No. 02-1315

In The Supreme Court of the United States

GARY LOCKE, Governor of the State of Washington, et al.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, THE ASSOCIATION OF CATHOLIC COLLEGES & UNIVERSITIES, THE ASSOCIATION OF SOUTHERN BAPTIST COLLEGES & SCHOOLS, THE CENTER FOR PUBLIC JUSTICE, FAMILY RESEARCH COUNCIL, FOCUS ON THE FAMILY, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici are associations of religious educational institutions, religious liberty advocacy groups, and public policy organizations. All are deeply concerned about government discrimination against religion. Because several amici have joined in a single brief, the interests of individual amici are stated in an Appendix. This brief is filed with consent of all parties.[1]

SUMMARY OF ARGUMENT

The State of Washington provides scholarships to high achieving students of modest income at *any* accredited college or university in the state, majoring in *any* subject, except for those majoring in theology from a religious perspective. This flagrant and facial discrimination against religious activity and religious viewpoints violates both the Free Exercise Clause and the Free Speech Clause. This basic point is well developed in the Brief of Respondent. We briefly review it here as a necessary basis for further arguments that place the case in broader constitutional perspective.

Discrimination in favor of or against religion violates the constitutional requirement that government be neutral toward religion. The *reason* for government neutrality is to prevent government from interfering with private religious choices and commitments. This obligation of neutrality is best understood as substantive neutrality, defined as minimizing government influence on religion, rather than formal neutrality, defined as a mere absence of religious classifications. But in this case, the two forms of neutrality converge. Washington's express religious exclusion violates formal neutrality, and its discouragement of theology majors violates substantive neutrality.

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[1] This brief was drafted entirely by the counsel named on its cover, and funded by the amici listed on its cover.

This discrimination has nothing to do with the reasons for restricting government funding of religion. If the state awards a scholarship to Joshua Davey based on his income and academic achievement, and if Davey uses that scholarship to study theology, it is Davey and not the state or its taxpayers that has directed money to religious uses. Using the scholarship to study theology would not entangle the state in religious questions; to the contrary, it is the challenged exclusion that requires the state to investigate theology programs and evaluate the perspective from which they are taught. No condition on Promise Scholarships interferes in any way with the autonomy of church affiliated colleges, except the very condition – no devotional theology degrees – that is being challenged. There is a common theme to these points: state interference with private religious choice is minimized when the state funds nothing, or when it funds everything within a neutrally defined category. Discriminatory funding is always the worst policy, because discriminatory funding pressures citizens to adapt their own religious choices to the state's favored categories.

The state has discretion to set its own church-state policy within the boundaries of the federal Constitution, but it has no authority to violate the federal requirement of government neutrality toward religion.

Nondiscriminatory Promise Scholarships, equally available for religious and secular majors, would be fundamentally different from the Virginia general assessment rejected in the Founders' generation. The essence of the general assessment was massive discrimination in favor of religious viewpoints. The general assessment would not have incidentally funded some religious application that was part of a broader and neutral category, and the state would have received no secular services for its money. Some of the state's amici claim that the general assessment controversy was about the funding of religious schools, citing one of the authors of this brief, among other scholars. The claim is mistaken, and the citations are egregious miscitations.

This case differs in three ways from other cases upholding refusals to fund constitutionally protected activities. First, in many of those cases, the state promulgated its own secular message, either directly or through paid intermediaries. Here, the state's only interest is in an educated citizenry; it has expressed no preference for particular majors or viewpoints apart from its exclusion of theology majors.

Second, many of those cases involved constitutional rights that do not require government neutrality. Government can vigorously express its preference for live birth so long as it does not "unduly burden" abortion. This is very different from the state's obligation to be neutral between religion and nonreligion. The refusal to fund abortion was not neutral, but it did not have to be.

Third, all of those cases involved a mere refusal to support a particular activity with government funds. They did not withhold other government funds from all persons who continued the unfunded activity with their own money. But here the state has stepped over that line; because Davey majors in theology from a religious perspective, the state will not award any scholarship to be used for any courses.

ARGUMENT

I. The Denial of Davey's Scholarship Discriminates Against Religious Activity and Viewpoints.

Joshua Davey was eligible for a state Promise Scholarship to attend college on the basis of his academic record and his family's modest income. He was declared ineligible, however, because he decided to major in theology, along with business administration, at Northwest College. The state has made clear that the disqualifying feature of his theology major was that it would be taught from a "devotional" standpoint, that is, a standpoint "designed to induce religious faith." Brief for the Petitioners at 6. If the theology major at Northwest College reflected a "secular"

or "purely academic" approach to religion and the Bible, Davey would have kept his scholarship. *Id.* at 6, 10.

These undisputed facts establish that the Washington policy openly and explicitly discriminates against religious activity and viewpoints. The policy thus presumptively violates the Free Exercise and Free Speech Clauses.

A. Free Exercise and Nondiscrimination.

The "fundamental" and "minimum" requirement of the Free Exercise Clause is that a law may not single out religiously motivated activity for discriminatory treatment. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523, 532 (1993). "A law that targets religious conduct for distinctive treatment" must "undergo the most rigorous of scrutiny" and "will survive only in rare cases." *Id.* at 546. *See also Employment Div. v. Smith*, 494 U.S. 872, 877-78, 888 (1990). This principle forbids laws that "impose special disabilities on the basis of . . . religious status." *Smith*, 494 U.S. at 877 (citing *McDaniel v. Paty*, 435 U.S. 618, 643 (1978)). The "unique disability" imposed in *McDaniel* was denying to members of the clergy a generally available opportunity – the right to serve in the state legislature if elected by the voters. *Id.* at 632 (Brennan, J., concurring).

