No. 02-1315

In The Supreme Court of the United States

GARY LOCKE, Gov., individually and in his official capacity; MARCUS S. GASPARD, individually, and in his official capacity as Executive Director of the Higher Education Coordinating Board; BOB CRAVES, individually, and in his official capacity as Chair of the Higher Education Coordinating Board; JOHN KLACIK, individually, and in his official capacity as Associate Director of the Higher Education Coordinating Board,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

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

BRIEF OF THE INSTITUTE FOR JUSTICE, THE CENTER FOR EDUCATION REFORM, CATO INSTITUTE, CITIZENS FOR EDUCATIONAL FREEDOM, AND THE GOLDWATER INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The **Institute for Justice** is a 501(C)(3) nonprofit, public interest law firm dedicated to protecting individual liberties. One of the core areas on which the Institute focuses its activities is the promotion of parental choice in education. Since its founding 12 years ago, the Institute has participated in the defense of every parental choice program passed by the various state legislatures, including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), usually by representing as defendant-intervenors parents of schoolchildren attending schools using scholarships made available under these programs. A primary legal issue in these cases has been whether the inclusion of parental options to choose a religious school for their children to attend comports with the federal and state constitutions' religion clauses.

The **Center for Education Reform** ("CER") is a national voice for more choices in education and more rigor in education programs, both of which are key to more effective schooling. CER delivers practical, research-based information and assistance to engage a diverse lay audience – including parents, policymakers and education reform groups – in taking actions to ensure that U.S. schools are delivering a high quality education for all children in grades K-12.

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[1] This brief is filed with the consent of the parties. No counsel to any of the parties to this matter authored this Brief in whole or in part. No person or entity other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief.

The **Cato Institute** was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Towards those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case raises squarely issues of increased choice in the educational marketplace and the interaction of the First Amendment Establishment Clause and Free Exercise values and thus is of central interest to Cato and the Center.

Citizens for Educational Freedom ("CEF") is a national, grassroots organization with its headquarters in Missouri. Founded in 1959, CEF is dedicated to supporting parents' rights to choose schools for their own children. The **Educational Freedom Foundation** is a charitable foundation affiliated with CEF and serves to educate the public about parental rights in education and school choice issues.

The Goldwater Institute, established in 1988, is a nonprofit, independent, nonpartisan, research and educational organization dedicated to the study of public policy. Through its research papers, editorials, policy briefings and forums, the Institute advocates public policies founded upon the principles of limited government, economic freedom and individual responsibility. One of the central missions of the Goldwater Institute is studying and

promoting parental decision making and control in education.

SUMMARY OF ARGUMENT

The U.S. Constitution does not permit states to control or channel the free and independent choices of individuals in matters of religion or speech. Yet, in the case under consideration, that is precisely what the state of Washington has sought to do under the aegis of the state constitution's Blaine Amendment (Wash.Const. art. 1, section 11). More broadly, the state has asserted the right to subsidize individuals' choices of secular higher education while denying equal benefits to those who would choose an education with religious purpose. This constitutes discrimination on the basis of religion, violating no less than four provisions of the Federal Constitution.

As the Ninth Circuit held below, Washington's denial of a Promise Scholarship to Joshua Davey solely because he had chosen to pursue a Pastoral Studies major at a religious college violated his rights under the Free Exercise of Religion Clause of the First Amendment. His choice of this major was religiously motivated, and Washington's denial was unquestionably based upon its conclusion that to fund his scholarship would violate the state's Blaine Amendment language prohibiting the application of state funds to religious instruction or the support of any religious establishment.

Washington's action also constituted viewpoint discrimination under the Free Speech Clause. Were Davey studying theology courses at a public or private secular university he would have received the scholarship. It was

only because his college was religious and taught theology from the perspective of religious truth that Washington disqualified him from state aid.

In distinguishing between theology programs and courses at religious versus secular institutions, Washington plainly draws a line on the basis of religion, a suspect classification under the Equal Protection Clause of the Fourteenth Amendment and subject to strict scrutiny under this Court's precedents. Washington lacks a compelling justification for this religious discrimination, nor is its exclusion of Mr. Davey narrowly tailored to meet such a justification.

Finally, by discriminating against individuals choosing to major in religious studies offered from a religious perspective at religious colleges, Washington violates the Establishment of Religion Clause by deliberately hindering religion as against non-religion. The religious neutrality called for by this Court's *Lemon* test for Establishment Clause violations forbids programs with a primary effect either advancing *or inhibiting* a particular religion or religion in general. Extending the reach of Washington's Blaine Amendment to encompass the free and independent choices of private individuals plainly has the primary effect of inhibiting religion.

