No. 02-1315

In the Supreme Court of the United States

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL., PETITIONERS

v.

JOSHUA DAVEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

THEODORE B. OLSON
Solicitor General
Counsel of Record

R. ALEXANDER ACOSTA
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

GREGORY G. GARRE
Assistant to the Solicitor General

DAVID K. FLYNN
ERIC W. TREENE
KAREN L. STEVENS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a State may deprive an otherwise eligible student of scholarship funds made available to high school graduates based on academic achievement, financial need, and enrollment at an accredited post-secondary school, solely because the student elects to major in theology taught from a religious perspective.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

In the Supreme Court of the United States

No. 02-1315

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL., PETITIONERS

v.

JOSHUA DAVEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The Washington promise scholarship program makes education aid available to high school graduates on the basis of academic performance, financial need, and enrollment at an accredited college or university, but disqualifies otherwise eligible students if they elect to pursue a major in theology taught from a religious perspective. The court of appeals held that the program violates the First Amendment rights of otherwise eligible students, such as respondent, who are deprived of a promise scholarship solely because they choose to pursue a religious education. That decision is correct and compelled by this Court's precedents.

The United States has a significant interest in the constitutional principles governing this case. Congress has enacted several programs that make funds available to disadvantaged individuals to obtain services from qualified entities of their own choosing, regardless of the religious affiliation, if any, of such entities. See, *e.g.*, 42 U.S.C. 9858n(2); 42 U.S.C. 604a(a)(2)(B)(ii), (c), and (e)(1). At the same time, Congress has enacted programs that make aid available

directly to public and private schools and that specify that such direct aid may not be used for programs that involve religious instruction or worship. See, *e.g.*, 20 U.S.C. 1062(c)(1), discussed note 4, *infra*.

In addition, Congress has recognized the United States' interest in eliminating discrimination because of religion by authorizing the United States to intervene in federal cases seeking relief from a denial of equal protection of the laws under the Fourteenth Amendment on account of, *inter alia*, religion. 42 U.S.C. 2000h-2. The United States has a vital interest in ensuring that educational opportunities are available to all individuals consistent with the protections of the First and Fourteenth Amendments.

STATEMENT

1. In 1999, Washington established a pilot program—the promise scholarship program—to reward superior academic achievement and encourage successful high school students from low- and middle-income families to pursue post-secondary educational opportunities. See Wash. Rev. Code § 28B.119.005 (2002); J.A. 50. The program is administered by the Washington Higher Education Coordinating Board (Board) and was opened in 1999 to any student graduating from public and approved private high schools in Washington who met three eligibility criteria: (1) the student finished in the top 10% of his graduating high school class; (2) the student's family income was equal to or less than 135% of the State's median; and (3) the student was enrolled in an accredited university in Washington. J.A. 51; Pet. App. 8a-9a.

Under the program, scholarships are made available to eligible students during the first year of a student's post-secondary education and may be renewed for one additional year. The amount of the scholarship depends on the available funding and the number of eligible aid recipients in a given year. The scholarship was worth $1125 per student in 1999-2000, and $1542 per student in 2000-2001. Pet. App.

8a, 52a-53a. Scholarship funds are sent to schools and held in the qualifying student's name. The institution must certify that the student is enrolled and eligible to receive the award before the scholarship funds are released. The funds may be used for education-related expenses, including tuition, books, or room and board. See J.A. 50-54, 57-58; Pet. App. 52a-53a.

In October 1999, the Board notified administrators at accredited institutions that students who are otherwise eligible to receive a promise scholarship may *not* receive such a scholarship if they elect to pursue a degree in theology. J.A. 61-62; Pet. App. 10a & n.3. The Board explained that the Washington constitution has long been "interpreted * * * as prohibiting state financial aid funds for students who are pursuing a degree in theology." J.A. 61-62; see 1969 Wash. Laws ch. 222, § 15 ("No aid shall be awarded to any student who is pursuing a degree in theology."), codified at Wash. Rev. Code § 28B.10.814 (2002).[1] The legislature later established that "[promise] scholarships may not be awarded to any student who is pursuing a degree in theology." Wash. Rev. Code § 28B.119.010(8) (2002). The Board's regulations contain the same disqualification provision. Wash. Admin. Code § 250-80-020(12)(g) (2003).

The prohibition on awarding promise scholarships to students who declare a major in theology applies only to theology that is taught from a religious perspective—"that is, instruction 'that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct.'" Pet. Br. 22-23 (quoting *Calvary Bible Presbyterian Church* v. *Board of Regents of Univ. of Wash.*, 436 P.2d 189, 193 (Wash. 1967), cert. denied, 393 U.S. 960 (1968)). Thus, a student may use scholarship funds to study

[1] Article I, § 11, of the Washington constitution provides in part that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." See Pet. Br. 2-3; Pet. App. 88a.

comparative religion from a secular point of view, but he is disqualified from such funds if he studies religion from the point of view of those who accept religion as truth or seek to inculcate its beliefs (or disbeliefs). Pet. Br. 5-6, 22-23, 43.

2. Respondent is a Christian who, because of his religious beliefs, has "planned for many years to attend a Bible college and to prepare [himself] through that college training for a lifetime of ministry, specifically as a church pastor." J.A. 40, 43; see Pet. Br. 9. In August 1999, he was awarded a promise scholarship based on his superior high school academic record and financial need. Pet. App. 9a; J.A. 53-54. Petitioner Locke sent respondent an award certificate and letter congratulating him on his selection as a promise scholarship recipient and informing him that the scholarship was $1125 for the 1999-2000 school year. J.A. 55-56, 76. Respondent enrolled in Northwest College, a private Christian college located in Kirkland, Washington, which is accredited by the State and offers degrees in both religious and secular fields of study. Pet. App. 9a, 53a-54a. He declared a double major in pastoral ministries and business management, the education that he believed would "best prepare [him] for the complex management and spiritual tasks that comprise contemporary Christian ministry." J.A. 43.