Sherbert v. Verner, 374 U.S. 398 (1963), likewise makes clear that "the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* at 404. *Sherbert* held that when the state denied unemployment benefits to a claimant who refused to work on Saturday, her sabbath, it placed "unmistakable" pressure on her "to forego that religious practice." *Id.* Of course the Court rejected one broad interpretation of *Sherbert* in *Smith*, but it reaffirmed *Sherbert*'s holding on grounds that are clearly applicable here. *See Smith*, 494 U.S. at 883-84 (reading *Sherbert* to require that government respect religious reasons for acting when it respects secular reasons for similar conduct). *Sherbert*, *McDaniel*, *Smith*, and *Lukumi* all stand for the proposition that the state cannot

discriminate against a religious practice without a compelling reason. At least where there is discrimination, it remains clear that the Free Exercise Clause is violated when a citizen's "declared ineligibility for benefits derives solely from the practice of her religion." *Sherbert*, 374 U.S. at 404.

There is no question that the Promise Scholarship is a generally available benefit, and that the exclusion of theology majors imposes a unique disability on those majors. Scholarships are available to students attending any accredited public or private college, taking any of the host of majors offered at those colleges. The state excludes only theology taught from a religious perspective. The ineligibility of students like Davey "derives solely" from their religiously motivated decision to major in theology. This singling out of religion from such a broad-based entitlement flagrantly violates the nondiscrimination principle. Here, as in *Lukumi*, the Court need not "define with precision" the standard for determining whether a funding condition is religion-neutral and "of general application" (508 U.S. at 543). Washington's singling out of theology majors for exclusion "fall[s] well below the minimum standard necessary to protect First Amendment rights" (*id.*).

The state does not bar Promise Scholarship students from all religiously oriented courses. Davey could have received a scholarship while majoring in business or any other non-theology major, even if his courses in that major included a good deal of religious teaching. But that fact does not help the state's case. The state in *McDaniel*, by disqualifying clergy from sitting in the legislature, "impose[d] a unique disability" on those who held their religious views "with such depth of sincerity as to impel [them] to join the ministry." 435 U.S. at 631 (Brennan, J., concurring). Similarly, by denying a scholarship for those who care enough about their religious beliefs to study theology, Washington "impos[es] a civil disability upon those deemed to be too deeply involved in religion." *Id.* at 639-40.

B. Free Speech and Viewpoint Discrimination.

Neutrality in the sense of nondiscrimination also is central in cases, such as this one, that involve religious expression.[2] The Free Speech Clause forbids singling out for unfavorable treatment speech that reflects a religious viewpoint. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). This principle likewise applies where the discrimination against religion occurs in a program of government benefits. *Rosenberger*, 515 U.S. at 832-36.

In the terms of free speech doctrine, the Washington exclusion is a classic instance of discrimination by viewpoint. Promise Scholarships are available to those who study theology and religion from a "secular" perspective, but are denied to those who study religion from a perspective "designed to induce religious faith." Pet. Br. at 5-6.

The state and its amici try to claim that the exclusion of theology majors "is a neutral law that does not discriminate against religion." Pet Br. at 39-40; see also Brief Amicus Curiae of American Civil Liberties Union *et al.* at 23-26. Part of their argument appears to be that the distinction between the "secular" and "devotional" study of religion is a distinction based on subject matter rather than viewpoint. See Brief of ACLU *et al.* at 24. This Court expressly rejected a similar distinction, between religious worship and other religious speech, in *Widmar v. Vincent*, 454 U.S. at 269-70 n.6.

The state's argument illustrates once again how regulators exploit this Court's deference to subject matter

[2] College education involves expression both by the student who chooses his school and courses, participates in classroom discussion, and writes papers, and by the college itself and its faculty.

exclusions. The state relies on a doctrine that authorizes governments to exclude whole subject matters from public places without having to offer any reason, thus "restrict[ing] speech by fiat." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 694 (1992) (Kennedy, J., concurring). Without serious review of the reasons for subject matter exclusions, government may manipulate or gerrymander its definition of subject matter to exclude undesired viewpoints. It is futile for the Court to closely scrutinize viewpoint discrimination if it gives carte blanche to subject matter discrimination and permits subject matter to be defined in ways that closely track viewpoint.

In any event, the claim that the state is not engaged in viewpoint discrimination is facetious. Whether religion is studied from a secular perspective or a "devotional" one, the subject matter is still religion. Under the state's policy, Promise Scholarship recipients can pursue the University of Washington's major in religion – an example of the secular study of religion – and analyze New Testament books from the standpoint of "[m]odern scholarly methods of research and analysis." J.A. 68. But they cannot major in religion elsewhere and analyze New Testament books from the standpoint that they are divinely inspired. The state's brief perfectly sums up the viewpoint discrimination here: Davey loses his scholarship because the courses in his major "teach the Bible as truth, whereas a purely academic understanding [for which a student could receive a scholarship] would not necessarily subscribe to the Bible as ultimate truth." Pet. Br. at 10. Likewise, students can receive scholarships and take a secular approach to St. Augustine, Kierkegaard, and other thinkers on "God, man, knowledge, and authority." J.A. at 72, 68. But a religion major at Northwest College is denied a scholarship because he studies the very same thinkers from the standpoint of whether and how they support Christian faith. It could scarcely be clearer that the state discriminates between different viewpoints concerning the same subject matter.