ARGUMENT

I. INTRODUCTION

Washington, like 36 other states, has a religion clause in its state constitution familiarly known as a Blaine Amendment.[2] Some 29 states, not including Washington, have what commentators characterize as "compelled support" clauses involving religion in their constitutions.[3] All told, only three states have neither sort of provision in their constitutions.[4] Virtually all of these religion clauses were adopted long before – in some cases, more than a century before – this Court held in 1947 that the federal Constitution's religion clauses apply to the states in *Everson v. Board of Education*, 330 U.S. 1 (1947). The existence and prevalence of these state religion clauses create a myriad of opportunities for conflicting interpretations of state and federal requirements. One area where

[2] The common denominator of what we term the Blaine Amendments is a prohibition on state aid to sectarian (*i.e.*, religious) institutions. A number of states adopted such provisions before the federal Blaine Amendment narrowly failed to pass Congress with the requisite two-thirds majorities in 1876. The anti-Catholic Republican majorities in both houses of Congress had more than enough votes to subsequently require through enabling legislation that new applicants for statehood (such as Washington) include Blaine amendments in their state constitutions. See generally Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J. L. & Pub. Pol'y 657 (1998).

[3] The common denominator of "compelled support" clauses is language stating that no person shall be compelled to attend or support any church or religious ministry without his consent. Generally of an earlier derivation than the Blaine Amendments, these clauses disestablished state churches/religions by stripping them of their previous state – mandated support.

[4] Louisiana, Maine, and North Carolina.

these conflicts are particularly acute involves parental choice programs in education.

Increasing dissatisfaction with the current condition of America's public elementary and secondary education system, particularly in America's inner cities, where a huge proportion of minority students are educated in school districts whose performance can at best be described as dismal, has spawned an intense interest in educational alternatives. Among the most promising alternatives are reforms premised on parental choice, in which parents are empowered to select private schools for their children by receiving scholarships or vouchers.[5] Such reforms engender fierce opposition on the part of organizations, such as the teachers' unions, that have a stake in preserving the near monopoly that public school systems exercise by virtue of their provision of free education. One of their most common allegations against parental choice proposals is that such proposals violate state constitutional religion clauses like the Blaine Amendments and compelled support provisions. They routinely subject such programs to legal challenges under the Blaine Amendments, often disrupting the programs and the precious educational opportunities they provide.[6]

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[5] *Amici* include in this category tax credit programs that allow parents tax credits for private educational expenses or that help generate private scholarships by tax credits for donations to scholarship funds.

[6] For example, in 1994 the Puerto Rico Supreme Court invalidated an innovative parental choice program under its Blaine Amendment because it permitted parents to use scholarships to send their children to religious schools as well as private secular schools. *Association de Maestros v. Torres*, 137 D.P.R. 528, 1994 PR Sup. LEXIS 341 (1994).

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These allegations are premised on the same reasoning that opponents presented to this Court under the Establishment Clause in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). They interpret these provisions to prohibit aid to individuals who are given a free and independent choice of schools for their children to attend and who choose a religious provider, on the theory that the parents are inconsequential conduits of aid to the religious schools they've chosen. In essence, opponents of such programs equate aid to the families to aid given directly to the schools as schools.[7] A number of state supreme courts have in the past adopted this reasoning, sometimes conscious they were adopting a more restrictive approach than this Court has taken in analogous cases under the Establishment Clause.[8]

Similarly, in 1999, the Vermont Supreme Court reinterpreted the compelled support language in its constitution to prevent parents from selecting religious schools under its longstanding school choice program. *Chittenden Town Sch. Dist. v. Dep't of Ed.*, 738 A.2d 539 (Vt.), *cert. denied*, 528 U.S. 1066 (1999). Absent a definitive ruling from this Court that the Federal Constitution prohibits singling out religious schools and their patrons for adverse treatment, state parental choice programs will continue to be subjected to constant litigation reaching divergent results. See generally Bolick, *Voucher Wars: Waging the Legal Battle Over School Choice* (2003).

[7] *Amici* are not arguing that direct aid to religious schools is or is not constitutional – that issue, left open by *Mitchell v. Helms*, 530 U.S. 793 (2000), is not raised by this case.