Students who major in pastoral ministries at Northwest are pursuing a degree in theology taught from a religious perspective and thus are disqualified from promise scholarships. Pet. App. 10a; Pet. Br. 10-11. In October 1999, respondent was informed by the financial aid director at Northwest that, under the program's terms, he would have to forfeit his promise scholarship if he did not abandon his major in pastoral ministries. J.A. 45. Because respondent refused to abandon his chosen educational objective, he was deprived of his promise scholarship. Pet. App. 10a.

3. In January 2000, respondent filed this action in the District Court for the Western District of Washington, argu-

ing, *inter alia*, that the Board's policy of denying promise scholarship funds to otherwise eligible students solely on the basis of their decision to major in theology violates the Free Exercise Clause, Establishment Clause, and Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. J.A. 11-15. He sought a declaration that the Board's policy is unlawful, an injunction reinstating his promise scholarship, and certain other relief. J.A. 20-21. After the district court denied respondent's request for a preliminary injunction, see J.A. 75-81, the parties filed cross-motions for summary judgment. In October 2000, the district court granted summary judgment for petitioners, rejecting respondent's First Amendment and other claims. Pet. App. 51a-85a.

4. The court of appeals reversed. Pet. App. 1a-50a. The court held that the promise scholarship program violates the Free Exercise Clause insofar as it "conditions receipt of the Promise Scholarship on the recipient's not pursuing a degree in theology taught from a religious perspective," and that the Board's "classification based on religion is unconstitutional as applied through [the Board's] policy to [respondent]." *Id.* at 30a. In so holding, the court emphasized that the terms of the program and the administrative policy implementing it "necessarily communicate[] disfavor" of students who choose a path of religious study, and "discriminate[] in distributing the subsidy in such a way as to suppress a religious point of view." *Id.* at 22a.

Judge McKeown dissented. Pet. App. 31a-50a. In her view, "[t]his is a funding case, not a free exercise case or a free speech case," and "the State of Washington may constitutionally decline to fund pastoral studies as part of its Promise Scholarship." *Id.* at 33a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the First Amendment prohibits petitioners from making promise scholarships

available to all students who meet the academic performance, financial need, and enrollment criteria, except those who choose to pursue a degree in theology taught from a religious viewpoint.

A. The Establishment Clause, Free Exercise Clause, and Free Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment overlap and reinforce one another in requiring the State to maintain a position of neutrality with respect to religion and forbidding discrimination on account of religious beliefs or practices. The provision of the Washington program that disqualifies otherwise eligible students from a promise scholarship based solely on their decision to pursue a theology degree taught from a religious perspective directly contravenes those constitutional commands. Indeed, that provision engages in quintessential viewpoint discrimination against the study of religion from a religious perspective and sends the stigmatizing message that the State disfavors promising students who choose to pursue such religious studies.

B. The court of appeals correctly held that the Washington program violates the Free Exercise Clause. That Clause protects individuals from laws that impose special disabilities on the exercise of religious beliefs or practices. Laws that "target[] religious conduct for distinctive treatment," and thus are neither neutral nor generally applicable, are subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993). The Washington program is neither neutral nor generally applicable. On its face, the program and the Board's policy administering it disqualify any student who is pursuing a degree in theology. Nor is there any dispute that the disqualification provision targets theology taught from a religious perspective. See Pet. Br. 5-6, 22-23, 43. Indeed, the very reason for the disqualification is the inherently religious nature of such studies. Accordingly, the program's

disqualification provision must undergo the most searching constitutional scrutiny.

The disqualification provision does not survive such scrutiny, as petitioners all but concede by devoting their efforts to attempting to show that strict scrutiny is not applicable. Although a State may have a compelling interest in drawing religious classifications to avoid the violation of the federal Establishment Clause, that interest is not implicated by the private-choice program in this case. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). In addition, although States have a strong interest in complying with their own laws, that interest does not justify imposing special disabilities on religious activity that violate the Free Exercise Clause. *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *McDaniel* v. *Paty*, 435 U.S. 618 (1978). Nor does the disqualification provision advance the stated secular purpose of the program. The State's objectives in rewarding educational achievement and in encouraging the pursuit of opportunities in higher education are fully served by rewarding superior students without regard to whether they choose a secular course of study.

C. The Court's funding decisions reinforce the conclusion that the program's disqualification provision impermissibly targets religious pursuits for disfavored treatment. While the government generally enjoys substantial leeway in deciding what activities to fund, see, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991), that latitude does not trump the "constitutionally imposed 'governmental obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment." *Maher* v. *Roe*, 432 U.S. 464, 475 n.8 (1977). Moreover, in *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), this Court invalidated under the First Amendment a public university's program that made funds available to a variety of

student activities, except student publications with a religious viewpoint. Here, as in *Rosenberger*, the First Amendment prevents the State from singling out and excluding religious viewpoints from the educational opportunities and university discourse that the State otherwise chooses to subsidize—an area that is rich in expressive conduct protected by the First Amendment.

D. States retain substantial leeway under the Constitution in making funding decisions that may indirectly affect religion, but do not target religious pursuits for discriminatory treatment. For example, a State may choose based on a neutral secular objective to make scholarship funds available only to students who pursue courses in fields of study deemed important for technological advancement (*e.g.*, computer sciences), or who choose to attend public colleges or universities. But the First Amendment prevents a State from establishing a program that is designed to create educational opportunities for all promising high school graduates based on neutral, secular criteria such as academic performance and financial need, but disqualifies students who meet those criteria solely because they pursue religious study.

