No. 20-1088

In The
Supreme Court of the United States

DAVID AND AMY CARSON, AS PARENTS AND NEXT FRIENDS OF O.C., ET AL.,

Petitioners,

v.

A. PENDER MAKIN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE DEPARTMENT OF EDUCATION,

Respondent.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Locke v. Davey*, 540 U.S. 712 (2004); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or amicus, *e.g.*, *Espinoza v. Montana Department of Revenue,* 140 S. Ct. 2246 (2020). The ACLJ is dedicated, *inter alia*, to religious liberty and freedom of speech.

SUMMARY OF ARGUMENT

In the distribution of religion-neutral benefits (here, tuition assistance), the government may not disfavor otherwise eligible private entities solely on the basis of their religious identity or activities. The lower court's rejection of that norm cannot stand. Importantly, this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), does not require a contrary result. The fact that lower courts continue to invoke *Locke* for the opposite proposition demonstrates the need for this Court to overturn *Locke*.

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[1] The parties have filed blanket consents to amicus briefs. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT

Governments often employ incentives (grants, credits, and deductions) to pursue desired social goods, such as the fostering of charitable works and the education of children. That the incentivized activities may involve religious entities or pursuit of religious goals is not a constitutional problem. *Walz v. Tax Comm'n of NY*, 397 U.S. 664 (1970) (tax exemption included properties dedicated to religious purposes); *Mueller v. Allen*, 463 U.S. 388 (1983) (deduction for education expenses included expenses at private religious schools). What the government may *not* do is discriminatorily exclude otherwise qualified, eligible entities solely because of their religious identity or activities. This norm follows from much of this Court's jurisprudence. The First Circuit nevertheless declared that otherwise neutral educational assistance is impermissible *solely when funds go to schools with religious missions.* This Court should reverse.

I. It Is Unconstitutional Invidiously to Discriminate in a Secular Benefits Program against an Otherwise Eligible Entity Solely Because of Its Religious Identity or Activities.

Express governmental discrimination, in a secular benefits program, against an otherwise qualified entity, solely because of that entity's religious identity or activities, is generally unconstitutional. Yet the court below approved precisely such discrimination.

The Constitution "forbids hostility" toward "all religions," *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

"State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). The Establishment Clause "commands that . . . [a state] 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." *Id.* at 16.

This Court has therefore held that it violates the First Amendment (specifically, the Free Exercise Clause) to target clergy for special political disabilities. *McDaniel v. Paty*, 435 U.S. 618 (1978). This Court has likewise held, in the context of a speech forum, that it violates the First Amendment to exclude an entity because of its religious message, *e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), including when a funding program is at issue, *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Similarly, the exclusion of an otherwise eligible recipient from a government grant program, solely because that entity is religious in nature, violates the Free Exercise Clause. *Trinity Lutheran Church v. Comer,* 137 S. Ct. 2012 (2017). Most recently, in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), this Court held that a ban on aid only to "sectarian" schools "turns expressly on religious status and not religious use," *id.* at 2256, and thus violates the nondiscrimination norm articulated in *Trinity Lutheran* and "the decades of precedents on which it relied," *Espinoza*, 140 S. Ct. at 2260. *See id.* at 2256-57, 2260-61.

This Court has also held that the Equal Protection Clause commands that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), and that discrimination triggered by the exercise of a fundamental right – here, the religious educational choices of parents – triggers strict scrutiny under the Equal Protection Clause. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications affecting fundamental rights trigger strict scrutiny). *A fortiori*, restrictions that rest on no more than "a bare desire to harm" – or exclude – a particular group are impermissible. *Cleburne*, 473 U.S. at 446-47 (citing *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

Thus, a government's posting of a "no religious choices or entities allowed" sign, whether literal or figurative, runs afoul of both the Equal Protection Clause and the religion and speech[2] clauses of the First Amendment. *See also Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (upholding parental right to choose religious schools for their children).

It follows that the selective exclusion challenged here cannot stand. The bar on tuition assistance applies expressly to so-called "sectarian" schools, Pet. at 5-6. And as *Espinoza* held, the state's appeal to concerns about the use to which any funds could be put cannot sanitize this express discrimination. "Status-based discrimination remains status based even if one of its goals or effects is preventing religious

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[2]The standards governing discrimination against religious speech are the same under the Free Speech and the Equal Protection Clauses. *E.g.*, *Carey v. Brown*, 447 U.S. 455, 463 (1980); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 n.4 (1992).

organizations from putting aid to religious uses." 140 S. Ct. at 2256.

A contrary ruling would authorize gratuitous hostility against those who choose religious entities for donations, education, services, etc. A state or federal government could disallow deductions for charitable contributions only to religious schools. Use of public parks could be free except for religious school events. Tours of museums and state capitols could be free for all student groups except those from religious schools. A government transportation agency could allow free (and thus subsidized) use of express lanes by HOV vehicles except for buses carrying children to or from religious schools. Such a rule, in a land settled by believers seeking religious freedom, would be ahistorical, ironic, and "odious," *Trinity Lutheran*, 137 S. Ct. at 2025.