[8] See *Visser v. Nooksack Valley Sch. Dist.*, 207 P.2d 198 (Wash. 1949); *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961); *State ex rel. Nussbaum*, 115 N.W.2d 761 (Wis. 1962); *Bd. of Ed. v. Antone*, 384 P.2d 911 (Okla. 1963); *Opinion of the Justices*, 216 A.2d 668 (Del. Sup. 1966); *Spears v. Honda*, 449 P.2d 130 (Haw. 1968); and *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971), all disallowing the transportation of children to religious schools

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The Washington Supreme Court is the most notorious in this regard. In *Visser v. Nooksack Valley School Dist.*, 207 P.2d 198 (Wash. 1949), just two years after this Court held in *Everson* that states were subject to the federal religion clauses in a case upholding New Jersey's practice of subsidizing the transportation of all children to their schools, including religious schools, the Washington Supreme Court held that its Blaine Amendment forbade a similar program in Washington. Similarly, after this Court issued its unanimous Establishment Clause decision in *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986), holding that it was constitutional for Washington to allow Witters to pursue a religious vocation by attending a religious college with state assistance, but remanding the case to the Washington Supreme Court for a ruling on the effect of the Washington constitution, that court held that its Blaine Amendment prohibited Witters from using his entitlement at a religious college. *Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119 (Wash.), *cert. denied*, 493 U.S. 850 (1989).

It is this state court interpretation of the Washington Blaine Amendment that has led to the case under consideration. Washington continues to treat aid given to

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under state religion clauses post-*Everson*. See *Gaffney v. Dep't of Ed.*, 220 N.W.2d 550 (Neb. 1974); *Pastor v. Tussey*, 512 S.W.2d 97 (Mo. 1974); *McDonald v. Sch. Bd.*, 246 N.W.2d 93 (S.D. 1976); *Bloom v. Sch. Comm.*, 379 N.E.2d 578 (Mass. 1978); *California Teachers Ass'n v. Riles*, 632 P.2d 953 (Cal. 1981); and *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983), all disallowing free secular textbooks for children in religious schools under state religion clauses after this Court upheld a similar program under the Establishment Clause in *Bd. of Ed. v. Allen*, 392 U.S. 236 (1968).

individuals as aid to religious schools, even where the individuals choose such schools in a religiously-neutral program with a surfeit of secular choices. In so doing, Washington is applying a state constitutional provision that was designed to disadvantage Catholics in a way that now disadvantages all religions. This more "catholic" discrimination is equally repugnant to the principles of religious liberty incorporated into the U.S. Constitution, notwithstanding Washington's and its supporting *amici*'s attempts to justify its actions as simply a more rigorous and purportedly virtuous separation of church and state.

II. WASHINGTON'S BLAINE AMENDMENT CANNOT BE DIVORCED FROM ITS ANTECEDENTS IN RELIGIOUS BIGOTRY.

Members of this Court have recognized that state Blaine Amendments are not a benign expression of a desire for a stricter separation of church and state. Justice Thomas, writing for the four-member plurality in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000), stated that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Consideration of the [Blaine] Amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general. And it was an open secret that 'sectarian' was a code word for 'Catholic.'" Similarly, the Arizona Supreme Court refused to apply its Blaine Amendment, which was modeled on Washington's, to a tax credit program, noting that "[t]he Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the

contemporary Protestant establishment to counter what was perceived as a growing 'Catholic' menace." *Kotterman v. Killian*, 972 P.2d 606, 626 (Ariz. 1999).[9]

Petitioners, and particularly their *amici* Historians and Law Scholars on Behalf of Petitioners, seek to obfuscate and deny this well-established history. In an effort that can at best be characterized as disingenuous, those *amici* contend that the federal Blaine Amendment arose from a variety of factors of which anti-Catholicism was but one, and that there is no evidence that Washington's Blaine Amendment was motivated by anti-religious or anti-Catholic animus. Rather, they suggest that state constitution drafters, both before and after the failed effort to enact the federal Blaine Amendment, were "primarily concerned with the survival of the nascent public schools and in securing their financial security."[10]

What this analysis fails to put into proper perspective is that the "nascent public schools" these amendments sought to protect were in fact pervasively and intentionally Protestant institutions, hostile to the Catholic faith.[11] Protecting their monopoly over the use of state education

[9] The court went on to say that "we would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it." *Id.*

[10] Brief *Amicus Curiae* of Historians and Law Scholars on Behalf of Petitioners at 17.