ARGUMENT

THE FIRST AMENDMENT PROHIBITS PETITIONERS FROM DISQUALIFYING OTHERWISE ELIGIBLE STUDENTS SUCH AS RESPONDENT FROM PROMISE SCHOLARSHIPS BASED SOLELY ON THEIR DECISION TO PURSUE A THEOLOGY MAJOR TAUGHT FROM A RELIGIOUS PERSPECTIVE

A. The Provisions Of The First And Fourteenth Amendments Reinforce One Another And Prohibit The State From Singling Out Religion For Discriminatory Treatment

The Establishment Clause, Free Exercise Clause, and Free Speech Clause of the First Amendment and the Equal

Protection Clause of the Fourteenth Amendment overlap and reinforce one another by requiring the government to assume a position of "wholesome 'neutrality'" with respect to religion. *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 222 (1963); see *Board of Educ. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he Religion Clauses * * * and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not to affect one's legal rights or duties or benefits."). That principle—and the corollary that the State may not target religion for disfavored treatment—is the starting point for this case.

The Establishment Clause acts as a limitation on "the scope of legislative power" to either advance or inhibit religion, which "is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor prohibits religion." *Abington Township*, 374 U.S. at 222; see *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 648-649 (2002). Although most of this Court's Establishment Clause cases have involved challenges to laws that allegedly benefitted religion, the Court has long recognized that the Establishment Clause forbids laws that *disadvantage* religion as well. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993); see also *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment) ("[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion.").

In determining whether a law that allegedly impermissibly benefits religion violates that principle of neutrality, this Court has considered whether a "reasonable observer" would believe that the State is endorsing a religious practice or belief. *Zelman*, 536 U.S. at 655; see *Mitchell* v. *Helms*, 530

U.S. 793, 835 (2000) (plurality); *id.* at 843 (O'Connor, J., joined by Breyer, J., concurring in the judgment); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in the judgment). The conclusion that a reasonable observer would believe that the State is *hostile* toward religion similarly bears on whether a law impermissibly inhibits religion. See *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring); *McDaniel* v. *Paty*, 435 U.S. 618, 636 (1978) (Brennan, J., joined by Marshall, J., concurring in the judgment) (a law that "manifests patent hostility toward, not neutrality respecting, religion * * * has a primary effect which inhibits religion").

"[A] further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state." *Abington Township*, 374 U.S. at 222. As this Court has observed, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. The Free Exercise Clause thus prevents a State from "impos[ing] special disabilities on the basis of religious views or religious status." *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 876-877 (1990) (citing *McDaniel* v. *Paty*, 435 U.S. 618 (1978)).

Lukumi recognizes that the Equal Protection Clause provides analogous protection against government action that singles out individuals because of their religion and subjects them to discriminatory treatment. In discussing the free exercise claim in that case, Justice Kennedy referred to the Court's equal protection jurisprudence and observed that determining a statute's neutrality may involve "an equal

protection mode of analysis." 508 U.S. at 540 (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). At the same time, the Court has grouped discrimination against individuals based on religion with discrimination based on race in discussing the Equal Protection Clause. See *Burlington No. R.R.* v. *Ford*, 504 U.S. 648, 651 (1992); *American Sugar Ref. Co.* v. *Louisiana*, 179 U.S. 89, 92 (1900); see also *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment) ("Just as the government may not segregate people on account of their race, so too it may not discriminate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.").

Similarly, the Free Speech Clause requires government to remain neutral with respect to religious viewpoints when it facilitates private expression in a public forum. In *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. at 822-823, the Court held that a public university violated the Free Speech Clause when it authorized payments from a student activity fund to a variety of student publications, but refused to authorize such payments for student publications with a religious viewpoint. As the Court explained, moreover, in singling out religious viewpoints for such "disfavored treatment," the university not only violated the free speech rights of students, but it impermissibly compromised "[t]he neutrality commanded of the State by the separate Clauses of the First Amendment." *Id.* at 831, 845; see *id.* at 845-846; see also *Lukumi*, 508 U.S. at 543 (discussing "parallels" between protections guaranteed by the Free Speech and Free Exercise Clauses).

The Washington promise scholarship program violates those overlapping commands of the First and Fourteenth Amendments by singling out and disqualifying students who otherwise meet the neutral eligibility criteria such as academic performance and financial need based solely on their

decision to pursue a major in theology taught from a religious perspective. Indeed, the program on its face creates a stigmatizing religious classification for receipt of educational assistance that may alter the lives of high school graduates. The court of appeals decided this case under the Free Exercise Clause and thus did not need to consider respondent's claims under the other provisions of the First and Fourteenth Amendments. As explained below, the court of appeals' free exercise analysis is correct, but the First and Fourteenth Amendments provide several different paths to the same end in this case.

B. The Program's Disqualification Provision Violates The Fundamental Constitutional Command That The State May Not Target Religion For Discriminatory Treatment

The court of appeals held that "denying a Promise Scholarship to a student otherwise qualified for it according to objective criteria solely because the student decides to pursue a degree in theology from a religious perspective infringes [the student's] right to the free exercise of his religion." Pet. App. 30a. That conclusion is correct and compelled by this Court's decisions.

1. The Free Exercise Clause protects individuals from laws that target religious beliefs or practices. See *Employment Div.*, 494 U.S. at 877; *Lukumi*, 508 U.S. at 532-533. In *Lukumi*, this Court held that "[a] law burdening religious practice that is not neutral or not of general applicability must undergo the most rigorous of scrutiny"—*i.e.*, "[t]o satisfy the commands of the First Amendment, [such] a law * * * must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." 508 U.S. at 546 (internal quotation marks omitted). A law fails the neutrality requirement if it "targets religious conduct for distinctive treatment," or otherwise "infringe[s] upon or restrict[s] practices because of their religious motivation." *Id.*

at 533-534. "[O]nly in rare cases" will "[a] law that targets religious conduct for distinctive treatment" comport with the liberty guarantee of the Free Exercise Clause. *Id.* at 546.

