No. 18-1195

In The

Supreme Court of the United States

KENDRA ESPINOZA, *ET AL.*,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, *ET AL.*,
Respondents.

On Writ of Certiorari to the Montana Supreme Court

AMICUS CURIAE BRIEF OF THE HONORABLE SCOTT WALKER IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

Amicus Scott Walker[1] was the 45th Governor of the State of Wisconsin and is a strong supporter of school choice. As governor from 2011-2018, Amicus signed into law a number of laws to expand school choice in Wisconsin, including the creation of the Racine Parental Choice Program and Wisconsin Parental Choice Program, which allow low-income children in Racine and across the State, respectively, to access a school voucher to attend a private school of their choosing. He also passed the Special Needs Scholarship Program to give a similar benefit to children with disabilities.

All told, during his time as governor, he oversaw dramatic, if not unprecedented, growth in school vouchers from 20,996 students in 102 private schools in 2011 to 40,073 students in 284 private schools in 2018.[2]

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[1] As required by Supreme Court rules 37.3 and 37.6, Amicus states as follows. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus or its counsel made such a monetary contribution. Consent has been given by all parties for this brief.

[2] Ola Lisowski, The John K. MacIver Institute for Public Policy, *Our Wisconsin: Education Scorecard* (Feb. 25, 2019), http://s17596.pcdn.co/wp-content/uploads/2019/02/Our-Wisconsin_-Education2.pdf.

Amicus has an interest in advocating for the successes of school choice in Wisconsin, in encouraging other states, such as Montana, to adopt similar programs, and in defending the constitutionality of these programs.

SUMMARY OF ARGUMENT

The Montana Supreme Court has invalidated a state school choice program because program scholarships may be used at religious schools, relying on Montana's "Blaine" amendment – a state constitutional provision providing in part that

> [t]he legislature . . . shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

Mont. Const. art. X, § 6(1); *see Espinoza v. Montana Dep't of Revenue*, 2018 MT 306, 393 Mont. 446, 435 P.3d 603 (2019). The question before this Court is whether singling out religious schools for less favorable treatment is compatible with the First Amendment. The Court's prior case law in analogous

areas dictates that the answer to this question must be "no."

In a long line of cases, this Court has consistently affirmed that "singl[ing] out the religious for disfavored treatment," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___ U.S. ___, 137 S. Ct. 2012, 2020 (2017)—whether in the realm of government benefit programs or otherwise—offends the Constitution. *See, e.g.*, *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 16 (1947) (states "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation"); *McDaniel v. Paty*, 435 U.S. 618 (1978) (Tennessee could not prohibit minister from attending state constitutional convention as delegate); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) (law targeted at preventing adherents of Santeria religion from engaging in ritualistic animal slaughter was impermissible); *Trinity Lutheran*, 137 S. Ct. 2012 (state grant program allowing schools and other entities, but not religious organizations, to obtain reimbursement for playground surface replacement held unconstitutional).

This decades-old legal trend has been dotted with outliers which have only grown more incongruous as the Court has further refined its Free Exercise Clause jurisprudence. The most notable in

this context is *Locke v. Davey*, in particular because of the similarities between that case and this one.

Locke involved a college scholarship program which carved out a single exclusion for students pursuing a degree in devotional theology. *Locke v. Davey*, 540 U.S. 712, 715 (2004). Like other schemes that this Court has invalidated, the scholarship program "facially discriminate[d] against religion," and was guilty of the flaws this Court has repeatedly condemned. *Id.* at 726 (Scalia, J., dissenting). Yet this Court upheld the program.

The result in *Locke* is unjustifiable, especially in light of this Court's recent decision in *Trinity Lutheran*, where the Court struck down a state grant program that carved out a single exclusion for religious organizations. *Trinity Lutheran*, 137 S. Ct. at 2017. This inconsistency was a point adverted to at the time by some of the justices on the Court. *See id.* at 2025 (Thomas, J., joined by Gorsuch, J., concurring in part) (noting concern over *Locke* but observing in part that "no party has asked us to reconsider it"); *id.* at 2039 (Sotomayor, J., joined by Ginsburg, J., dissenting) (suggesting that the Court's interpretation of *Locke* was not "faithful"). But this Court did not need to overrule *Locke* in *Trinity Lutheran* and so instead "construe[d] [it] narrowly." *Id.* at 2025 (Thomas, J., concurring in part).