[11] See generally Jorgenson, *The State and the Non-Public School; 1825-1925* (1987); Gall, *The Past Should Not Shackle The Present: The Revival of a Legacy of Religious Bigotry By Opponents of School Choice*, 59 N.Y.U. Ann. Surv. Am. L. 413 (2003).

funds was hardly a religiously-neutral act in that context.[12]

Similarly, the absence of evidence regarding Anti-Catholicism in the debates on the Washington Constitution of 1889, in which the state Blaine Amendment language first appeared, is hardly dispositive of the question whether the Amendment was improperly motivated, because of the simple fact that the federal Enabling Act of 1889 *required* the state to establish a system of public schools free of sectarian control.[13] That Act effectively permitted the customary "nonsectarian" public schools (*i.e.*, generically Protestant public schools), while denying funding to "sectarian" Catholic schools.[14] That the federal government required Washington to incorporate the Blaine approach into its constitution in order to become a state simply means that the discriminatory motivation

[12] The *amici* do appear to concede that the public schools of the 19th century had a "Protestant nonsectarian complexion" (*Amici* Brief at 19) and that "nonsectarian" meant a "watered-down Protestantism" in which doctrines distinguishing sects of Protestants were not taught (*id.* at 18). They fail to draw the obvious conclusion, however, that the effort to preserve the public school monopoly on funds was thus a bigoted and hypocritical effort by the Protestant establishment to retain funds for its schools and deny funds to those of the Catholics.

[13] See Enabling Act, ch.180, section 4, 25 Stat. 676-77 (1889).

[14] The effort of Oregon in 1923, fueled by the Ku Klux Klan among others, to require that all schoolchildren attend public schools that led to this Court's decision in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), takes on a distinctly religious cast when one realizes that the public schools were generically Protestant.

existed at least at the federal level and possibly at the state level as well.[15]

This Court need not go so far as to invalidate Washington's Blaine Amendment *in toto*, but must overrule interpretations of it that conflict with federally-protected rights.[16] Given the current state of federal religion clause jurisprudence, some forms of direct assistance to religious schools *qua* schools would probably still fail to pass federal muster under *Mitchell v. Helms*, and can be similarly foreclosed by state Blaine Amendments. But denying assistance such as Promise Scholarships on a discriminatory basis, where individuals choose religious educational options and where such assistance is clearly permissible under the federal Constitution,[17] cannot be permitted.

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[15] In the analogous context of race discrimination, school districts that segregated African-American students pursuant to state law were not immune from suit if plaintiffs could not show evidence the district agreed with the state policy and would have adopted it without state coercion.

[16] After all, virtually all state religion clauses were adopted at a time when no one seriously thought the federal religion clauses applied to the states. Accordingly, they were usually intended to provide parallel protections to the Federal Constitution's guarantees of religious liberty. Thus, the failed federal Blaine Amendment itself contained language prohibiting state establishments of religion and protecting free exercise, before going on to forbid aid to sectarian institutions.

[17] Similar federal student assistance programs like the G.I. Bill, 38 U.S.C. § 3451 *et seq.*, Pell Grants, 20 U.S.C. § 1070 *et seq.*, and Guaranteed Student Loans, 20 U.S.C. § 1070a *et seq.*, do not exclude ministerial students or students majoring in theology. While virtually all states have student assistance programs similar in many respects to Washington's Promise Scholarships, Washington notes in its Petition for Certiorari that only 14 have statutes that prohibit using public funds to pay for a degree in theology. Pet. at 22.

III. WASHINGTON'S EFFORTS TO CONTROL AND CHANNEL THE FREE AND INDEPENDENT CHOICES OF INDIVIDUALS WITH RESPECT TO RELIGION VIOLATE THE FEDERAL CONSTITUTION.

A. Introduction

In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), this Court rebuffed Oregon's efforts to require that all its schoolchildren attend public schools. In doing so, the Court said:

> [W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often hitherto pointed out, rights guaranteed by the constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional responsibilities.

268 U.S. at 534-35.

Amici believe it is this preexisting right to direct the education of their children that underpins and justifies distinguishing between programs in which governments provide assistance directly to schools and those in which assistance is provided to individuals or families to allow them to select schools. In the line of cases commencing

with *Everson*, 330 U.S. 1 (1947), continuing through *Board of Ed. v. Allen*, 392 U.S. 236 (1968), *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), and culminating in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), this Court has permitted the individual beneficiaries of government programs to select a religious education for themselves or their children, where "any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely free and independent choices of aid recipients." *Witters*, 474 U.S. at 487.