Although the Free Exercise Clause protects individuals against discrimination "which is masked as well as overt," *Lukumi*, 508 U.S. at 534, "the *minimum* requirement of neutrality is that a law not discriminate on its face," *id.* at 533 (emphasis added). See also *id.* at 557 (Scalia, J., joined by the Chief Justice, concurring in part and concurring in the judgment) ("[T]he defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e.g.*, a law excluding members of a certain sect from public benefits, cf. *McDaniel* v. *Paty*, 435 U.S. 618 (1978)).") (emphasis in original).

The Court has pointed to *McDaniel* v. *Paty*, *supra*, as a prototypical example of a law that impermissibly discriminates on its face against religion. See *Lukumi*, 508 U.S. at 523, 533; *Employment Div.*, 494 U.S. at 877. In *McDaniel*, the Court held that a Tennessee statute that disqualified clergy from serving as delegates to state constitutional conventions violated the First Amendment. 435 U.S. at 621, 629. Chief Justice Burger, writing for a plurality of the Court, explained that "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform similar religious functions, or, in other words, to be a minister," and that the State's "clergy-disqualification" violated that right by conditioning the [plaintiff]'s eligibility to be a state constitutional delegate on the surrender of his religious calling. *Id.* at 626. In other words, quoting the Writings of James Madison, the plurality concluded that the State had impermissibly "punish[ed] a religious profession with the privation of a civil right." *Ibid.*

Justice Brennan, joined by Justice Marshall, concurred in the judgment in *McDaniel*. As he explained, the clergy-disqualification provision "imposes a unique disability upon

those who exhibit a defined level of intensity of involvement in protected religious activity." 435 U.S. at 632. In agreeing with the plurality that the provision violated the Free Exercise Clause, Justice Brennan rejected the notion "that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment." *Id.* at 633. Rather, as he explained, "in prohibiting legislative service because of a person's leadership role in a religious faith, Tennessee's disqualification provision imposed an unconstitutional penalty upon [the plaintiff's] exercise of his religious faith." *Ibid.* (internal quotation marks and citation omitted).[2]

2. As the court of appeals explained, the promise scholarship program "lacks neutrality for the same reason that Tennessee's disqualification of ministers from public office, invalidated in *McDaniel*, lacked neutrality." Pet. App. 15a. On its face, the program (see Wash. Rev. Code § 28B.119.010(8) (2002); Wash. Admin. Code § 250-80-020(12)(g) (2003)) and the Board's policy administering it (J.A. 61-62) disqualify "any student who is pursuing a degree in theology." Wash. Rev. Code § 28B.119.010(8) (2002). The line drawn by the program between the study of theology and other subjects is plainly based on religion; as petitioners

[2] Justice Brennan separately concluded that the clergy-disqualification violated the neutrality command of the Establishment Clause as well. 435 U.S. at 636-642. As he explained, "the exclusion manifests patent hostility toward, not neutrality respecting, religion; forces or influences a minister or priest to abandon his ministry as the price of public office; and, in sum, has a primary effect which inhibits religion." *Id.* at 636; see *id.* at 639. The disqualification provision in this case likewise may force or influence financially needy students to abandon their training in religion as the price of obtaining a promise scholarship and thus manifests a hostility toward religion. Although the court of appeals did not need to reach that argument in deciding this case, see Pet. App. 31a, the Establishment Clause argument nonetheless was asserted by respondent in the lower courts and in his complaint (J.A. 13-14), and it accordingly provides another ground for affirming the decision below.

emphasize, the disqualification provision applies only to theology taught from a perspective "that inculcates belief (or disbelief) in God." Pet. Br. 5; pp. 3-4, *supra*. Accordingly, under the program, a promise scholar is free to pursue "all manner of instruction," except "religious instruction that inculcates religious belief (or disbelief)." Pet. Br. 43.

So, for example, a promise scholar is free to seek an education in anthropology, computer science, classics, european studies, marine affairs, music, oceanography, pharmacology, psychology, or women studies. See University of Washington, *Colleges, Schools, Departments, and Degree Programs* (modified May 15, 2003) <http://www.washington.edu/home/departments/departments.html.>. In addition, he may study comparative religion from a secular point of view. Pet. Br. 5. But if he elects to study religion from the perspective of those who accept religion as truth or seek to inculcate its values, he is barred from receiving the scholarship. Pet. Br. 43; see Pet. Br. 22-23. That is, if he elects to study the "Bible as truth," rather than as literature, Pet. Br. 10, no scholarship is available. The Washington program therefore not only targets religious subjects in general, it targets religious *viewpoints* in particular. See *Rosenberger*, 515 U.S. at 831; *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 123-125 (2001) (Scalia, J., concurring).

Respondent was deprived of his promise scholarship based on his decision to declare a major in pastoral ministries, in order to prepare to become "a member of the clergy." J.A. 101; see J.A. 43. Preparing to enter the ministry, no less than serving in the ministry, is a religious activity protected by the Free Exercise Clause. See *McDaniel*, 435 U.S. at 626; *Abington Township*, 374 U.S. at 222. Indeed, petitioners themselves acknowledge that "the right to practice religion * * * include[s] pursuing a degree in theology" taught from a religious perspective, Pet. Br. 24, and emphasize that the quintessentially religious nature of

that study is the reason that the State refuses to fund it, see Pet. Br. 5-6, 10. Thus, just like the disqualification provision invalidated in *McDaniel*, the one in this case on its face establishes a "religious classification"—based on "involvement in protected religious activity"—that imposes a "unique disability" on those who meet that classification by disqualifying them from a significant benefit made available to individuals who do not engage in such religious activity. 435 U.S. at 632 (Opinion by Brennan, J.).