In truth, the Court could do the same here. The Montana scholarship program did not involve the

training of ministers and *Locke* did not involve the exclusion of religious schools from a generally available scholarship program. The Court could distinguish *Locke*, leave it untouched, and still rule in favor of Petitioners. But the Court should go further. It should overrule *Locke* rather than permit the case to continue to sow confusion or to stand alone as a difficult-to-explain "one-off" case. As explained below, *Locke*'s reasoning is fundamentally flawed in several respects; it did not announce a "workab[le] . . . rule"; it conflicts with related decisions; it has not produced a body of case law in this Court; and there is little "reliance on the decision." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, ___ U.S. ___, 138 S. Ct. 2448, 2478-79 (2018) (setting forth relevant factors considered by this Court when determining whether to overrule a particular case). Consequently, the Court should overturn it.

ARGUMENT

I. *Locke v. Davey*

This Court's decision in *Locke* involved the State of Washington's "Promise Scholarship Program," which was designed "to assist academically gifted students with postsecondary education expenses." *Locke v. Davey*, 540 U.S. 712, 715 (2004). The program's eligibility requirements were based on academic achievement and household income, among other items. *Id.* at 716. But scholarship recipients were also categorically barred from pursuing theology

degrees, a rule intended to "codif[y] the State's constitutional prohibition on providing funds to students to pursue degrees that are 'devotional in nature or designed to induce religious faith.'" *Id.* at 716 (quoting *Locke* Pet's Br. 6; *Locke* Resp't's Br. 8).

Joshua Davey, who received a Promise Scholarship and wished to obtain a degree in pastoral ministries, sued alleging the scholarship program violated the Free Exercise clause, among other claims. *Id.* at 717-18. The United States District Court for the Western District of Washington rejected this claim (along with the others), explaining in part that Washington had not "prohibited Davey from studying pastoral ministries" and that Davey possessed no "right to have Washington fund his religious instruction." *Davey v. Locke*, No. C00-61R, 2000 WL 35505408, at *4-*5 (W.D. Wash. Oct. 5, 2000).

In light of this Court's precedent, the United States Court of Appeals for the Ninth Circuit had little trouble reversing the decision. *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002). The Ninth Circuit first set forth a central teaching of this Court's earlier decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*: a "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.* at 753 (quoting *Lukumi*, 137 S. Ct. at 546)). In the Ninth Circuit's view, Washington's scholarship program was not neutral: it "refer[red] on [its] face to religion,"

was "administered so as to disqualify only students who pursue a degree in theology from receiving its benefit," and "as applied exclude[d] only those students who declare[d] a major in theology that is taught from a religious perspective"; further, "Davey's eligibility for the Scholarship . . . was conditioned on giving up his religious pursuit." *Id.* at 753-54. "A state law," the Ninth Circuit explained, "may not offer a benefit to all . . . but exclude some on the basis of religion." *Id.* at 754.

The Ninth Circuit rejected the argument adopted by the district court: that Davey's arguments "presume[d] a right to state funding for his religious exercise." *Id.* at 754. Relying in part on free speech cases, the Court focused on the fact that Washington had generally opened the program to "all students who meet objective criteria" "secular" in nature and reminded the state that "the government may not deny a benefit to a person because he exercises a constitutional right." *Id.* at 755-56.

Having determined that strict scrutiny was applicable, the Ninth Circuit concluded that Washington's interest in "not appropriating or applying money to religious instruction as mandated by its constitution" was "less than compelling" such that its scholarship program as operated was unconstitutional. *Id.* at 759-60. In so doing, the court reaffirmed the principle that "a state's broader prohibition on governmental establishment of religion is limited by the Free Exercise Clause of the federal

constitution." *Id.* at 759 (citing *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) and *Kreisner v. City of San Diego*, 1 F.3d 775, 779 n. 2 (9th Cir.1993)). It then observed that, given the contours of the program, including its secular nature, the objective criteria it used, and the fact that money only made its way "to sectarian schools or for non-secular study" via an indirect route premised on private choice, it was "difficult to see how any reasonably objective observer could believe that the state was applying state funds to religious instruction or to support any religious establishment by allowing an otherwise qualified recipient to keep his Scholarship." *Id.* at 760.[3]

The Ninth Circuit's decision was a straightforward application of this Court's precedent and, as discussed further below, foreshadowed this Court's strikingly similar 2017 decision in *Trinity Lutheran.* It is thus surprising and more than a little difficult to explain this Court's reversal of the Ninth Circuit's decision on appeal. *Locke v. Davey*, 540 U.S. at 725.