The First Circuit's ruling in this case *allowed* precisely what the Constitution *forbids*. Accordingly, this Court should reverse.

II. *Locke v. Davey* Provides No Valid Basis for a Contrary Result.

The court below invoked this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), as supporting the supposed constitutionality of a "no choice of religious schools" rule. Pet. App. 47a-50a. But *Locke* provides no such support for the decision below, as *Trinity Lutheran* and *Espinoza* amply demonstrate. In any event, *Locke* at best provides very unsteady footing for *any* rule that would justify targeted religious discrimination.

Locke worked no revolution in constitutional jurisprudence. *Locke* did not purport to overturn any of this Court's precedents. Nor did it challenge the notion that discrimination against churches as such would violate the Constitution. *See* 540 U.S. at 724 (distinguishing government action "evincing hostility toward religion"). To the contrary, *Locke* expressly distinguished a situation like the one here, where someone or something had "to choose between their religious beliefs and receiving a government benefit." *Id*. at 720-21.

Moreover, the *Locke* decision represents an especially ill-suited candidate for the construction of a religion-antagonistic body of law. The fact that *Locke* continues to generate erroneous lower court decisions as in *Trinity Lutheran*, *Espinoza*, and the case at bar shows the need for this Court definitively to repudiate *Locke v. Davey*.

A. The *Locke* Decision Is Itself Questionable.

At issue in *Locke* was a state's decision to deny a scholarship to an incoming college student who had announced his intention to pursue a major in devotional theology. 540 U.S. at 716-17. The majority ruled that this denial reflected a historically based refusal to use tax money to fund the training and maintenance of clergy. *Id*. at 722-23 & n.6. To be sure, that "historic and substantial" concern, *id*. at 725, was real. However, that concern addressed a *special privilege* being afforded to clergy, not a *common benefit* being denied to clergy. In other words, the state's boot in *Locke* far exceeded the historical footprint.

There is a huge difference *in kind*, not just in degree, between doling out a special benefit to a select profession (i.e., clergy) and singularly denying an otherwise generally available benefit (i.e., scholarships, access to public parks, use of public libraries) only to the select group. The first is a privilege; the second is blatant discrimination. *See id.* at 727 (Scalia, J., dissenting) ("Davey is not asking for a special benefit to which others are not entitled. . . . He seeks only equal treatment").

The *Locke* majority sought to counter this disconnect between the state interest and the challenged restriction by asserting that "training for religious professions and training for secular professions are not fungible," and that "[t]raining someone to lead a congregation is an essentially religious endeavor." *Id.* at 721. There is some truth to this. But the *Locke* majority's rejoinder proves far too much. The same could be said of countless other acts: carrying a religious icon in procession vs. carrying a political banner; wearing a yarmulke vs. wearing a pullover cap; growing a long beard for religious reasons vs. growing a beard for health or style. In each such case, to single out the religious act for restraint, when the comparable (and, in secular terms, indistinguishable) act is not so restrained, is antireligious discrimination.

Morever, the "essential" difference between religious and secular professions is *only visible to the theological eye*. That is, the nonbeliever considers religious acts to be meaningless rituals of no greater significance than a Zumba exercise. Only to the eyes of faith is the religious act "essentially" different. Yet the federal and state courts are not equipped or even permitted to render such inherently religious assessments. While

disallowing a special assessment for ministers did not require courts to determine whether Ethical Culture or Veganism counts as a religion – *nobody* got tax money for their profession – a targeted exclusion of what is "essentially religious" from an otherwise general benefits program necessarily thrusts courts into the theological thicket.

The distinction between special privileges and unique disabilities has growing importance in a time of expanding government. The more benefits and services the state undertakes to pay, deliver, control, or manage, the more important it becomes to resist discriminatory disqualifications. When the state undertakes, for example, to foot the bill for healthcare for the populace or a segment thereof, it would be plainly discriminatory to disqualify otherwise eligible ministers, and only ministers, for this tax-funded benefit.

In short, the rationale of *Locke* rests upon a basic category error. Disavowing that error leaves *Locke* without its asserted historical foundation. But even if this Court were to leave *Locke entirely* intact, *Locke* would not control this case involving the wholly secular benefit of tuition assistance fostering education and parental choice.

B. The Decision in *Locke* Was Unnecessary.

Compounding the weakness of the rationale in *Locke* is the fact that determination of the opinion's central issue was completely unnecessary to resolve the case. In actuality, the restriction at issue in *Locke* was so poorly tailored to the state's proffered rationale as to be irrational, having no real effect except to penalize

those students who were guileless enough to declare a major in devotional theology before they were required to do so.