II. Discriminatory Denial of Funding Here Violates the Religion Clauses' Fundamental Principle of Respecting Voluntary Choices and Commitments in Religious Matters.

The amici joining this brief believe strongly in the principle of nondiscrimination against religious activities and viewpoints. We agree that this case is controlled by *Lukumi*, *McDaniel*, and *Rosenberger*. But we also think it important to put this case in a broader context. The state points out that the Court has forbidden public schools to engage in religious instruction but has allowed them to teach about religion "'objectively as part of a secular program of education.'" *Id.* at 40-41 (quoting, *e.g.*, *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)). From this the state falsely asserts that it may discriminate against religious instruction, and in favor of secular instruction, when the speech and activity at issue are private and voluntary. This argument is mistaken. More broadly, we wish to explain why the First Amendment requires or permits distinctive treatment for religion in some situations, but requires nondiscrimination against religion in this case. Both nondiscrimination in this case and distinctive treatment in other situations ultimately serve a more fundamental goal: that government should avoid interfering with the voluntary choices of private individuals in religious matters.

A. The Ultimate Value Underlying the Religion Clauses is Substantive Neutrality, or the Protection of Voluntary Choices and Commitments in Religious Matters.

The ultimate goal of the Constitution's provisions on religion is religious liberty for all – for believer and nonbeliever, for Christian and Jew, for Protestant and Catholic, for Western traditions and Eastern, for large faiths and small, for atheist and agnostic, for secular humanist and the religiously indifferent, for every individual human being in the vast mosaic that makes up the American people. The ultimate goal is that every American should be

free to hold his own views on religious questions, and to live the life that those views direct, with a minimum of government interference or influence.

The fundamental principle to achieve that goal is for the government to maintain "substantive neutrality" toward religion:

> [S]ubstantive neutrality [means] this: the 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 anything can be. It should proceed as unaffected by government as possible. . . .
>
> This elaboration highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized. The same is true of religious practice and refusal to practice. The goal of maximum religious liberty can help identify the baseline from which to measure encouragement and discouragement.

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-02 (1990).

Substantive neutrality is not always the same as formal neutrality, that is, facial nondiscrimination or the absence of religious classifications. *See, e.g., Lukumi*, 508 U.S. at 561-62 (Souter, J., concurring). Sometimes the government may or even must treat religion differently from other ideas and activities in order to preserve the goals of substantive neutrality: private religious liberty and minimum government interference in religious choices and commitments. For example, the government may accommodate private, voluntary religious exercise by exempting it from burdensome regulation, even if the exemption does not "come packaged with benefits to

secular entities." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). Even though such an exemption gives religion distinctive treatment, it is constitutionally legitimate if it "does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice." *Thomas v. Review Bd.*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting on other grounds).

When the government speaks for itself, it must also treat religion distinctively. Neutrality requires that the government not express religious views itself or take a position on religious matters, even though it may express views on a host of nonreligious matters and even seek to lead public opinion concerning such matters. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 591 (1992) (unlike in secular matters, "[i]n religious debate or expression the government is not a prime participant"); *Schempp*, 374 U.S. at 222-26 (holding that neutrality forbids public schools to conduct Bible readings or other religious exercises).

The state and its amici rely on *Schempp* and other government speech decisions in arguing that the First Amendment generally distinguishes religious from secular instruction. *See* Pet. Br. at 40-41; Brief of ACLU *et al.* at 25. But the state commits a fundamental category mistake. Restrictions on the government's own religious speech do not authorize government to discriminate against the voluntary religious activity and expression of private individuals. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (emphasis in original).

As the Court emphasized in *Rosenberger*, a holding that the state "may not discriminate based on the viewpoint of private persons whose speech it facilitates" does not govern issues concerning "the [state's] own speech, which is controlled by different principles." 515 U.S. at 834.

Plainly, the instruction at private colleges where Promise Scholarships may be used is private speech and activity, not government speech. The scholarships can be used for a vast range of educational choices, including any accredited college and any major except for theology from a religious viewpoint. Such a wide variety of options will surely include teachings that conflict with each other, as related subjects are taught by a variety of faculty at a variety of colleges. As with the list of publications in *Rosenberger*, these conflicting perspectives cannot logically be called the position of the state. *See* 515 U.S. at 833.

The private nature of this speech and activity is also evident from the student's right to use the scholarship for religious instruction as long as it occurs in a non-theology major. Davey is a double major, in theology and business administration. If he had declared only the business major, and taken all the same theology courses as electives, he could have used his state scholarship to pay for any of them. But if using the scholarship really made the courses government speech, Davey could not apply the scholarship to any religious courses at all.

The fact that the state can teach about religion but not teach religion as a creed does not undercut the fact that the distinction between these two is one of viewpoint. *Weisman* and *Rosenberger* together teach that government must make such a viewpoint distinction between religion and nonreligion in its own speech, but that it cannot do so when providing benefits to private parties engaged in expression. The explanation lies again in the underlying principle of substantive neutrality, that government should as much as possible minimize its effect on citizens' diverse religious choices. In the context of government speech, neutrality means that government is constrained to express neutral viewpoints or to say nothing at all. Neutral expression on controversial subjects is hard to maintain; it is usually easier to preserve neutrality by silence:

> [G]overnment can respect religious pluralism when it gives financial aid, by giving aid to any group (religious as well as non-religious) that

> provides the requisite services – but it is far more difficult for government to respect and promote religious pluralism when it engages in religious speech itself. Any statement the government makes is bound to favor one faith over another; even an ecumenical statement that seeks to be inclusive of all faiths favors ecumenical religion over the more sectarian kinds.