In reviewing the Ninth Circuit's ruling, this Court framed the case as involving the "play in the joints" between the Free Exercise Clause and the Establishment Clause, *id.* at 718 (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)), that is, the notion that "there are some state

[3] One judge dissented. *Davey v. Locke*, 299 F.3d 748, 760-68 (9th Cir. 2002) (McKeown, J., dissenting).

actions permitted by the Establishment Clause but not required by the Free Exercise Clause," *id.* at 719. More specifically, the Court explained, while there was "no doubt that the State could, consistent with the Federal Constitution, *permit* Promise Scholars to pursue a degree in devotional theology," the relevant question was "whether Washington, pursuant to its own constitution, which ha[d] been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, [could] deny them such funding without violating the Free Exercise Clause." *Id.* (emphasis added) (footnote omitted) (citations omitted).

In this Court's view, it could. The Court rested its decision on essentially four grounds.

First, the Court distinguished the scholarship program from laws invalidated in prior cases. Of particular relevance here, the Court summarily concluded that the program did not "require students to choose between their religious beliefs and receiving a government benefit"; instead, Washington had "merely chosen not to fund a distinct category of instruction" and scholarship recipients could "still use their scholarship to pursue a secular degree at a different institution from where they [were] studying devotional theology." *Id.* at 720-21 & n.4. In all, this placed a "relatively minor burden on Promise Scholars." *Id.* at 725; *see id.* at 720 ("In the present case, the State's disfavor of religion (if it can be called

that) is of a far milder kind [than occurred in *Lukumi*]."*)*

Second, Washington was permitted to treat "training for religious professions and training for secular professions" differently because "[t]raining someone to lead a congregation is an essentially religious endeavor" and because the federal and state constitutions, with their anti-establishment clauses, themselves treat religion differently. *Id.* at 721.

Third, and on that same topic, the Court could "think of few areas in which a State's anti-establishment interests come more into play" than "procuring taxpayer funds to support church leaders," a "hallmark[] of an 'established' religion." *Id.* at 722.

Finally, "[f]ar from evincing the hostility toward religion which was manifest in *Lukumi,* . . . the entirety of the Promise Scholarship Program [went] a long way toward including religion in its benefits, insofar as recipients could still enroll in religious schools and even in devotional theology courses." *Id.* at 724.

Justice Scalia and Justice Thomas dissented. *Id.* at 726-734 (Scalia, J., joined by Thomas, J., dissenting); *id.* at 734-35 (Thomas, J., dissenting).

Locke has since received significant criticism, including by members of this Court. *See, e.g.*, Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v.

Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227 (2004); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155 (2004); Susanna Dokupil, *Function Follows Form: Locke v. Davey's Unnecessary Parsing*, 2004 Cato Sup. Ct. Rev. 327; Richard F. Duncan, *Locked Out: Locke v. Davey and the Broken Promise of Equal Access*, 8 U. Pa. J. Const. L. 699 (2006); *Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., joined by Gorsuch, J., concurring in part) ("This Court's endorsement in *Locke* of even a 'mil[d] kind' of discrimination against religion remains troubling." (citation omitted) (quoting *Locke*, 540 U.S. at 720)); *Locke*, 540 U.S. at 733 (Scalia, J., dissenting) ("Let there be no doubt: This case is about discrimination against a religious minority.").

Locke is indeed a seriously flawed decision that continues to needlessly complicate this Court's free exercise jurisprudence. In ruling for the Petitioners in this case, this Court should finally overrule it.

II. This Court Should Overrule *Locke*

This Court assesses whether it should overrule a case by reference to the doctrine of *stare decisis*—"in English, the idea that today's Court should stand by yesterday's decisions." *Kimble v. Marvel Entm't, LLC*, ___ U.S. ___, 135 S. Ct. 2401, 2409 (2015). "*Stare decisis* is not an inexorable command; rather,

it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

Pursuant to this "principle of policy," the Court's "cases identify factors that should be taken into account in deciding whether to overrule a past decision." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, ___ U.S. ___, 138 S. Ct. 2448, 2478 (2018). These include, relevant here: "the quality of [*Locke*'s] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478-79. These factors all suggest that *Locke* should be overruled.

