
No. 00-35962

United States Court of Appeals for the Ninth Circuit

JOSHUA DAVEY,
Plaintiff-Appellant,

vs.

GOVERNOR GARY LOCKE, 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; and JOHN KLACIK, individually, and in his official capacity as Associate Director of the Higher Education Coordinating Board,

Defendants-Appellees

**On Appeal from the United States District Court
for the Western District of Washington**

BRIEF OF PLAINTIFF-APPELLANT

**Jay A. Sekulow
Kevin H. Theriot
The American Center for Law
and Justice
1000 Regent University Drive
Virginia Beach, VA 23484
(757) 226-2489**

**Stuart J. Roth
The American Center for Law
and Justice
120 Zeigler Circle E
Mobile, Alabama 36608
(334) 633-2154**

**Walter M. Weber
The American Center for Law
and Justice
1000 Thomas Jefferson Street, NW
Suite 609
Washington, D.C. 20007
(202) 337-2273**

**Richard A. Bersin
Law Office of Richard Bersin
601 Union Street, Suite 4900
Seattle, Washington 98101
(206) 343-2006**

Attorneys for Plaintiff-Appellant

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JURISDICTION

The district court had jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343 because the plaintiff, Joshua Davey, advanced claims under the First and Fourteenth Amendments to the United States Constitution and under federal law, particularly 28 U.S.C. § 2201 and 42 U.S.C. §§ 1983 and 1988. Mr. Davey also asserted state law claims, over which the district court exercised supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

Final judgment dismissing all of the plaintiff's claims was entered in the court below on October 6, 2000. ER¹ 64. On October 26, 2000, Mr. Davey filed a timely notice of appeal from the Judgment and related Order denying Mr. Davey's motion for summary judgment and granting the defendants-appellees'² motion for summary judgment. *See* ER 63 (Order); ER 64 (Judgment); ER 65 (Notice of Appeal). This Court has jurisdiction pursuant to 28 U.S.C. § 129 over Mr. Davey's appeal filed pursuant to Fed. R. App. P. 4(a)(1) and 26(a).

¹ "ER" denotes Clerk's Record documents included in the Excerpts of Record; ER tab numbers conform to the lower court's docket numbers.

² Collectively, "HECB," which refers to the state's Higher Education Coordinating Board. The term is used to include governor Locke, although he is not formally an HECB member.

STATEMENT OF THE ISSUES

Mr. Davey qualified to receive the state-funded Washington Promise Scholarship (“Scholarship”) under religion-neutral criteria for academic merit, family financial status, and enrollment in a qualified institution.³ ER 63:2. The HECB denied Mr. Davey the Scholarship solely because he declared that he would major in “Pastoral Ministries.” ER 63:3; ER 12:30. These facts raise the following legal questions:

- I. Whether the HECB violated Mr. Davey’s right to the free exercise of religion under the First Amendment to the United States Constitution, when he was singled out for discriminatory treatment solely because he declared a major in Pastoral Ministries? This issue was raised at ER 1:6-7 ¶¶ 46-53 and ruled on at ER 63:10-13; ER 64.
- II. Whether the HECB violated Mr. Davey’s right to the equal protection of the laws pursuant to the Fourteenth Amendment to the United States Constitution, when he was singled out for discriminatory treatment solely because he declared a major in Pastoral Ministries, while similarly situated students who did not declare a major, or declared majors in other academic disciplines, received the

³ Students who meet the religion-neutral merit, financial, and enrollment criteria are termed “Promise Scholars” in this brief.

- Scholarship? This issue was raised at ER 1:7 ¶¶ 54-61 and ruled on at ER 63:18-19; ER 64.
- III. Whether the HECB's religious restriction violates the Establishment Clause of the First Amendment when the religious restriction treats theology students unfavorably? This issue was raised at ER 1:8 ¶¶ 62-66 and ruled on at ER 63:13-14; ER 64.
- IV. Whether the HECB violated Mr. Davey's right to freedom of speech as guaranteed by the First Amendment, when he was singled out for discriminatory treatment solely because he declared a major in Pastoral Ministries? This issue was raised at ER 1:8-9 ¶¶ 67-77 and ruled on at ER 63:14-17; ER 64.
- V. Whether the HECB violated Mr. Davey's right to free association, as guaranteed by the First Amendment, when HECB denied Mr. Davey the Scholarship because of his association with Northwest College's ("Northwest") Department of Religious and Ministerial Studies ("Religion Department") and that denial infringed his ability to associate? This issue was raised at ER 1:9-10 ¶¶ 78-83 and ruled on at ER 63:17-18; ER 64.
- VI. Whether the HECB's religious restriction prohibiting an award of the Scholarship to any student who pursues a degree in theology is

- unconstitutionally vague under the Fourteenth Amendment, when the religious restriction is undefined, and implementation of the restriction is delegated to school officials without any application guidelines or administrative oversight? This issue was raised at ER 1:10 ¶¶ 84-92 and ruled on at ER 63:20-21; ER 64.
- VII. Whether the HECB violated Mr. Davey’s right to the free exercise of religion under Washington State Constitution Article 1, § 11, when he was singled out for discriminatory treatment solely because he declared a major in Pastoral Ministries? This issue was raised at ER 1:10-11 ¶¶ 93-100 and ruled on at ER 63:10-13; ER 64.
- VIII. Whether the HECB violated Mr. Davey’s right to freedom of speech under Washington State Constitution Article 1, § 5, when he was singled out for discriminatory treatment solely because he declared a major in Pastoral Ministries? This issue was raised at ER 1:11-12 ¶¶ 101-110 and ruled on at ER 63:9-10; ER 64.
- IX. Whether the HECB’s express discrimination against students of theology is justified by the state’s alleged interest in enforcing a greater separation of church and state than is required by the federal constitution? This issue was raised at ER 1:6-12 ¶¶ 51, 59, 75, 82, 98, and 108. The court below discussed this issue at ER 63:7-8.