Thomas C. Berg, *Religion Clause Anti-Theories*, 72 Notre Dame L. Rev. 693, 745 (1997).

In short, the way for the state to keep out of private individuals' choices about religion is to refrain from religious statements in its own speech, but to accord religious statements by private speakers the same treatment that it gives to secular statements. In the next two sections, we show that (1) denying Davey's scholarship because he chose a religious major interferes with his individual choice in religious matters and (2) denying the scholarship does not serve any other purpose that might justify this interference with individual choice.

B. The Discriminatory Denial of Funding Here Interferes with Voluntary Religious Choice.

The denial of Promise Scholarships to students such as Davey distorts individual choice in religious matters. The Court has repeatedly recognized that providing aid to private individuals under neutral, secular criteria and allowing them to use it at either religious or nonreligious schools promotes the "genuine and independent choices of [those] individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); *see also Mueller v. Allen,* 463 U.S. 388 (1983); *Witters v. Washington Dep't of Servs.,* 474 U.S. 481, 487-88 (1986); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1 (1993). Conversely, to withdraw aid because a student chooses a religious major interferes with the student's choices.

By declaring a major in pastoral ministries, Davey lost nearly $2,700 in scholarship aid for two years of

college. *Davey v. Locke*, 299 F.3d 748, 750-51 (9th Cir. 2002). Common sense, precedent, and the record all suggest that the prospect of losing such an amount will often affect a student's choice of major, especially for Promise Scholarship recipients with their modest family incomes. *See* Wash. Admin. Code § 250-80-020(12) (1999) (recipient's family income cannot be more than 35 percent above the state median). In *Sherbert v. Verner*, this Court found unconstitutional distortion of religious choice in the prospect of losing 22 weeks of modest unemployment benefits. 374 U.S. at 404; *id.* at 417-18 (Stewart, J., concurring). Northwest College's financial aid officer testified that students consider changing their majors to retain their state scholarships:

> Being a Christian school, and working with the State, this issue, as you can imagine, comes up. And with the student who is perhaps struggling with being eligible for State money and their major, I talk with them. . . .
>
> [I say that i]f you are planning to become a minister, no matter what your major is, this warrant, this check, this award, is not intended to go to a student in your position. And I talk with the student, by just changing your major to get this award is not the correct thing to do.

J.A. at 156-57. The counselor seems to emphasize the spirit rather than the letter of the law, for a student taking a non-theology degree can retain his scholarship even if he is preparing for the ministry. Wash. Admin. Code § 250-80-020(12). But the key point is this: the counselor's testimony confirms that students consider which choice of major will cause them to lose their Promise Scholarship.

By excluding theology studies taught from a "devotional" perspective, the state creates an incentive for students not to pursue that major and instead to pursue a major less infused with religious teaching. "[T]he pressure upon [students] to forego [a theology major] is unmistakable." *Sherbert*, 374 U.S. at 404. In addition, because the law allows scholarships for those pursuing a religion major taught from a secular perspective, it may induce some

students committed to a religion major to choose a college whose approach to the study of religion is more secular and less devotional. At the margin, it might induce some colleges to tip their religion courses from the devotional toward the secular in order that their religion majors may receive Promise Scholarships. These distortions of private choice violate the First Amendment.

C. Denying Funding in This Case Serves None of the Purposes of the Religion Clauses.

Refraining from state funding of private religious education can, in some situations, serve the Religion Clauses' goals of liberty and religious autonomy. Government money is a powerful source of government influence; government expenditures on religion generally expand government influence in a field where that influence should be minimized. Describing the same point from the private perspective, voluntary funding of religious instruction often maximizes individual liberty and the influence of private choice. Each individual can decide when, how, and how much to contribute to whom, and whether to contribute at all. Voluntary funding of religious organizations protects individual conscience and keeps government out of religion.

But Washington's exclusion of theology majors like Davey serves none of these goals. Indeed, it transgresses a number of them. Government funding decisions have the least impact on private religious choice when government funds *nothing*, or when it funds *everything* within a neutrally defined category. Government does maximum harm to free choice when it funds some choices and refuses to fund their directly competing alternatives.

1. Impositions on taxpayers' consciences.

A common and longstanding argument against state support of private religious organizations is that it forces taxpayers to support instruction in religious doctrines that

they may conscientiously oppose. The objection goes back as far as Thomas Jefferson's charge "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *A Bill for Establishing Religious Freedom* (Va. 1786), quoted in Michael W. McConnell *et al.*, *Religion and the Constitution* 69-70 (Aspen 2002). Respecting the taxpayer's choice not to fund religion may be a consideration in some cases. But it is not in this case.

The state plainly does not think that including students' religious choices in Promise Scholarships coerces any taxpayers to support religious instruction. The state allows scholarships for students at religious colleges such as Northwest majoring in any subject other than theology. This is so even though non-theology majors are likely to receive a great deal of religious instruction at Northwest, which (like many other religious colleges) aims to educate all students "from a 'distinctly Christian' point of view." 299 F.3d at 751 (quoting http://www.nwcollege.edu/about/index.html).