A. *Locke* was wrongly decided

Amicus respectfully submits that, as this Court's own precedents show, this Court erred when it ruled that the State of Washington could establish an otherwise "neutral and generally available student-aid program[]," Pet. 3, but categorically deny access to the program to students pursuing a devotional theology degree, *i.e.*, based upon a student's independent decision to put his scholarship to a religious use.

Before examining the reasoning in *Locke*, however, it helps to place *Locke* in context by briefly

examining three of this Court's prior free exercise decisions which are especially relevant here: *McDaniel*, *Lukumi*, and *Trinity Lutheran*.

In the 1978 case of *McDaniel v. Paty*, this Court was presented with a Tennessee statute that prohibited ministers "from serving as delegates to the State's limited constitutional convention." *McDaniel*, 435 U.S. at 620 (plurality opinion). This Court concluded that the statute violated the free exercise rights of Paul McDaniel, a Baptist minister. *Id.* at 621, 629 (plurality opinion); *id.* at 629-30 (Brennan, J., concurring in the judgment); *id.* at 642 (Stewart, J., concurring in the judgment). The plurality explained that Tennessee had "conditioned the exercise of one [right] on the surrender of the other"; namely, McDaniel's right to the free exercise of religion on the one hand and his right "generally to seek and hold office as [a] legislator[] or delegate[] to the state constitutional convention" on the other. *Id.* at 626. And in weighing Tennessee's interests, the plurality concluded that the state had "failed to demonstrate that its views of the dangers of clergy participation in the political process have not lost whatever validity they may once have enjoyed." *Id.* at 628.

About fifteen years later the Court issued another landmark free exercise case in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). There the City of Hialeah, Florida adopted a number of ordinances ostensibly designed

to "protect[] the public health and prevent[] cruelty to animals" by regulating animal sacrifice. *Lukumi*, 508 U.S. at 527, 543. But this Court determined, after examining the text of the laws and their operation, that the ordinances had actually been enacted to target adherents of the Santeria religion, *id.* at 533-540, 542-546, for whom animal sacrifice "is an integral part" of their religion. *Id.* at 531. Applying strict scrutiny, this Court found the ordinances wanting given their over- and under-inclusiveness. *Id.* at 546-47. "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation," the Court explained, "will survive strict scrutiny only in rare cases." *Id.* at 546.

Finally, just over two years ago in *Trinity Lutheran v. Comer*, this Court concluded that a Missouri grant program "help[ing] public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires" violated the Free Exercise Clause because it "categorically disqualifi[ed] churches and other religious organizations"—including the petitioner in that case, Trinity Lutheran Church—from receiving grants." *Trinity Lutheran*, 137 S. Ct. at 2017.

Relying in part on *Lukumi*, the Court reiterated the rule that a "policy [that] expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely

because of their religious character" "triggers the most exacting scrutiny." *Id.* at 2021 (citing *Lukumi*, 508 U.S. at 546). And "[l]ike the disqualification statute in *McDaniel*, [Missouri's] policy put[] Trinity Lutheran to a choice: It [could] participate in an otherwise available benefit program or remain a religious institution." *Id.* at 2021-22. This "impose[d] a penalty on the free exercise of religion," *id.* at 2021, even if an "indirect" one, *id.* at 2022 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)).

The Court quickly dispatched of the argument that Missouri had "simply declined to allocate to Trinity Lutheran a subsidy the State had no obligation to provide in the first place." *Id.* at 2022. Trinity Lutheran was not "claiming any entitlement to a subsidy" but was instead "assert[ing] a right to participate in a government benefit program without having to disavow its religious character." *Id.* Religious individuals and groups are "member[s] of the community too." *Id.*

Applying strict scrutiny, the Court summarily rejected the notion that Missouri's proffered interest—a "policy preference for skating as far as possible from religious establishment concerns"—qualified as "compelling." *Id.* at 2024.

McDaniel, *Lukumi*, and *Trinity Lutheran* show that for decades this Court's precedent has consistently confirmed that the government may not

"single out the religious for disfavored treatment," including when establishing generally-available benefit programs. *Id.* at 2020. Unfortunately, *Locke* created a mistaken exception to this rule. In light of the principles discussed above, *Locke*'s reasoning was faulty for the following reasons.