By excluding students pursuing theology degrees from religious colleges[18] Washington seeks to exercise "a general power to standardize its children by accepting instruction from [secular] teachers only." Petitioners argue that in limiting their program to secular instruction they are merely enforcing a more rigorous "separation" of church and state. But there can be no question that their actions place those persons wishing to pursue an education containing religious elements for themselves or their children at a significant disadvantage. Petitioners' position reflects a fundamental misunderstanding of their powers

[18] Some states such as Colorado exclude all students attending "pervasively religious" colleges from their student assistance programs, rather than just theology students at such colleges. See, for example, *Americans United for Separation of Church and State v. State of Colorado*, 648 P.2d 1072 (Colo. 1982) (upholding under Colorado's Blaine Amendment the inclusion of students at religiously-affiliated but not pervasively-sectarian colleges). These broader exclusions suffer from the same constitutional deficiencies as the narrower Washington exclusion because they discriminate on the basis of religion.

to discriminate against religious options and in favor of secular ones.

Petitioners, as well as those states that have similarly interpreted their religion clauses to preclude individual recipients of educational assistance from selecting religious educational providers,[19] have fundamentally misunderstood their role with respect to religion. This Court has made clear in its modern religion clause jurisprudence that government-operated schools must be secular, because for such schools to teach religion would reflect governmental endorsement and coerce individuals through the taxing power to support that endorsement.[20] This jurisprudence has of course resulted in the "de-religification" of the formerly Protestant public schools, a development *amici* have supported as a long overdue elimination of religious bias. But just because publicly-operated schools must be secular does not mean that *privately*-operated schools must be secular if their clientele benefits from public assistance. So long as government is not deliberately using individuals as a means of aiding religion (*i.e.*, not creating one of "the ingenious plans for channeling aid to sectarian schools that periodically reach this Court" (*Committee for Public Education v. Nyquist*, 413 U.S. 756, 785)), "the fact that aid goes to individuals means that the decision to support religious education is

[19] See note 7, *supra*, citing cases in which states have taken a non-parallel interpretation to circumvent this Court's interpretation of the Establishment Clause.

[20] See, e.g., *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (outlawing mandated prayer in public schools), and *Lee v. Weisman*, 505 U.S. 577 (1993) (outlawing school-sponsored prayer at graduation ceremonies).

made by the individual, not the State." *Witters*, 474 U.S. at 488. Under *Pierce* and *Meyer v. Nebraska*, 262 U.S. 390 (1923), parents are ultimately responsible for the education of their children and have every right to teach them, either directly or through surrogates, about religion, without the state questioning whether they are "indoctrinating" their offspring. Empowering parents, or individuals such as Joshua Davey, through a religiously-neutral program of financial assistance that allows them to effectively exercise their pre-existing right to direct their own or their children's education does not constitute state aid to religion.

B. Petitioners Wrongly Characterize the Ninth Circuit's Decision Below as Requiring the State To Subsidize Davey's Right To Pursue a Degree in Theology.

Citing *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983); *Rust v. Sullivan*, 500 U.S. 173; and *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), for the proposition that the government's decision not to fund the exercise of a fundamental right does not infringe that right, Petitioners contend that this case falls squarely within that category. Their argument fundamentally misunderstands those cases and the nature of what Washington has done in applying its Blaine Amendment to exclude Davey from the scholarship program's benefits. While nothing in the federal Constitution requires Washington to provide Promise Scholarships to any individuals at all, nor prevents Washington from funding individuals in specified classes defined by a religiously-neutral line such as whether they attend public

colleges or study engineering, Washington has excluded Davey pursuant to a line drawn on the basis of religion. He is excluded because he chose to pursue a religious vocation.

Just as the University of Missouri did not have to provide free meeting rooms to student groups in *Widmar v. Vincent*, 454 U.S. 263 (1981), once it did so this Court held that it could not deny such facilities to religious student groups, nor rely on its state Blaine Amendment as a justification for the discrimination. Similarly, just as the University of Virginia did not have to subsidize student publications in *Rosenberger v. Rectors & Visitors of the University of Virginia*, 515 U.S. 819 (1995), once it did so, this Court held that it could not refuse to fund publications taking a religious perspective.[21] Once Washington chose to provide scholarships for its residents attending colleges in Washington, it could not deny them scholarships on the basis of religion, nor can it justify such discrimination against religion in general on the basis of its Blaine Amendment.[22] In short, while Washington has no affirmative obligation to subsidize any of its citizens' rights to pursue particular degrees, once it starts

[21] See also *Bd. of Ed. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); and *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001).