Promise Scholarships should not be seen as coercing taxpayers to support religion. On facts identical to those here, this Court held that when a college student chooses to use neutrally available aid for a religious course of study at a religious college, "the decision to support religious education is made by the individual, not by the State." *Witters*, 474 U.S. at 488. The same factors that made the connection between the state and the religious instruction "highly attenuated" in *Witters* (*id.*) are present here. Nothing in the scholarship program gives recipients like Davey any financial incentive to choose a religious course of study, and indeed a relatively small percentage are likely to do so. *See id.* In other words, the state is simply forcing the taxpayer to support a student's education – which benefits the state in secular terms by "assuring the development of the talents of its qualified domiciliaries" (*Davey*, 299 F.3d at 756). It is the student's decision, not the state's, for the education to be religious.

The state and its amici claim a particular interest in keeping funds from going to clergy training, but that does not change the logic of the situation. Larry Witters was also training for the ministry, but the Court unanimously rejected a challenge to state funding of his education. If the choice of how to use the funds is the student's, not the state's, then the choice to pursue training for the ministry is the student's as well. This same point disposes of the amici's argument that some denominations will benefit more than others who do not train their clergy at accredited undergraduate institutions (Brief of ACLU *et al.* at 19-20). Again, the connection between the state and the different results for different denominations is highly attenuated. The kind of disparate impact of which the amici complain could arise under any program funding college education. Some denominations are more likely than others to employ non-clergy staff trained at undergraduate schools with the help of state scholarships. Some denominations would be less likely than others to employ college-educated church workers at all.

Any program of funding under neutral criteria will result in differential impacts because of the differences in the choices and personal characteristics of students of different faiths. These varying disparate impacts do not justify purposeful, facial discrimination against religious choices compared with all other choices of major.

2. Government entanglement in religious questions.

Some forms of funding require the government to make discretionary decisions about which activities are valuable enough to fund, how much funding they should receive, and so forth. When decisions involving religious recipients turn on discretionary rather than bright-line factors, there is a danger that government will interfere in and distort private religious decisions by deciding whom to fund, or in what amount, according to political pressure, popularity, or the religious preferences of the dominant faction. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 622-23

(1971) (warning about competing political pressures for discretionary education appropriations). But obviously, respecting the choice of students like Davey to use their scholarships for theology study does not involve the state in any religious questions. The state simply offers the scholarship to students who qualify because of academic achievement and family income, without regard to whether the student chooses a religious use and without making any subjective judgment.

It is the exclusion of students like Davey that puts the state in the improper position of drawing discretionary and religiously significant lines. The state must decide, for example, which theology degrees are taught from a secular, "academic" perspective and which are taught in ways "designed to induce religious faith." Some programs may fall clearly in one category or the other: the University of Washington classes (see *supra* p. 7) may be clearly secular, while Northwest College classes may be clearly devotional. But the line may be far less clear at other colleges, which try to maintain an often "precarious balance," giving weight to both the teachings of their church and the standards of the secular academy. See Stephen L. Carter, *The Constitution and the Religious University*, 47 DePaul L. Rev. 479, 485-86 (1998). For example, consider a policy statement of Brigham Young University:

> At BYU, individual academic freedom is based not only on a belief (shared by all universities) in the value of free inquiry, but also on the gospel principle that humans are moral agents who should seek knowledge in the sacred as well as in the secular, by the heart and spirit as well as by the mind, and in continuing revelation as well as in the written word of God.

Statement on Academic Freedom at Brigham Young University, reprinted in Douglas Laycock, *The Rights of Religious Academic Communities*, 20 J. Coll. & Univ. L. 15, 36 (1993).

It is far from clear how the state should apply its secular/devotional distinction if Brigham Young were located in Washington. To decide whether BYU theology

degrees were eligible, the state would have to examine their content closely. It would have to conduct the kind of "comprehensive, discriminating, and continuing state surveillance" that this Court has said creates excessive entanglement between church and state. *Lemon*, 403 U.S. at 619.

3. Recipient schools' autonomy.

Even if the state offers a funding program with no religious conditions on eligibility, the funding might still raise Religion Clause concerns if it comes with other conditions limiting the autonomy of participating religious schools. Just as religious conditions distort the religious choices of those eligible for scholarships, such conditional funding might create incentives for a religious school to compromise its independent mission and message and conform to the state's views and policy goals. But such concerns are absent or minimal here. There has been no assertion that any conditions accompanying Promise Scholarship eligibility might realistically restrict a religious school's autonomy – except the one that Davey challenges. Again, scholarships are available to students at any accredited undergraduate institution in the state, and for any program of study save one. The only significant condition is the very one at issue here – the exclusion of theology majors taught from a religious perspective. Ending that exclusion will end the one incentive that schools have to change their teaching so that their students can receive state aid.

4. The state's discretion to choose a church-state policy.

Finally, the state and its supporting amici fall back on the state's discretion to choose a church-state policy stricter than that of the Establishment Clause. But the state's rights argument is very weak in this case. As we have shown, the exclusion of students like Davey violates the core principles and policies of the Religion Clauses and serves none of the purposes that rules against funding of

religious education might serve. As this Court held in *Widmar*, 454 U.S. at 277, to withhold a widely available benefit from an activity simply because of the religious viewpoint it reflects cannot be justified by the interest "in achieving greater separation of church and state than is already ensured under the Establishment Clause." Moreover, funding students in circumstances like Davey's is not merely permitted by the Establishment Clause; it is so clearly permitted that the question is not even close. The *Witters I* decision permitting such funding on identical facts was unanimous, including the votes of those justices who were the most restrictive of funding under the Establishment Clause – Justices Brennan and Marshall (the latter of whom wrote the Court's opinion).