Perhaps most fundamentally, this Court erred in *Locke* when it concluded that the Promise Scholarship program did not "require students to choose between their religious beliefs and receiving a government benefit" and that Washington had instead "merely chosen not to fund a distinct category of instruction." *Id.* at 720-21. This is the precise argument that was made, and rejected, in *Trinity Lutheran*. Like the scrap tire program in *Trinity Lutheran*, Washington's scholarship program "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Trinity Lutheran*, 137 S. Ct. at 2021. Justice Scalia's dissent in *Locke* echoes the Court's opinion in *Trinity Lutheran*: "Davey is not asking for a special benefit to which others are not entitled. He seeks only *equal* treatment—the right to direct his scholarship to his chosen course of study, a right every other Promise Scholar enjoys." *Locke*, 540 U.S. at 727 (Scalia, J., dissenting) (citation omitted). The "indirect penalty" the government placed on Davey because of his religious aspirations was no less real than the one Missouri placed upon Trinity Lutheran Church.

Trinity Lutheran distinguished *Locke* in part because, unlike in *Trinity Lutheran*, "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." *Trinity Lutheran*, 137 S. Ct. at 2023.

"[R]eliance on [this] status–use distinction" to distinguish *Locke* "does not suffice." *Id.* at 2026 (Gorsuch, J., concurring in part). For one thing, as pointed out by Justice Gorsuch in his separate writing in *Trinity Lutheran*, that distinction is difficult to police because it "blurs in much the same way the line between acts and omissions can blur when stared at too long." *Id.* at 2025 (Gorsuch, J., concurring in part). It makes little difference, in the context of the Free Exercise Clause, whether someone is excluded because, as Justice Gorsuch explained, he is "Lutheran" or is excluded because he "do[es] Lutheran things." *Id.* at 2026 (Gorsuch, J., concurring in part). It is hard to understand why a law targeting monks or nuns, for example, could withstand review if it is rephrased to target those living in single-sex religious communities. *See also McDaniel*, 435 U.S. at 627 (plurality opinion) (indicating that theoretically status as a minister or priest could be "defined in terms of" either "conduct and activity" *or* "belief"); *Locke*, 540 U.S. at 733 (Scalia, J., dissenting) (noting that the scholarship program excluded "those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry").

Maintenance of this distinction thus lends itself to precisely the sort of "disguised" "mechanism[] . . . designed to persecute or oppress a religion or its practices," *Trinity Lutheran*, 137 S. Ct. at 2026 (quoting *Lukumi*, 508 U.S. at 547), that this Court identified and struck down in *Lukumi*. After all, the ordinances in that case did not ostensibly persecute the Santerians because of who they *were*, so the argument would go; it persecuted them because of what they proposed *to do*—engage in ritualistic animal sacrifice. This Court was not hoodwinked by that argument; it recognized that conduct was in fact a proxy for status.

Even if the status–use distinction were workable, it was not actually applied in *Locke*. The *Locke* Court explicitly recognized that in prohibiting Promise Scholarship recipients from pursuing devotional theology degrees "the only interest at issue" was "the State's interest in not funding the religious training *of clergy*." *Locke*, 540 U.S. at 722 n.5 (emphasis added). Put differently, the problem was not that recipients would use the funds to study religion or learn in a religious environment; it was that the funds would be used to become a cleric. The Court knew and acknowledged that Davey was being denied a scholarship "because of who he *was*," *Trinity Lutheran*, 137 S. Ct at 2023; the Court spent pages discussing "procuring taxpayer funds *to support church leaders*," "one of the hallmarks of an 'established' religion." *Locke*, 540 U.S. at 722 (emphasis added). When the *Locke* Court wrote that

"majoring in devotional theology is akin to a religious calling," *id.* at 721, it meant a calling *to a particular occupation*—that is, to a particular *status*. *See also id.* ("Training someone *to lead a congregation* is an essentially religious endeavor" (emphasis added)).

Lastly, it is not obvious "why the First Amendment's Free Exercise Clause should care" about the status-use distinction, given that "that Clause guarantees the free *exercise* of religion, not just the right to inward belief (or status)." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part). The Free Exercise Clause would be a weak safeguard if it only protected the inmost thoughts of religious adherents from discrimination and not their "freedom to act." *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940). While permitting the state to determine who can train to be a cleric or to control the nature of the training would raise concerns under the Religion Clauses or "between" them, the independent choice of scholarship recipients eliminated such concerns.

Nor can Washington's choice be defended as an ostensibly "neutral" commitment to secularism. If, as this Court has repeatedly said, the Religion Clauses mandate that government favor neither "religion" nor "irreligion," *see, e.g.*, *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 875-76 (2005), then systematically excluding religious persons and otherwise eligible programs from governmental

programs undercuts that constitutionally mandated even-handedness.