Petitioners argue that the promise scholarship program is *neutral*, suggesting that it simply draws a "permissible distinction between secular and religious instruction." Pet. Br. 39-40. That argument is fallacious. The program's disqualification provision is specifically "directed at * * * religious practice"—"because of [its] religious motivation"—and therefore is not neutral. *Lukumi*, 508 U.S. at 533, 577; see *Good News Club*, 533 U.S. at 114. Indeed, the disqualification provision is drawn in terms of the same kind of religious classification that underlay the clergy-disqualification provision in *McDaniel*. Yet, as noted, the law in *McDaniel* is a classic example of "the defect of lack of neutrality" in this context. *Lukumi*, 508 U.S. at 557 (Opinion by Scalia, J.); see *id.* at 523, 533; *Employment Div.*, 494 U.S. at 877.

To be sure, as explained below, some classifications that take into account religion may be unavoidable. In particular, a State may distinguish between secular and religious activities when doing so is necessary to avoid advancing religion in violation of the Establishment Clause and the neutrality commanded by the First Amendment. The State in *McDaniel* unsuccessfully defended its clergy-disqualification provision on the ground that it was necessary to "prevent[] the establishment of a state religion," 435 U.S. at 628, and petitioners here asserted a similar defense below. Pet. App. 25a-28a. But the fact that some religious classifications might prove necessary to comply with the federal

Establishment Clause does not mean that a classification, such as the one at issue in this case, that singles out religious activity for unequal—and disfavored—treatment because of its religious motivation can avoid the strict scrutiny called for by this Court's precedents or, more to the point, that such a law can be labeled as neutral in the first place.

In any event, the promise scholarship program readily fails the closely related requirement of general applicability as well. As the Court explained in *Lukumi*, that requirement embodies the "principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." 508 U.S. at 543. The promise scholarship program plainly imposes such a burden; as explained, it "is administered so as to disqualify only students who pursue a degree in theology from receiving its benefit." Pet. App. 14a. That type of religion-specific disqualification or disability is the very antithesis of a law of general applicability.

3. Because the promise scholarship program is neither neutral nor generally applicable, it automatically triggers the most searching constitutional review. See *Lukumi*, 508 U.S. at 531-532, 546; *Employment Div.*, 494 U.S. at 886 n.3. The dissent below (Pet. App. 37a-38a) suggested that such strict scrutiny applies only if a law imposes a "substantial burden" (*id.* at 37a) on the exercise of religion. See Pet. Br. 37a-38a. That is incorrect.[3] As the Court emphasized in

[3] The lower courts are divided on this issue. Some courts of appeals have concluded that a facially discriminatory statute does not trigger strict scrutiny unless the plaintiff shows that the challenged classification substantially burdens religious exercise, see *Strout* v. *Albanese*, 178 F.3d 57 (1st Cir.), cert. denied, 528 U.S. 931 (1999); *KDM* v. *Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999), cert. denied, 531 U.S. 1010 (2000), while other courts have held that a law that fails the neutrality or general applicability requirements automatically triggers strict scrutiny, see *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002), cert. denied, 123 S. Ct. 2609 (2003); *Hartman* v. *Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995); *Peter* v. *Wedl*, 155 F.3d 992 (8th Cir. 1998).

Lukumi, a law that fails either the neutrality or general applicability requirements "must" undergo strict scrutiny. 508 U.S. at 531-532; see *id.* at 546.

Laws that target religion for discriminatory treatment squarely implicate the concerns that led to the ratification of the Free Exercise Clause more than 200 years ago, regardless of how perniciously they inhibit religious activities or beliefs. See *Lukumi*, 508 U.S. at 532; see also *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002), cert. denied, 123 S. Ct. 2609 (2003). That is particularly true in the case of laws that *facially* discriminate against religion. Indeed, a law forbidding theology students or Catholics from using the public parks would trigger (and flunk) strict scrutiny, even if going to public parks was in no way material to religious exercise. Moreover, quite apart from the individualized burdens that they may impose on religious exercise or beliefs, laws that contain such facial discrimination evince a hostility toward religion that simply is not tolerated by the First Amendment, absent a showing of the highest constitutional necessity. See Part A, *supra*.

In any event, the religious classification at issue imposes a direct and substantial burden on the exercise of religion by the students it singles out for disfavored treatment. Promise scholarships are made available only to students with special financial needs. See J.A. 50; Wash. Rev. Code § 28B.119.010(1)(b) (2002). Although respondent demonstrated the requisite financial need, because he elected to pursue a degree in pastoral ministries, he was deprived of a promise scholarship worth $1125 for the 1999-2000 year and another potential scholarship of $1542 for the following year. J.A. 45, 95. Although he has continued to pursue his ministry studies, respondent has had to make up the lost scholarship fund by working more than 20 hours a week while attending school. J.A. 48-49, 99-100. The extra time he has

spent working has adversely affected his studies and significantly altered his college experience. J.A. 48-49, 120.

Indeed, this Court has long recognized that, even in the context of programs that do not facially discriminate against religion, the denial of benefits to individuals solely because of their refusal to forgo their religious practices may constitute a substantial burden. For example, in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), a Seventh Day Adventist was denied unemployment benefits after being fired for refusing to work on Saturdays. The Court concluded that by "forc[ing] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work," the government had imposed "the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship." *Id.* at 404. The Court rejected the argument that unemployment benefits were not a right but merely a privilege, explaining that "[i]t is too late in the day to doubt that the liberties of religion * * * may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Ibid.* Applying *Sherbert*'s analysis, the program in this case effectively imposes a $1125 fine on respondent for following what he believes to be his religious calling to prepare for a life in the ministry. J.A. 8-9, 43.