Accordingly, to hold that the state may not discriminate against religious choices in this situation is far from holding that the state must fund religion whenever the Establishment Clause permits it. Most obviously, a state need not fund private education at all. But if it does choose to fund private education, it must have compelling justifications for discriminating against religion.

D. Nondiscriminatory Funding of Secular Functions Is Fundamentally Different From the Preferential Funding of Religious Functions that the Founders Rejected.

A fundamental episode in the American history of disestablishment is Virginia's rejection of the general assessment, more formally entitled *A Bill Establishing a Provision for Teachers of the Christian Religion*, reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, 72-74 (1947) (Appendix to opinion of Rutledge, J., dissenting). The state and its amici rely on rejection of the general assessment as a reason to resist nondiscriminatory funding of scholarships for higher education. But the two programs are fundamentally different. Nothing like the general assessment has been seriously proposed since repeal of the Massachusetts establishment in 1833.

As its full title makes clear, the essence of the general assessment was a massive discrimination in favor of religious viewpoints. In a time of minimal government, Christian clergy and Christian places of worship were to be singled out for special subsidy. Supporters of the measure did all they could to make it nonpreferential *as among Christian denominations*. They even provided a secular alternative for non-Christians and conscientious objectors, who could decline to designate a church and thereby send their clergy tax to a fund for schools. *Id.* at 74.

But there was no attempt to make the general assessment neutral *as between religion and nonreligion*. No one claimed, or could have claimed, that clergy and church buildings fell within the neutrally drawn boundaries of some larger category of state-funded activities. And no one claimed, or could have claimed, that the state would receive any secular service or benefit not derived from the religious functions of the churches. The argument for the general assessment was the familiar argument for other forms of establishment – that the state would benefit from having a more Christian population. *Id*. at 72.

This case, and all modern funding cases, are fundamentally different. No one proposes to fund the inherently religious functions of churches, and no one proposes to fund religious organizations preferentially over secular organizations providing the same service. Instead, the state funds a service – in this case, higher education – that is offered by both secular and religious providers. Higher education at Northwest College meets all the state's accreditation requirements and offers a wide range of courses less infused with religion than those in the theology department.

In this case, the broad neutral category of higher education includes, as one of its many applications, the training of clergy. And the training of clergy is a core religious function. But for multiple reasons, the case is still like the modern funding cases and unlike the general assessment: because the training of clergy is so clearly an incidental application of a vastly broader program;

because the training of clergy also serves the state's goal of educating its citizenry; because the decision to direct the money to religious uses is made by private citizens with no encouragement from the state; and because discriminatory exclusion of theology majors powerfully interferes with private religious choice, but treating them identically with all other majors does not influence anyone's choice. Excluding theology majors from a generally applicable program is a far greater departure from religious neutrality than is including them.

This Court has already decided cases where a neutrally defined category included some applications involving core religious functions. *Witters* was such a case; the Court held that a broad scholarship program could be applied to the training of clergy. 474 U.S. at 489. And *Rosenberger* was such a case; the magazine at issue there was core religious speech, permeated with evangelical Christian faith. *See* 515 U.S. at 825-26; *id*. at 865-67 (Souter, J., dissenting). The secular benefit to the state was not in the magazine's religious speech as such, but in the creation of a broad and nondiscriminatory forum for ideas. Promise Scholarships present one more in a series of modern funding cases, in which the state pays for a secular benefit and a religious institution provides that benefit in conjunction with religious functions of its own.

The state and its amici are well aware of the difference between modern controversies, involving nondiscriminatory funding of secular functions performed in religious contexts at religious institutions, and the general assessment's discriminatory funding of religious functions. Some of those amici try to bridge the gap with egregious miscitation. These amici claim that Madison and Jefferson opposed "an effort by the Virginia Assembly to impose an assessment for the support of houses of worship and teachers of religion, *including teachers in private religious schools*" (emphasis added). Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners at 6 & n.8. They cite for this proposition Douglas Laycock and Thomas Buckley, neither of whom says any such thing. They go on to claim that "Jefferson and Madison viewed their

constitutionally based principle as applying in the religious school context," *id.* at 7 & n.14, citing Laycock and Thomas Curry, neither of whom says any such thing.

Each of the cited sources simply describes the assessment bill's opt-out paragraph, which provided that the payments of any taxpayer who failed to designate a church should be paid "into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning." 330 U.S. at 74. Thomas E. Buckley, *Church and State in Revolutionary Virginia 1776-1787* at 108-09, 133 (Univ. Of Virginia Press 1977); Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 141 (Oxford Univ. Press 1986); Douglas Laycock, "*Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 897 & n.108 (1986). Laycock shows that the reference to "seminaries of learning" meant schools for general education, not schools for the training of ministers. *Id.* Buckley and Curry treat that usage as obvious. The whole issue was theoretical; there was no general school fund in Virginia before 1810. J.L. Blair Buck, *The Development of Public Schools in Virginia 1607-1952* at 28-29 (Va. St. Bd. of Educ. 1952). Probably there were few Virginians in 1785 willing to publicly advertise themselves as non-Christians. But public advertisement was the price of exemption; the bill required public posting of an alphabetical list of taxpayers and the churches they had designated to receive their tax (330 U.S. at 73).

What is important here is that the provision for payment to a school fund was *not* an effort to support religious schools, as the state's amici contend; it was an effort to accommodate the possibility of non-Christian taxpayers. And it was *not* the subject of any controversy. Madison did not mention schools in his *Memorial and Remonstrance Against Religious Establishments* (reprinted in *Everson*, 330 U.S. at 63-72), the most complete compendium of secular and religious arguments against the assessment. Buckley's survey of other arguments against the assessment does not mention any attack on the schools provision. Buckley

at 113-43. The effort to convert this exemption for non-Christians into an attempt to raise money for religious schools is a gross distortion of history, for which the sources cited provide absolutely no support.