Thus, the program in *Locke* truly did put Davey to an unconstitutional choice. But while the Court's conclusion otherwise is perhaps its most central flaw, it is not its only flaw. The *Locke* Court justified Washington's discriminatory scholarship program on three other grounds, each of which was likewise in error.

First, *Locke* allowed for differential treatment because "[t]raining someone to lead a congregation is an essentially religious endeavor" and because the federal and state anti-establishment clauses treat religion differently. *Id.* at 721. So religion, in the Court's view, is simply "something different." But this is an argument that proves too much, because it would "justify the singling out of religion for exclusion from public programs in virtually any context." *Id.* at 730 (Scalia, J., dissenting) (discussing Washington's "pure philosophical preference: [its] opinion that it would violate taxpayers' freedom of conscience *not* to discriminate against candidates for the ministry").

As this Court has repeatedly explained, the idea that religious people may be discriminated against based upon purported Establishment Clause concerns runs up against the Free Exercise Clause. *Trinity Lutheran*, 137 S. Ct. at 2024. To say that Washington may exclude Joshua Davey from the Promise Scholarship Program based on anti-

establishment concerns thus allows the Establishment Clause (and its analogues) to completely swallow the Free Exercise Clause—a result that has never been adopted by this Court.

The *Locke* Court's next error (directly related to the previous one) rests on its more specific conclusion that Washington's discriminatory scholarship program was justified by its "historic and substantial state interest" in "not funding the religious training of clergy." *Locke*, 540 U.S. at 722 n.5, 725. "In fact," observed the Court, "we can think of few areas in which a State's anti-establishment interests come more into play." *Id.* at 722. Even Justice Gorsuch, who largely rejected the proposition that *Locke* could be explained by reference to the status-use distinction, mused that "[i]f [*Locke*] can be correct and distinguished [from the facts of *Trinity Lutheran*], it seems it might be only because of the opinion's claim of a long tradition against the use of public funds for training of the clergy, a tradition the Court correctly explains has no analogue here." *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring in part).

The problem with reliance on this interest to justify the result in *Locke* is that, whatever the vitality of this interest in the abstract, excluding devotional theology majors from the Promise Scholarship program did little to nothing to further it—certainly not enough to excuse the burden on Davey's free exercise rights.

As one scholar, Douglas Laycock, points out, in affirming that "there is no doubt that [Washington] could, consistent with the Federal Constitution, *permit* Promise Scholars to pursue a degree in devotional theology," this Court itself explained in *Locke* that "[u]nder [its] Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke*, 540 U.S. at 719 (emphasis added); *see* Laycock, *Theology Scholarships*, *supra*, at 168. But if "there is no state action in a student's choice of a school or a major," Laycock writes, "then there are no constitutional constraints on how . . . money can be spent." Laycock, *Theology Scholarships*, *supra*, at 168-69.

That being so, how can Washington prohibit Promise Scholars from using their money to pursue a devotional theology degree under the theory that it has an interest in not funding the clergy when in fact private choice "breaks the link," *id.* at 169, between church and state? *See also Locke*, 540 U.S. at 730 n.2 (Scalia, J., dissenting) (rejecting proposition that "a State has a constitutionally sufficient interest in discriminating against religion in whatever other context it pleases, so long as it claims some connection, however attenuated, to establishment concerns").

In any event, the Court's citation of this particular anti-establishment interest fails even on its own terms, because unlike the historic "popular

uprisings against procuring taxpayer funds to support church leaders, . . . one of the hallmarks of an 'established' religion," *id.* at 722, the Washington Scholarship program would not have "singled . . . out for financial aid" devotional theology majors. *Id.* at 727 (Scalia, J., dissenting). That is, "[o]ne can concede the Framers' hostility to funding the clergy *specifically*, but that says nothing about whether the clergy had to be excluded from benefits the State made available to all." *Id.* at 727 (Scalia, J., dissenting). Once again, the Court's analysis suffers from a means-end disconnect; the Court identifies a permissible state interest, but fails to establish that Washington's law actually furthers it. Particularly conspicuous, then, is the fact that *Locke* is "devoid of any mention of standard of review." *Id.* at 730 (Scalia, J., dissenting). The case does not hold together when considered under traditional strict scrutiny.