[22] *Amici* cannot help from noting the irony that the Blaine Amendments, designed to preserve Protestant hegemony over the public schools and public fisc. against Catholic challenges, have transmuted over the years into engines for discrimination against religion in general.

subsidizing some of its citizens it becomes obligated not to deny subsidies to others on an unconstitutional basis.

Petitioners' reliance on the *Maher* line of cases misconstrues those decisions and their relationship to Washington's discriminatory classification scheme, as the Ninth Circuit correctly concluded below. While these cases quite properly distinguish between burdening a constitutional right, as occurred in *Meyer* and *Pierce*, and failing to subsidize one, they also recognize that the refusal to subsidize cannot be on the basis of a suspect classification. See, e.g., *Regan*, 461 U.S. 540, 548 (noting "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim . . . at the suppression of dangerous ideas'") (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)). In denying Davey the Promise Scholarship because he wished to major in theology taught from a religious perspective, Washington discriminates invidiously in its subsidies, treating the religious perspective as a dangerous idea requiring suppression.

In *Harris v. McRae*, 448 U.S. 297 (1980), the sequel to *Maher*, this Court rejected the claim that by funding childbirth services for indigent women the government violated equal protection principles by refusing to fund their abortions. Saying that "[t]he guarantee of equal protection . . . is a right to be free of invidious discrimination in statutory classifications and other governmental activity," 448 U.S. at 322, this Court held that financial need is not a constitutionally suspect classification subject to strict scrutiny. Religion, however, is a constitutionally

suspect classification,[23] and the free exercise of religion a constitutionally protected right. While in *Harris*, this Court held that Congress was permitted to "establish incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid," 448 U.S. at 324, Washington is not permitted to establish incentives that encourage students to pursue a secular education by discriminating against religion.[24]

Nor is the decision below a case involving government speech, as Petitioners and their *amici* seek to characterize it. By subsidizing the educations of the scholarship recipients, Washington is not itself the provider of the education, except where the recipients select a public college or university, in which case the Establishment Clause independently prohibits the state from teaching about religion or a particular religion from a viewpoint of religious truth. The Ninth Circuit below found that "pursuing a course of study of one's own choice" is part of "the expressive conduct, creative inquiry, and the free exchange of ideas [that] the educational enterprise is all about." *Davey v. Locke*,

[23] See section III. F., *infra*.

[24] *Amici* are not arguing that Petitioners violate the constitution by discriminating on the basis of religion by funding and operating secular public schools and universities, because the Establishment Clause quite properly requires that such institutions be secular because the government is operating them. But where as here the government does not operate the institutions, the government has no right to encourage, nor rational basis for encouraging, individuals to choose secular schools or programs. The First Amendment is intended to keep the government neutral in matters of faith, not only by ensuring that governmental institutions be religiously-neutral, but also by ensuring that government not encourage or discourage private choices that may be influenced by religion.

299 F.3d 748, 755 (2002). The state has no more business encouraging students to approach religion from a secular viewpoint in theology majors than it would in encouraging them to approach religion classes from a religious viewpoint.

C. The Ninth Circuit Correctly Held That Washington Violated Davey's Right to Free Exercise of Religion.

It is often the case that a classification made on a prohibited basis violates multiple federal constitutional protections. Cases such as this one involving discrimination based on religion frequently do so, because religion is not only the special concern of the First Amendment's two religion clauses, see, e.g., *Everson*, 330 U.S. 1 (1947) (Establishment Clause), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise Clause), but also frequently involves speech implicating the Free Speech Clause, see, e.g., *Rosenberger*, 515 U.S. 819 (1995), and constitutes a suspect classification for purposes of the Fourteenth Amendment's Equal Protection Clause, see, e.g., *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951).[25] Washington's efforts to exclude Davey for choosing to pursue a religion major at a religious college violates all of these provisions. The Ninth Circuit's decision focuses primarily on the Free Exercise

[25] See also *United States v. Armstrong*, 517 U.S. 687, 716 (1996); *Bd. of Ed. v. Grumet*, 512 U.S. 687, 715 (1994); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 650 (1992); and Volokh, *Equal Treatment Is Not Establishment*, 13 Notre Dame J. L. & Pol. 341 (1999).

Clause and correctly concludes that Washington violates the clause through application of its Blaine Amendment.