Petitioners state that respondent could have used his promise scholarship to study business management at Northwest and still pursued a theology degree "at *another* school using his own funds." Pet. Br. 25, 38-39 (emphasis added). But, as the court of appeals explained, "[a] state law may not offer a benefit to all * * * but exclude some on the basis of religion." Pet. App. 16a. Promise scholars remain free to pursue double majors, as long as one of their majors is not theology taught from a religious perspective. Requiring promise scholars, such as respondent, who wish to pursue a double major that includes theology to shoulder the added

financial and practical burdens of enrolling in and attempting to integrate themselves into the educational communities of two *separate* colleges is a substantial burden by any measure. Moreover, no separate-school option is available to students who are interested in pursuing only a single, disqualifying religious major.

4. This is not one of the "rare cases" (*Lukumi*, 508 U.S. at 546) in which a law targeting religion for discriminatory treatment survives strict scrutiny. Indeed, petitioners devote their efforts in this Court to arguing that strict scrutiny does not apply and never directly challenge the court of appeals' holding that the program fails such scrutiny. See Pet. App. 25a-31a.

a. This Court has recognized that there is a compelling interest in drawing content-based religious classifications to avoid violation of the Establishment Clause. See *Good News Club*, 533 U.S. at 112-113; *Rosenberger*, 515 U.S. at 837-838. For example, as amici Vermont et al. point out (Br. 17 n.4), some federal statutes that provide *direct* aid to schools specify that such aid may not be made available "for any educational program, activity or service related to sectarian instruction or religious worship." 20 U.S.C. 1062(c)(1). But the Court has indicated that such classifications are necessary to alleviate the "special Establishment Clause dangers [present] when *money* is given to religious schools or entities directly rather than * * * indirectly." *Mitchell*, 530 U.S. at 818-819 (internal quotation marks and citations omitted; emphasis in original).[4]

---

[4] All but one of the federal statutes cited by amici Vermont et al. (Br. 17-18 & n.4) are part of programs that involve the provision of direct financial aid to schools or other entities and thus are distinguishable from the private-choice program in this case. See 25 U.S.C. 1803(b) (direct grants by the Secretary of the Interior to colleges and universities controlled by Indian tribes may not be "used in connection with religious worship or sectarian instruction"); 20 U.S.C. 1062(c)(1) (direct grants by Secretary of Education to historically black colleges and universities may

However, petitioners do not argue that the disqualification provision in this case is necessary to avoid violation of the Establishment Clause, and it plainly is not. Absent the disqualification provision at issue, the promise scholarship program would bear all the hallmarks of the educational assistance programs upheld in *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), and *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). *Witters*, after all,

---

not be made "for any educational program, activity, or service related to sectarian instruction or religious worship, or provided by a school or department of divinity"); 20 U.S.C. 1066c(c) (loan guarantees for capital improvements to historically black colleges and universities may not be made "for any educational program, activity, or service related to sectarian instruction or religious worship, or provided by a school or department of divinity or to an institution in which a substantial portion of its functions is subsumed in a religious mission"); 20 U.S.C. 1068e(a) (use of appropriated funds "for a school or department of divinity or any religious worship or sectarian activity" is not allowed under programs providing grants to institutions serving economically disadvantaged students or certain other schools); 42 U.S.C. 5001(a)(2) (grants to state agencies and nonprofit groups for volunteer service projects for elderly volunteers may not be used for "projects involving the construction, operation, or maintenance of so much of any facility used or to be used for sectarian instruction or as a place for religious worship"). Congress has recognized the distinction drawn by this Court's decisions between direct and indirect funding. Thus, while States that give federal child care block funds *directly* to entities are barred by federal law from allowing such funds to be used for religious activities, 42 U.S.C. 9858k(a), States that choose to provide *parents* with federally funded certificates for use at the child care provider of their choice are required by federal law to allow parents to choose religious as well as nonreligious providers, 42 U.S.C. 9858n(2). The one statute cited by amici Vermont et al. that does not involve a bar on direct aid to religious programs—25 U.S.C. 3301 *et seq.*—is also distinguishable. That statute provides direct grants to Indian Tribes, which in turn "make grants to individual Indian students." 25 U.S.C. 3303(b)(1). The Tribes are given substantial discretion regarding how to use the funds. See 25 U.S.C. 3303(b). As a result, there is no programmatic guarantee that a Tribe would dispense aid in a neutral manner, and respect for tribal autonomy may counsel against imposing a requirement that a Tribe dispense the aid only as part of a genuinely neutral private choice program.

involved the use of Washington vocational assistance funds made available on neutral terms to an individual who chose to use the funds to study for the ministry at the Inland Empire School of the Bible. 474 U.S. at 483. The promise scholarship program, like the programs in *Witters* and *Zelman*, is designed to promote educational opportunity and scholarship funds may reach schools only as a result of the truly private choices of aid recipients. See Pet. App. 29a-30a.

In the court of appeals, petitioners argued that the State's interest in not violating a provision of its *own* constitution is compelling. See Pet. App. 25a. Petitioners do not appear to renew that argument in this Court, but the court of appeals correctly rejected it. *Id.* at 28a. Even assuming that the Washington constitution would prohibit granting promise scholarships to students that choose to pursue a degree in theology (a debatable point of state law, see *id.* at 26a), the State's interest in complying with that provision would not justify targeting religious activity in a way that otherwise violates the First Amendment of the Federal Constitution. See U.S. Const. Art. VI, Cl. 2; *Widmar* v. *Vincent*, 454 U.S. 263, 275-276 (1981); *McDaniel*, 435 U.S. at 628-629; see also *Good News Club*, 533 U.S. at 107-108 n.2 (potential need to comply with state law would not justify viewpoint discrimination against religious groups).