This leaves the Court's final major ground for ruling against Joshua Davey: its repeated focus on the lack of "animus toward religion" in the "operation of the Promise Scholarship program" and in the "history or text of" the Washington Constitution's anti-establishment provision and the fact that, "[f]ar from evincing the hostility toward religion which was manifest in *Lukumi*, . . . the entirety of the Promise Scholarship Program [went] a long way toward including religion in its benefits." *Id.* at 724-25.

As the principal *Locke* dissent observed, the Court neglects to "explain why the legislature's

motive matters"; typically, "[i]t is sufficient that the citizen's rights have been infringed." *Id.* at 732 (Scalia, J., dissenting). But the error is even deeper than that. The *Locke* Court clearly had in its mind *Lukumi* given its repeated references to the case and the Ninth Circuit's reliance on *Lukumi* in ruling in the opposite direction. *Id.* at 718, 720, 724. And in *Lukumi* references to "animosity," *Lukumi*, 508 U.S. at 542, 547, and "hostility," *id.* at 534, to religion were certainly made, including in a section of the opinion that failed to garner a majority of the Court, *see id.* at 541 (plurality opinion) (examining record items "evidenc[ing] significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice").

But this discussion was of greater relevance in *Lukumi* because the ordinances at issue there *were facially neutral*. *Lukumi*, 508 U.S. at 533-34; *Trinity Lutheran*, 137 S. Ct. at 2021 (discussing *Lukumi*). The *Lukumi* Court was consequently required to "ferret out" the ordinances' "discriminatory purpose." *Trinity Lutheran*, 137 S. Ct. at 2021.

Locke, on the other hand, did not require this type of probing because it discriminated *on its face* against religion by excluding devotional theology as a permissible major. *See Locke*, 540 U.S. at 726 (Scalia, J., dissenting) (complaining that *Lukumi* and *Locke* are "irreconcilable" in that Washington's scholarship program "facially discriminates against religion").

That Washington's purpose in excluding devotional theology majors may have been "benign," *id.* at 733 (Scalia, J., dissenting) is therefore doubly irrelevant.

For all of the foregoing reasons, *Locke* "was poorly reasoned," an "important" consideration for *stare decisis* purposes. *Janus*, 138 S. Ct. at 2479. Rather than permitting a state to establish a generally available scholarship program and then bar a specific, religious major from that program, it is much more consistent with the Free Exercise Clause to conclude, as did the Court in *McDaniel*, *Lukumi*, and *Trinity Lutheran*, that the government may not target the religious for penalty.

B. This Court's other *stare decisis* considerations do not suggest that *Locke* should be retained

Under one view, *Locke*'s fundamental incorrectness is enough to establish that this Court should overrule it. *See Gamble v. United States*, ___ U.S. ___, 139 S. Ct. 1960, 1981, 1984 (2019) (Thomas, J., concurring) (asserting that "the Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions . . . over the text of the Constitution and other duly enacted federal law" and explaining that "[w]hen faced with a demonstrably erroneous precedent" the Court "should not follow it").

Nevertheless, under this Court's precedent, overruling a case requires "a 'special justification'—over and above the belief 'that the precedent was wrongly decided.'" *Kimble*, 135 S. Ct. at 2409 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). That requirement is met here, in spades.

At the outset, however, it bears noting that *stare decisis* "is at its weakest when [the Court] interpret[s] the Constitution because [its] interpretation can be altered only by constitutional amendment or by overruling [its] prior decisions." *Janus*, 138 S. Ct. at 2478 (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). Further, this Court has explained that "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Id.* Consequently, the required showing should be even lighter than it normally might be.

Turning to the relevant *stare decisis* factors, first, *Locke*'s "rule" is not a "workab[le]" one. *Id.* The Court in *Locke* was compelled to eschew application of a traditional standard of review such as strict scrutiny, taking that case's analysis out of the mainstream of this Court's free exercise precedents. And, as demonstrated above, it is impossible to explain why the constitutional choice Washington put to Joshua Davey is somehow more permissible than the one Missouri put to Trinity Lutheran Church.

In *Trinity Lutheran* this Court sought to bring order to *Locke* by explaining that the distinction between the two cases rested on the distinction between religious status and religious conduct. *Trinity Lutheran*, 137 S. Ct. at 2023. As discussed above, that difference is an illusory one and will spawn an endless supply of conflicting lower court decisions as courts and litigants attempt to explain why a particular action is really a stand-in for status and vice versa.