III. Decisions Permitting the Government to Put Conditions on Funding Are Inapplicable to This Case.

Notwithstanding the effects on religious choice from excluding students like Davey, the state argues that it is free to do so because its "decision not to subsidize religious instruction . . . does not infringe Davey's right to seek a theology degree." Pet. Br. at 20. In particular, the state claims that withdrawing the scholarship did not penalize Davey for exercising his right to study theology, because he could study business at one school, with a scholorship, and theology at another, using his own money. *Id.* at 25. The state cites this Court's decisions allowing government to refuse to pay for abortions, *e.g., Maher v. Roe*, 432 U.S. 464 (1977); *Rust v. Sullivan*, 500 U.S. 173 (1991); or for various forms of speech, *e.g., Rust*; *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). The state's argument is mistaken here for two reasons, one legal, one factual.

A. The Decisions Approving Conditions Are Inapplicable Because the Government Must Be Neutral Toward the Religious Choices of Private Individuals.

In citing decisions allowing selective funding conditions, the state ignores the Religion Clause principle that the government must remain neutral toward religious choices. The fundamental standard of substantive neutrality toward religion distinguishes this case from the abortion funding decisions, on which the state primarily relies. *Maher v. Roe*, for example, permitted states to provide funds to indigent pregnant women for childbirth but not for abortion, notwithstanding the right to choose abortion

declared in *Roe v. Wade*, 403 U.S. 113 (1973). The *Maher* Court reasoned that the right in *Roe* merely

> protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

432 U.S. at 473-74. The Court acknowledged that by selective funding "[t]he State may have made childbirth a more attractive alternative, thereby influencing the woman's decision," but it held that the state had not imposed an undue burden because "it has imposed no restriction on access to abortions that was not already there" because of a woman's indigency. *Id.* at 474. *Rust v. Sullivan* follows and quotes this precise reasoning, in holding that the government could prohibit federally funded family-planning programs from engaging in abortion counseling or referrals. 500 U.S. at 192-93 (quoting *Maher*, 432 U.S. at 474).

The principle that the government may disfavor abortion compared with childbirth, so long as it imposes no "undue burden" on the decision to abort, was confirmed in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The decisive opinion in *Casey* reemphasized that "'[t]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.'" *Id.* at 872-73 (quoting *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 511 (1989)). Accordingly, *Casey* upheld various regulations on abortion that did not create a "substantial obstacle" to a woman's decision to abort a nonviable fetus. *Id.* at 876-77 (plurality opinion) (citing, *inter alia*, *Maher*, 432 U.S. at 473).

In this respect, religious freedom is quite different from abortion rights. The state must be neutral on religious questions; it may not express preferences about religion of the sort it expresses about abortion and childbirth. As discussed in part II.A., the Religion Clauses

require the government to maintain neutrality toward religion, in the sense of neither encouraging nor discouraging individuals' choices in religious matters. Substituting religious references in the Court's statements about abortion would make those statements plainly untrue as a matter of law. The state has no power "to make a value judgment favoring [nonreligion] over [religion], and to implement that judgment by the allocation of public funds." *Cf. Maher*, 432 U.S. at 473-74. It has no authority to "make [secular private schools] a more attractive alternative, thereby influencing the [student's] decision." *Cf. id.* at 474. It has no power, "pursuant to democratic processes, [to] expres[s] a preference for [nonreligion over religion]." *Cf. Casey*, 505 U.S. at 872-73. The aim of religious freedom is that the government stay out of the people's religious choices, not that it influence or manipulate religious choices up to a point just short of imposing "undue burdens." Washington's exclusion plainly discourages students from majoring in theology and unjustifiably involves the state in religious decisions, as we showed in part II.A.

Rust v. Sullivan was also decided on the basis that the government can define the scope of its own messages, whether it sends those messages itself or subsidizes private speakers to send them. In *Rosenberger*, the Court made clear that *Rust* stands for the proposition that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. . . . When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 194, 196-200). More recently, the Court reemphasized that "we have explained *Rust* on th[e] understanding . . . that viewpoint-based funding distinctions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust,* in which the government 'used private speakers to transmit specific information pertaining to its own program.'" *Legal Servs. Corp. v.*

Velazquez, 531 U.S. 533, 541 (2001) (quoting *Rosenberger*, 515 U.S. at 833).

The Court again relied on this reasoning in *United States v. American Library Ass'n*, 123 S. Ct. 2297, 2307-08 (2003). Governments do not endorse every publication in their libraries, but neither do libraries attempt to neutrally collect everything that is printed. They necessarily choose "material of requisite and appropriate quality for educational and informational purposes." *Id.* at 2308 (plurality opinion). Implicit in this judgment is our other point – government need not be neutral towards pornography. Government cannot suppress pornography in private hands, but "libraries have traditionally excluded pornographic material from their other collections," *id.*, and certainly public schools could teach children that pornography is best avoided. Schools plainly could not teach children that religion is best avoided. As in *Rust*, *American Library* involved a government to some extent selecting its own messages, in the context of a constitutional right that does not require complete neutrality.