Widmar involved a challenge to a state university's policy of opening its facilities to student activities except for groups engaged in religious activities. In defending that policy, the State argued "that the State of Missouri has gone further than the Federal Constitution in proscribing indirect state support for religion," and that the university had "a compelling interest in complying with the applicable provisions of the Missouri Constitution." 454 U.S. at 275. The Court declined to decide whether "a state interest, derived from [a State's] own constitution, could *ever* outweigh free speech interests protected by the First Amendment," *id.* at 275-276

(emphasis added), but it made clear that a State's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution * * * is limited by the Free Exercise Clause and * * * by the Free Speech Clause." *Id.* at 276. In *McDaniel*, the Court similarly rejected Tennessee's effort to defend its clergy-disqualification provision based on the State's own interest in preventing an establishment of religion. 435 U.S. at 628-629.[5]

b. Nor does the disqualification provision advance the legitimate secular objective of the promise scholarship program. To the contrary, the provision *frustrates* that purpose. As petitioner Locke has observed, the promise scholarship program is designed "to provid[e] the best possible educational opportunities for the young people of the state of Washington" and is built on the recognition that "[e]ducation is the great equalizer in our society." J.A. 56; see Wash. Admin. Code § 250-80-010 (2003) ("Purpose. The Washington promise scholarship program recognizes and encourages the aspiration for superior academic achievement of high school students who attend and graduate from Washington high schools."). That ideal is advanced just as readily when a promising high school graduate decides to

[5] The Washington constitutional provision on which petitioners have relied in this case is a "Blaine Amendment" that has its origins not in the type of neutrality toward religion promoted by those like Jefferson and Madison, but in the "pervasive hostility to the Catholic Church and to Catholics in general" that existed in the late 19th century. *Mitchell*, 530 U.S. at 828. Washington was required by Congress to enact a Blaine provision in its constitution by its enabling act. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. The record of Washington's constitutional convention indicates that the State's Blaine provision has "a similar original intent and purpose" as the Blaine Amendment. See Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 Hastings Const. L.Q. 451, 468 (1988). That history provides all the more reason to reject any reliance on the provision as a means of justifying the discriminatory treatment at issue here.

pursue a college education that will prepare him to enter the ministry as when such a graduate decides to pursue a degree in a field like history, chemistry, or psychology. Cf. *Abington Township*, 374 U.S. at 218 ("Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance."). In either case, the State receives the full secular value of its program, just as it received a full return on the vocational assistance funds that Larry Witters used to prepare for a career in the Christian ministry. See *Witters*, 474 U.S. at 488.

C. The Court's Funding Cases Only Reinforce The Conclusion That The Promise Scholarship Program Impermissibly Singles Out Religion For Disfavored Treatment

Petitioners argue (Br. 20) that this case "falls squarely within th[e] principle" that "the government's decision not to fund the exercise of a fundamental right does not infringe that right." The court of appeals correctly rejected that argument and, instead, analogized the funding program in this case to the one invalidated under the First Amendment's Free Speech Clause in *Rosenberger*.

1. This Court has repeatedly recognized that "[w]ithin broad limits, 'when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.'" *United States* v. *American Library Ass'n*, 123 S. Ct. 2297, 2307-2308 (2003) (plurality) (*ALA*) (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991)). Thus, for example, in *Rust* the Court upheld regulations limiting the ability of certain federal funding recipients to engage in abortion counseling as a method of family planning. As the court explained, in crafting social policy, the government is free to choose "to subsidize family planning services which will lead to conception and childbirth, and declin[e] to 'promote and encourage abortion.'" 500 U.S. at 193. In *Maher* v. *Roe*, 432 U.S. 464 (1977), and *Harris* v. *McRae*, 448 U.S. 297

(1980), the Court similarly upheld federal funding restrictions that allowed recipients to use funds for medical services related to childbirth but not for abortions. See also *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983).

That line of government funding cases, however, does not authorize the sort of religious classification at issue in this case. As this Court itself recognized in *Maher*, one of the primary decisions on which *Rust* is built, see *Rust*, 500 U.S. at 192-194, those funding cases do not control the "significantly different context" in which a funding decision impinges on the "constitutionally imposed 'government obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment." 432 U.S. at 475 n.8 (distinguishing *Sherbert*, *supra*). Moreover, that understanding is underscored by the cases discussed above, which establish that the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or *benefits*," *McDaniel*, 435 U.S. at 639 (Opinion by Brennan, J.) (emphasis added), including benefits that come in the form of subsidies. See *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in the judgment) ("Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."); see also *Sherbert*, 374 U.S. at 404-405 & n.6.

When benefits are denied to individuals who otherwise meet a program's eligibility criteria solely because of a *religious* classification, the State is not simply declining to subsidize a constitutional right—a harm that this Court has held insufficient in other contexts. See *Rust*, 500 U.S. at 194-195; *Regan*, 461 U.S. at 549. Rather, the State is singling out religion for "distinctive treatment" (*Lukumi*, 508 U.S. at 534) in a manner that may disrupt the neutrality uniquely commanded by the First Amendment in matters of religion. Indeed, government funding cases like *Rust* emphasize that the State may make "value judgment[s]" about what conduct

it seeks to promote or discourage through the dispensation of public funds. 500 U.S. at 192; see *id.* at 193. But in matters of religion, the First Amendment strictly scrutinizes and disallows any "value judgments" that religion should be explicitly and exclusively disfavored. Thus, although a State may decide to subsidize medical services for the poor for childbirth but not abortion, it may not decide to fund medical services for Catholics, but not atheists.