The Court also distinguished *Locke* based on the specific interest at stake: "not using taxpayer funds to pay for the training of clergy." *Id.* at 2023. To the extent that *Locke* is limited to that specific circumstance, it hardly established a "rule" at all but instead a *sui generis* exception to a rule (and an erroneous one at that, given that Washington's scholarship program did not serve this interest). To the extent that *Locke* is *not* limited to its facts, however, the bench and bar are utterly without guidance as to how to know when a case falls into the *Locke* side of the ledger versus the *Trinity Lutheran* side of the ledger. *See Trinity Lutheran*, 137 S. Ct. at 2024 n.3 (plurality opinion) ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."). That lack of guidance and the confusion it is causing is a reflection of the fact that *Locke*'s analysis is not workable. *See, e.g.*, Pet. 30

(setting forth cases that have interpreted *Locke* to require divergent results).

For related reasons, the next two relevant *stare decisis* factors—the extent to which *Locke* is "consisten[t] with other related decisions" and "developments since the decision was handed down"—counsel in favor of overruling the case. *Janus*, 138 S. Ct. at 2478-79.

Locke is hopelessly in conflict with the Free Exercise Clause cases that preceded it, like *McDaniel* and *Lukumi*, and with *Trinity Lutheran*, which followed it. These cases affirm that "[t]he Free Exercise Clause protects against laws that 'impose[ ] special disabilities on the basis of . . . religious status," *Trinity Lutheran*, 137 S. Ct. at 2021 (alteration in original) (quoting *Lukumi*, 508 U.S. at 533), which is the only real way to describe a state scholarship program that excludes only those who desire to use program funds to learn how to "lead a congregation," *Locke*, 540 U.S. at 721.

There is also the matter of the dog that didn't bark: this Court has never actually relied on *Locke* in the decade and a half since it was decided, save for a couple of references made in a case decided the following term. *See Cutter v. Wilkinson*, 544 U.S. 709, 713-14, 719 (2005). The only time the Court has discussed *Locke* in any real depth was in *Trinity Lutheran*, which it did for the purposes of distinguishing it away. While certainly not

dispositive, this is not a sign of healthy precedent; it instead suggests a case that has been avoided like the plague. *See, e.g.* Bryan A. Garner et al., *The Law of Judicial Precedent* 397 (2016) (summarizing *stare decisis* factors and concluding that "[c]ourts generally give less precedential weight to decisions that are isolated and haven't been followed (or acquiesced in) than to a line of precedent").

Finally, there is little "reliance" on the *Locke* decision. *Janus*, 138 S. Ct. at 2479. As just explained, this Court has not used *Locke* in its case law. And there has always been serious question about whether *Locke* is largely limited to its facts. *See, e.g.*, Berg & Laycock, *supra*, at 250 ("Much of [*Locke*'s] reasoning . . . rests on the narrow basis that states have a particular interest in denying funds to clergy training."). Those raising this question have only received further vindication in *Trinity Lutheran*, where this Court wryly contrasted *Locke*'s anti-clergy-funding interest with "a program to use recycled tires to resurface playgrounds" to help show its inapplicability. *Trinity Lutheran*, 137 S. Ct. at 2023. The only parties who, at this point, may fairly claim reliance would be the narrow group of governmental entities which have crafted aid programs with clergy-training exceptions. This hardly justifies allowing bad precedent to stand.

There is thus ample reason to overrule *Locke* and little reason to allow it to survive. *Stare decisis* is no bar to overturning the decision.

CONCLUSION

This Court does not take up cases haphazardly; it does so to resolve uncertainty regarding "important federal question[s]" and to bring cohesion to federal law. *See, e.g.*, Supreme Court Rule 10 ("Considerations Governing Review on Certiorari"). Given differences between this case and *Locke*, this Court could rule in favor of Petitioners without disturbing its decision in *Locke*. But that approach would allow *Locke* to continue to foment discord in cases involving the Religion Clauses. Enough time has passed that *Locke*'s errors have become manifest. This Court would go a long way toward clarifying its case law by acknowledging that *Locke* is no longer good law—by admitting that the Court should have invalidated the discriminatory Washington scholarship program.

Consequently, Petitioners respectfully request that this Court rule in favor of Petitioners and, in so doing, overrule its decision in *Locke v. Davey*.

Respectfully submitted,

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September 17, 2019