The scholarship at issue in *Locke*, the Promise Scholarship, was available to graduating high school students for use *only in the first two years of college* study. Wash. Admin. Code §§ 250-80-010, 250-80-070(1), (4); *Locke*, 540 U.S. at 715-16. It could be used for any college "education-related expense, including room and board," 540 U.S. at 716. Students who did not declare any major during their first two years of college, or who declared a major other than devotional theology, could receive the Promise Scholarship. Brief for Respondent at 10 & n.4, *Locke v. Davey*, No. 02-1315 (U.S. Sept. 8, 2003) (citing record and noting that the state relied, in its answer, upon the ability of students to decline to announce a major and retain their eligibility for the scholarship). But any student who declared a major in devotional theology – i.e., theology taught from a believing perspective – was penalized with the loss of scholarship eligibility. 540 U.S. at 716. Thus, the scholarship program in *Locke*:

- Did not bar the use of tax funds for the study of devotional theology or ministerial training, even if the student fully intended to become a minister, so long as the student *did not declare a major, id.* at 725 & n.9;
- Did not bar the use of tax funds for the study of devotional theology or ministerial training as an elective or even a required course, even if the student fully intended to become a minister, so long as the student *declared a different major, id.*;
- Did not bar the use of tax funds for the study of theology, even by an actual minister or minister in

training, so long as the theology was taught from a nonbelieving perspective, *id.* at 716.

However, the restrictions at issue *did* disqualify a student with a declared major in devotional theology:

- Even if the student took no more courses in devotional theology during the covered freshman and sophomore years than were required of all other students at the same school, *id.* at 725 & n.9;
- Even if the student changed his major after sophomore year or, like Joshua Davey himself, changed his career plans and did not become clergy after all. (Davey attended Harvard Law School, *see* Joshua Davey, "The Real Losers of Locke v. Davey," *Icthus* (Apr. 1, 2004), *available at* http://www.hcs.harvard.edu/~ichthus/issues/1.1/essay_davey.html, and is now a partner at a law firm, https://www.troutman.com/professionals/ joshua-d-davey.html.

Thus, the restriction at issue in *Locke*, which supposedly furthered the goal of avoiding tax funding "for vocational religious instruction," 540 U.S. at 725, was almost completely ineffectual. The state "allowed scholarships to be used at 'pervasively religious schools' that incorporated religious instruction throughout their classes," *Espinoza*, 140 S. Ct. at 2257. And as noted above, scholarship recipients, including clergy in training, could specifically use scholarship funds for devotional theology study so long as they had declared a different major or were savvy enough not to declare any major. Meanwhile, students like Joshua Davey were penalized for their voluntary declaration of a major that they were not even required subsequently to pursue. Ultimately, the haphazardly tailored restriction in *Locke* was no more than a penalty for a college freshman's forthrightness

regarding his expected major, or a punishment for his mistaken predictions about his future study plans.

The *Locke* Court should have struck down the restrictions at issue as an irrational penalty on free speech (declaring a major) and religious exercise (declaring one's intent to pursue a religious vocation) that fails even minimal scrutiny. That case should certainly not be rewritten to be the basis for a broad mandate to treat religious entities as pariahs when neutral, generally available benefits are at stake.

C. This Court Should Definitively Inter the *Locke* Decision.

As in *Trinity Lutheran* and *Espinoza*, this Court can certainly reach the right result here without overruling *Locke*. However, it would be better for the law to repudiate *Locke* so that it does not continue to generate errors in the lower courts.

In *Trinity Lutheran*, the court of appeals relied upon *Locke*. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779. 785 (8th Cir. 2015). In *Espinoza*, the state supreme court likewise relied upon *Locke*, despite this Court's intervening decision in *Trinity Lutheran*. *Espinoza v. Montana Dep't of Revenue*, 2018 MT 306, P15, P16, 393 Mont. 446, 459, 435 P.3d 603, 608-09 (2018). And in the present case, the court of appeals also invoked *Locke* for support, Pet. App. 47a-50a, despite this Court's rulings in *Trinity Lutheran* and *Espinoza*.

Confining *Locke* to its facts will not do: *Locke*, as explained *supra* §II(B), is actually irrational on its own facts. What is needed to restore coherence and integrity to the law is this Court's recognition that

Locke was a mistake, ill-conceived on both its facts and its reasoning, a decision that merits express renunciation. The sooner this Court takes that step, the better.

CONCLUSION

May the federal government confer ROTC scholarships to attend Yale but not Baylor? May a government allow tuition assistance to families to fill a void where no free public school is available, but only if the students attend a secular school and not a religiously affiliated school? The answer in both cases is a resounding "no."

This Court should reverse the judgment of the First Circuit.

Respectfully submitted,

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