Early state constitutions broadly protected free exercise unless religious exercise “endanger[ed] ‘the public peace’ or ‘safety.’” *Fulton v. City of Philadelphia*, 593 U.S. 522, 575 (2021) (Alito, J., concurring in judgment).⁸ Madison, too, “focused on the types of *reasons* for which government could regulate religious exercise,” reasons that he thought “should be exceedingly limited,” when debating the limits of religious liberty. *The Court Shouldn’t Bruen-ize the Free Exercise Clause*, *supra*. “And Founding-era courts likewise protected religious liberty in ways that resembled modern strict scrutiny analysis in other important respects, including asking evidentiary questions that looked like some version of means-ends scrutiny.” *Id.*; Barclay, *Replacing Smith*, *supra*, at 461–65.

Indeed, this Court has recently taken a similar approach as it has refined the *Bruen* test through *Rahimi* and especially *Hemani*.⁹ There, the Court first assessed whether the government had pointed to a permissible historical reason for limiting a constitutional right. But the analysis did not end there. This Court made clear that government cannot disarm a

⁸ See also Michael W. McConnell, *The Origins & Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1455–66 (1990).

⁹ See Stephanie Barclay, *Hemani: Proving the Reason, Not Just Naming It*, SCOTUSBlog (June 22, 2026), <https://www.scotusblog.com/2026/06/hemani-proving-the-reason-not-just-naming-it/>.

person simply by naming a permissible historical reason. A government could defeat a constitutional right in any case if the Court was required to defer to its mere “say-so” about a permissible historical reason like dangerousness without “any further showing.” See *United States v. Hemani*, No. 24-1234, 608 U.S. ___ (U.S. June 18, 2026) (slip op. at 7, 18–19); *Kanter v. Barr*, 919 F.3d 437, 465 (7th Cir. 2019) (Barrett, J., dissenting). This Court suggested instead that government must prove that the permissible reason it names is the reason it actually acted, and to tie that reason to the person it seeks to disarm. In the religious exercise context, that is precisely what strict scrutiny does. See Stephanie Hall Barclay, *Constitutional Rights as Protected Reasons*, 92 U. Chi. L. Rev. 1179, 1187–88 (2025); Barclay, *Replacing Smith*, *supra*, at 455–564.

Moreover, the scope of federal and state funding for private actors has expanded dramatically since the Founding. Today, restrictions on government benefits are often just as powerful as outright penalties in their coercive power. Thus, as Justice Scalia explained, “[w]hen the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.” *Locke v. Davey*, 540 U.S. 712, 726–27 (2004) (Scalia, J., dissenting).

Accordingly, even without historical analogues like those described above, *Carson’s* application of strict scrutiny to the government’s exclusion of reli-

gious schools from otherwise available funding is consistent with Founding-era history and thus “a faithful means of applying the Constitution’s historic meaning today.” Storslee, *Free Exercise and Funding, supra*, at 137.

Conclusion

In considering the questions presented in this case, the Court should apply the standard enunciated in *Carson* and similar cases, consistent with the original understanding of the Free Exercise Clause.

Respectfully submitted,

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