In *Lukumi*, 508 U.S. 520 (1993), Justice Kennedy opened his opinion for the Court by saying, "The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." 508 U.S. at 520. In that case, this Court concluded that the challenged laws had an impermissible object, the suppression of Santeria religious practices, and pursued their asserted secular ends only with respect to conduct motivated by religious belief. In the case under review, the interpretation of the Washington Constitution and its implementation in Wash. Rev. Code section 28B.10.814[26] differs from the city of Hialeah's actions in only two ways: first, in seeking to suppress religion in general rather than a particular religion; and second, in doing so overtly rather than trying to camouflage its motives in secular garb. Surely these differences cannot be a basis justifying a different outcome.

Washington treats all religions alike in denying their adherents aid if pursuing a theology/religion degree.[27] The only religion majors the state will fund are those pursuing their studies from a secular point of view. Washington

[26] That section provides in relevant part that "[n]o aid shall be provided to any student who is pursuing a degree in theology."

[27] As this Court said in *Lukumi*, "At 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." 508 U.S. at 532 (emphasis added).

makes no efforts to hide that this is what it is doing; instead, it seeks to justify its actions as implementing the more thoroughgoing separation of church and state supposedly mandated by its constitution. Tennessee offered a similar rationale for denying ministers the right to participate as legislators and delegates to constitutional conventions, a position this Court rejected as violating the First Amendment in *McDaniel v. Paty*, 435 U.S. 618 (1978). As Justice Brennan said in his concurring opinion in *McDaniel*, the Free Exercise Clause was violated because "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." 435 U.S. at 639 (Brennan, J., concurring). See also *Employment Division v. Smith*, 494 U.S. 872, 877 (1990), in which this Court said that under the Free Exercise Clause "[t]he government may not . . . impose special disabilities on the basis of religious views or religious status." Unlike *Smith*, which involved secular objectives pursued using religion-neutral criteria, in this case Washington uses religious criteria to pursue an objective that is anything but religiously-neutral. It puts individuals pursuing religious studies from a religious perspective at a disadvantage against individuals pursuing all other studies, including religious studies from a secular perspective.

D. Washington Violates the Free Speech Clause By Engaging in Viewpoint Discrimination When It Excludes Theology Majors.

Education is essentially speech. It is communication between teachers and students, usually occurring in the confines of a school or college. Just as the Free Speech Clause prevents government from banning private schools,

it prevents government from banning religious schools. In *Griswold v. Connecticut*, 381 U.S. 479, 482-83, this Court said that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and the press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach – indeed, the freedom of the entire university community." *Rosenberger* applied these free speech principles to government action subsidizing secular viewpoints but denying equal treatment to religious viewpoints. Just as the University of Virginia was under no obligation to subsidize any viewpoints, but couldn't exclude those that were religious once it undertook to subsidize all others, so Washington, having undertaken to subsidize theology classes and majors taught from a secular viewpoint, cannot refuse to subsidize Davey's choice of theology taught from a religious viewpoint.

By excluding otherwise qualified students of theology from a merit-based program whose purpose is not to advance any particular field of knowledge, Washington has also violated Davey's academic freedom as protected by the Free Speech Clause. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., concurring). Academic freedom properly functions to prevent the government from influencing the marketplace of ideas by invidiously supporting or disfavoring particular viewpoints. It denies the government's authority to limit, burden, or otherwise discourage citizens' access to readily available information, unless

that information is itself unprotected by the First Amendment. See *United States v. American Library Ass'n*, 123 S. Ct. 2297 (2003).

Davey was denied his scholarship for no reason other than that the government has singled out theological studies for special disfavor. In so doing, Washington artificially burdens the choice of any scholarship recipient who might desire to study theology, thereby violating the principle of academic freedom. Washington's limitation vis-à-vis theology programs plainly interferes with the free "marketplace of ideas" that academic freedom is intended to promote and protect.[28]

E. Washington Violates the Establishment Clause By Inhibiting Religion.

Ever since *Everson*, this Court's initial application of its religion clause jurisprudence to the states, this Court has recognized that the religious neutrality mandated by the Establishment Clause requires evenhanded treatment of religion and non-religion, not just an absence of a preference for one religion or another. "[The First Amendment] requires the state to be a neutral in its relations with groups of believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." *Everson*, 330 U.S. at 18. Yet handicapping

[28] See *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new ground in reaffirming this Nation's dedication to academic freedom").

religion is precisely what Washington has sought to do in this case.

Religious neutrality is, of course, the underpinning of this Court's longstanding *Lemon* test for assessing Establishment Clause cases.[29] While that test has undergone restatement in recent years, see *Agostini v. Felton*, 521 U.S. 203 (1997), its core of evenhandedness has remained intact – government may not engage in actions that have the primary effect of advancing *or inhibiting* religion. Nor, under the "endorsement" aspect of the test, may government express endorsement *or disapproval* of religion.[30] In this case, Washington's interpretation and application of its Blaine Amendment plainly has the primary effect of inhibiting religion and clearly conveys an unmistakable message of disapproval.