This case clearly involves private speech rather than the government's. Given the wide range of eligible degrees and institutions, Promise Scholarships are not "a subsidy for specified ends"; they are "designed to facilitate private speech, not to promote a governmental message." *Velazquez*, 531 U.S. at 543, 542 (distinguishing *Rust*). The state's interest is in an educated citizenry; except for the exclusion at issue, it has demonstrated no interest in particular viewpoints or subjects of study. *Rust* distinguished the government's specific policy choice at issue there from the case of "a general law singling out a disfavored group on the basis of speech content" (500 U.S. at 194) – and the latter is precisely what the state does when it permits scholarships for every accredited major except theology taught from a devotional perspective. Because this case involves wide-ranging private speech rather than a "specified" government message, the restriction on viewpoint discrimination applies fully.

B. Denying Davey's Scholarship Goes Beyond Not Funding Religion; It Penalizes Him for the Exercise of His First Amendment Rights.

Even assuming that the state can favor nonreligious over religious courses by refusing to fund the latter, the denial of scholarships to students like Davey is still unconstitutional. By excluding Davey from a scholarship, the state does not merely refuse to fund religious instruction. It goes further and imposes an independent penalty on his religious choice, by denying him scholarship aid for secular courses – aid to which he would otherwise be entitled – because he chooses to pursue a theology major taught from a religious perspective. This subjects Davey to an unconstitutional condition.

Rust v. Sullivan distinguishes unconstitutional conditions from mere refusals to fund: "Our 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." 500 U.S. at 197 (emphasis in original). Likewise, *Regan*, 461 U.S. 540, the state's other chief citation, distinguishes between government "merely refus[ing] to pay" for an activity, and government "deny[ing] any independent benefit" because the beneficiary engages in the activity. *Id.* at 545.

A key factor in this distinction is whether the recipient can, in realistic terms, pursue his constitutionally protected activities in a separate program. The Court in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), struck down a federal law barring federally funded radio and TV stations from editorializing. Because the law provided no effective way for the station to "segregate its activities according to the source of its funding," it effectively meant that a "station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing." *Id.* at 400. By contrast, in *Rust* it

was crucial that family-planning agencies could realistically engage in abortion counseling and referral in separate programs outside the federally funded project. 500 U.S. at 198. And in *Regan*, which upheld the condition that tax-exempt organizations not engage in lobbying, it was crucial that the exempt organization could create a separate § 501(c)(4) entity for lobbying and maintain deductibility for contributions to its § 501(c)(3) entity. 461 U.S. at 544-46. The Court specifically noted that the requirements for separating the two entities were "not unduly burdensome" and there was no showing that the plaintiff "was unable to operate with the dual structure." *Id.* at 544 n.6.[3]

Withdrawing Davey's scholarship goes beyond refusing to fund religion and "den[ies an] independent benefit" by withdrawing aid for Davey's entire education. Davey took numerous courses for which he would have received scholarship support had he not declared theology as a major. All theology majors take core courses in subjects such as English and math (J.A. 148-49). But the penalty on choosing a theology major is particularly clear in Davey's case. He proposed to double major in business administration and theology. He lost funding for his business administration degree solely because he also chose to major in theology at Northwest. The Washington exclusion is so broad – covering the entire "school where the scholarship is used" (Pet. Br. at 25) – that Davey could not pursue a non-theology degree at Northwest College even in an entirely separate program from his theology degree, with no overlap in faculty, classroom space, or other features.

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[3] *See also American Library Ass'n*. There the Court emphasized "the ease with which patrons may have the filtering software disabled," 123 S. Ct. at 2306, which limited the effect of the funding condition on other, constitutionally protected speech viewed by adults. *Accord id.* at 2310 (Kennedy, J., concurring in the judgment); *id.* at 2312 (Breyer, J., concurring in the judgment).

The state's answer, apparently offered for the first time in this Court, is that a student such as Davey could use the Promise Scholarship for the non-theology major at Northwest, and then "simultaneously us[e] his own money to pursue a theology degree in a separate program at a second school." Pet. Br. at 25. This is obviously no answer whatever. The state proposes that the student pay close to two full-time tuitions simultaneously[4] and bear the serious inconvenience of attending two full-time programs at potentially distant campuses. Alternatively, the state suggests that the student pursue each degree half-time (see Pet. Br. at 12) – and therefore, of course, take twice as long to finish college. Either course is so "unduly burden[some]" (*Regan*, *supra*) that the condition "effectively prohibit[s] the recipient from engaging in [a theology degree] outside the scope of the [state] funded program" (*Rust*, 500 U.S. at 197). Discrimination that forces a student to attend a different college or university is a constitutionally cognizable burden, as this Court held in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 n.8 (1982) (female-only admissions policy at state nursing school "[w]ithout question . . . worked to [male applicant's] disadvantage" by forcing him to drive "a considerable distance from his home" to coeducational state nursing school and to forego jobs that he could have had closer to home).

But the burden does not stop at inconvenience. To devout students preparing for the ministry, theology degrees are not fungible items. There is no guarantee – indeed, it may be less than likely – that Davey will find another theology program that he can realistically attend and that fits his doctrinal beliefs and his particular goals for his ministry career. If Davey instead chooses Northwest College for theology, he may not find a Washington

[4] The Promise Scholarship's yearly maximum of approximately $1,500 covers only a small percentage of tuition at most colleges, especially private ones.

college that he can attend that teaches business courses in an evangelical Christian context as Northwest does. Either way, the rigid terms of Washington's exclusion cause Davey and students like him not only a severe practical burden, but also a serious risk that their conscientious choice of religious education will be frustrated.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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