Nor does this case involve a situation in which the government is funding its own speech and thus has even wider leeway in defining a particular message. See *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 542-543 (2001); *ALA*, 123 S. Ct. at 2309 n.7. The promise scholarship program was established to promote post-secondary educational opportunities for the most promising high school students with financial needs and—save for its disqualification provision—allows for and facilitates the full diversity of private viewpoints present in any robust university system.

2. As the court of appeals recognized, in terms of cases involving challenges to funding programs, *Rosenberger* is the better analogue. Pet. App. 18a-21a. In *Rosenberger*, the Court considered a challenge brought under the Free Speech Clause of the First Amendment to a student activities fund established by a public university, which subsidized a variety of student publications and other extracurricular activities, but withheld funding for student newspapers that promoted a religious message. 515 U.S. at 824. The Court held that the funding restriction violated the First Amendment by singling out "for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 831. In so holding, the Court specifically rejected the university's effort to distinguish the Court's public forum access cases, such as *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), on the ground that *Rosenberger* involved "the provision of funds rather than

access to facilities." 515 U.S. at 832. In addition, the Court rejected the argument that the university's policy was necessary to "obey the Establishment Clause," and, instead, found that "[t]he neutrality commanded of the State by the separate Clauses of the First Amendment was *compromised* by the University's course of action." *Id.* at 845 (emphasis added).

The scholarship program in this case is comparable to the program in *Rosenberger*. The program facilitates a broad spectrum of educational activities and viewpoints undertaken by students, but singles out religious viewpoints for disfavored treatment. In addition, as the court of appeals explained, the educational activities facilitated by the promise scholarship program are rich in expression protected by the Free Speech Clause from the standpoint of both the students who elect particular paths of study and the teachers who engage promise scholars in their selected courses of study. See Pet. App. 20a; *Rosenberger*, 515 U.S. at 836.

If anything, the funding program in this case is more difficult to square with the First Amendment than the one in *Rosenberger*. While the discrimination by the university in *Rosenberger* against the funding of student activities with a religious viewpoint might have been thought necessary in that case because the program involved more direct transmission of funds from the State to religious entities, here the indirect nature of the funding and genuine and independent student choice eliminate any Establishment Clause concerns arguably present in *Rosenberger*.

Like the university in *Rosenberger*, petitioners argue (Br. 44-45) that the Court's forum access cases are not instructive. Here, as in *Rosenberger*, 515 U.S. at 832, that argument should be rejected. There is no more reason under the First Amendment and the basic principles discussed above to allow a State to deny generally available scholarships to theology students than to deny generally available class-

rooms to religious clubs. Although funding programs present additional considerations, the First Amendment is not so idiosyncratic that it forbids a State from opening public school facilities after hours to any users except religious users, but permits a State to open educational opportunities to any promising students except theology students.[6]

D. The First Amendment Leaves States Broad Leeway To Design Programs That May Indirectly Affect Religion But Do Not Single Out Religion For Disfavored Treatment

Petitioners' amici argue that it is important for this Court to leave room for the States to "take diverse paths to religious freedom" and that "States must be granted the opportunity to come to their own conclusions as to how best to achieve religious liberty." Br. for Vermont et al. 20-30. But recognizing—consistent with the First Amendment and this Court's precedents—that the promise scholarship program impermissibly singles out religion for disfavored treatment will not deprive the States of room that the Constitution currently affords them. Moreover, the "play in the joints" between what the Free Exercise Clause requires and what the Establishment Clause forbids does not provide any basis for state action, like the program in this case, that *both* the Free Exercise Clause and Establishment Clause condemn. See Part B and note 2, *supra*.[7]

---

[6] In *Velazquez*, this Court reiterated that, although they "may not be controlling in a strict sense," "limited forum cases" such as *Lamb's Chapel* and *Rosenberger* "do provide some instruction" in cases involving challenges to speech restrictions placed on the receipt of "subsid[ies]." 531 U.S. at 544. That instruction only underscores that the disqualification provision at issue in this case impermissibly discriminates against religious viewpoints in violation of the First Amendment.

[7] In pressing the need for "play in the joints" between the Free Exercise and the Establishment Clauses, petitioners and their amici rely on *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970). *Walz*, however, involved the government accommodation of religion by granting property tax exemptions to religious organizations for religious properties. The Court

Nor would finding a First Amendment violation in this case categorically *require* States to subsidize religious instruction. States retain broad leeway to fashion educational assistance programs in any number of ways that do not target religion for disfavored treatment. For example, a State could decide based on a valid secular objective to provide scholarships only to students attending public colleges or universities, and thus avoid having to fund students who attend private schools, including private religious schools. Similarly, a State could choose for a valid secular purpose to fund scholarships for those majoring in specific areas such as agriculture or engineering in which there might be a secular need for additional training. In addition, as discussed above, States may prohibit direct funding of religious entities when necessary to avoid violating the Establishment Clause.

A State may not, however, establish a general assistance program that offers educational opportunities to the most promising students with financial needs, permit them to use the aid to attend any public or private accredited school of their choosing, and then deprive otherwise eligible students of such assistance solely because they elect to pursue a theology education from a religious viewpoint. Such a stigmatizing religious classification is prohibited by the First Amendment and inconsistent with our traditions.

---

in *Walz* stated "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669. Government efforts to accommodate religion, such as the tax exemption upheld in *Walz*, advance the principle of neutrality by minimizing government interference and entanglement with religion and thus "follow[] the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). The same thing cannot remotely be said of government action that discriminates against religion.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
R. ALEXANDER ACOSTA
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
GREGORY G. GARRE
Assistant to the Solicitor General
DAVID K. FLYNN
ERIC W. TREENE
KAREN L. STEVENS
Attorneys

SEPTEMBER 2003