If a private school student such as Joshua Davey wants to pursue a theology major, as opposed to any other major under the sun, then he must give up his entitlement to the Promise Scholarship. It is solely because theology involves religion that this occurs, and places religion at a disadvantage vis-à-vis non-religion. If Davey desired to

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[29] In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court formulated the test for programs under the Establishment Clause as requiring that a program have a secular legislative purpose, have a primary effect that neither advances *nor inhibits* religion, and not foster excessive governmental entanglement with religion.

[30] E.g., *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring in the judgment); *Bd. of Ed. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in the judgment); *Bd. of Ed. v. Mergens*, 496 U.S. 226, 249 (1990); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); and *Wallace v. Jaffree*, 472 U.S. 38, 56 (1984).

study sociology or economics from a Marxist point of view (including one that taught Marxism as "truth") and learn how religion is the opiate of the masses, he could do so without risking his Promise Scholarship. This result is far removed from some abstract notion of the separation of church and state. It has a primary effect of disadvantaging religion in the marketplace of ideas that is the university.[31] In exactly the same way that the Blaine Amendments were intended to preserve the advantages of the Protestant (public) schools over their Catholic (non-public) counterparts, Washington's Blaine Amendment now serves to preserve the advantages of non-religion over religion by channeling the choices of individuals toward non-religious majors and away from religious ones. The Establishment Clause cannot permit this.

F. Washington's Discrimination Based on Religion Violates the Equal Protection Clause.

The Equal Protection Clause, by designating certain classifications as suspect and strictly scrutinizing them, asserts that certain characteristics should not be the basis for governmental action. This Court has often said that religious discrimination violates the Equal Protection Clause.[32] *Amici* believe that religion should constitute a

[31] It is as if in *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the federal government could subsidize the art of Robert Mapplethorpe and Andres Serrano disparaging Christianity, but deny funding to any artist painting from a religious perspective.

[32] See, e.g., *United States v. Armstrong*, 517 U.S. 687, 715 (1996); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 650 (1992); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); and *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 92 (1900).

suspect classification in the circumstances of this case, and that Washington cannot provide a compelling justification for discriminating against religion.

Though this Court has in modern days gone far towards reducing government-sponsored religious discrimination, there can be no serious question but that the history of public education in the states (where the plenary authority for education resides) is replete with examples of religious bias, of which the Blaine Amendments are but one aspect. Were this not the case, this Court would never have been called upon to adjudicate so many Establishment Clause cases. In many circumstances, the Equal Protection Clause presents a straightforward way of identifying and rectifying religious discrimination, in much the same way that the Clause has dealt with the prevalence of race discrimination.[33] Particularly in programs providing assistance to individuals or families rather than institutions where the concerns of government sponsorship or endorsement of religion are

[33] Some of the confusion characterizing this Court's religion clause jurisprudence might be dispelled by use of equal protection analysis. For example, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); and *Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136 (1987), might appear to be inconsistent with *Employment Div. v. Smith*, 492 U.S. 872 (1990) (holding that a classification must be based upon religion to be actionable under the religion clauses). This has resulted in the *Sherbert* line of cases as being viewed as exceptions requiring neutral rules to accommodate religion. They could, however, also be viewed as discrimination cases, to the extent that non-religious excuses for failing to meet the religion-neutral requirements were accepted while religious excuses were not. Similarly, *Walz v. Tax Comm.*, 397 U.S. 664 (1970), upholding tax exemptions for church property, can be analyzed as a case refusing to single out religious institutions from the class of institutions afforded tax relief.

attenuated by independent private choices, review of the Equal Protection Clause makes sense.[34] Washington's action in denying Davey a Promise Scholarship based upon the religious nature of the program he freely chose violated his right to the equal protection of the laws.[35]

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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[34] If government refused to supply religious institutions with police and fire protection because they were religious, one can easily see an equal protection problem. Similarly, for New Jersey to provide free transportation to students in all schools but religious ones (*Everson*) or New York to supply free secular textbooks to all students but those attending religious schools (*Allen*) would constitute religious discrimination under the Clause.

[35] Any suggestion that the federalism principles underlying the Federal Constitution should permit the states greater leeway to experiment with a more rigorous separation of church and state is as mistaken as the idea that federalism should permit the states more leeway in discriminating on the basis of race.