STATEMENT OF THE CASE

Nature of the Case

This is a civil rights action filed under 42 U.S.C. § 1983 to vindicate Mr. Davey's constitutional rights under the First and Fourteenth Amendments to the United States Constitution and Washington Constitution article I, §§ 5 and 11.

Course of Proceedings

Mr. Davey filed his verified Complaint for Declaratory and Injunctive Relief and Damages on January 13, 2000. ER 1. The HECB filed an answer on February 4, 2000. ER 8.

Mr. Davey moved on March 3, 2000 to temporarily enjoin HECB from refusing to award the Scholarship to an otherwise eligible student, solely because the student was pursuing a degree in theology. ER 10. The lower court denied Mr. Davey's motion on March 21, 2000. ER 25. The parties then conducted discovery and both parties moved for summary judgment on August 27, 2000. ER 36, ER 39.

Disposition Below

On October 5, 2000, without oral argument, the lower court entered an order denying Mr. Davey's motion for summary judgment and granting the

HECB's motion for summary judgment dismissing all claims. ER 63:21.

Judgment on the Order was entered on October 6, 2000. ER 64.⁴

STANDARD OF REVIEW

The grant of summary judgment by a district court merits *de novo* review. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998); *see also Tucker v. California Dep't of Educ.*, 97 F.3d 1204, 1209 n.2 (9th Cir. 1996) (constitutionality of speech restriction is reviewed *de novo*). This court must view the evidence in the light most favorable to Mr. Davey, the nonmoving party. *Id.* Summary judgment was properly granted only if the lower court correctly applied the substantive law and there were no remaining issues of material fact. *Wendt v. Host Int'l Inc.*, 125 F.3d 806, 809-10 (9th Cir. 1997).

STATEMENT OF THE FACTS

The Parties

Plaintiff-appellant Joshua Davey is a twenty-year old Washington resident, ER 1:2 ¶¶8-9, who is currently mid-way through his second year of college at Northwest. ER 63:2-3.

⁴ Mr. Davey moved in district court for an injunction pending the appeal that would escrow Scholarship funds for the 2000-01 school year, ER 66, but the lower court denied the motion, ER 74. Counsel for the parties subsequently agreed in principle to place the funds in a jointly controlled certificate of deposit, which by mutual agreement will be transferred to the prevailing party upon conclusion of the litigation.

Defendant Gary Locke is governor of the State of Washington. ER 1:2 ¶ 12; ER 8:2 ¶ 12. Each of the other named defendants are HECB officials: Mr. Marcus S. Gaspard is the Executive Director; Mr. Bob Craves is the Chair; and Mr. John Klacik is the Associate Director. ER 1:3 ¶¶ 13-15; ER 8:2. Each defendant was sued in his individual and official capacities for the acts alleged in the Complaint. ER 1:2-3 ¶¶12-15.

Testimony from three third party witnesses is cited. Lana Walter is the Northwest financial aid director; Rebecca Collins is the HECB director of educational services; and Linda Schactler is director of the HECB fiscal and policy department.

The Undisputed Facts

In 1999, Governor Gary Locke and the Washington Legislature created a new college scholarship program for low- and middle-income students who achieve an excellent academic record throughout their high school careers. ER 12:11; ER 41:50. The Scholarship is available for the first two years of a student's post-secondary education. ER 12:11, 25. The Scholarship was worth \$1,125 in 1999-2000, ER 12:28, and \$1,542 in 2000-2001. ER 68:3. Scholarship recipients are also given official and public honors. ER 12:26-27, ER 41:46-59. Receiving the Scholarship is a

prestigious accomplishment in the eyes of families, faculty, and employers.
ER 41:31-33.

Scholarship applicants that meet the merit and financial criteria must attend an accredited public or private post-secondary institution within the state of Washington to receive the Scholarship. ER 63:2, ER 12:11. For private school students, the HECB sends a warrant in the student's name to the school, which is given to the student upon confirmation of enrollment. ER 12:28. Private school students such as Mr. Davey may spend the Scholarship funds on any education related expense. ER 8:2-3 ¶ 22; ER 12:28; ER 56:16-17. Examples of acceptable expenses include room and board, secular reference books from off-campus bookstores, and even groceries. ER 56:14, 16-17. The HECB offered no evidence to show that Mr. Davey would have spent any Scholarship funds on materials or tuition related to theology courses. On the other hand, the record shows that the state teaches courses in theology and other religious subject matter in state universities with state funds. ER 12:57-82.

Mr. Davey applied for the Scholarship in the summer of 1999. ER 12:2. In August 1999, Mr. Gaspard notified Mr. Davey that the HECB had awarded him the Scholarship. ER 12:25. Governor Locke wrote to Mr. Davey in September 1999 and congratulated him on his achievement. ER

12:26. “Education,” the Governor explained, “is the great equalizer in our society. Regardless of gender, race, ethnicity, or income, a quality education places all of us on a more level playing field.” ER 12:26. As the governor later said, “It’s my dream that some day, no high-achieving student will be blocked from pursuing a higher education because of financial burdens.” ER 41:52. Enclosed with the award letter was a handsome certificate, honoring Mr. Davey’s future contributions to the state and confirming that the Scholarship would support Mr. Davey’s “pursuit of a college education.” ER 12:27.

In fall, 1999, Mr. Davey enrolled at Northwest, a Christian college that was properly accredited for Scholarship purposes. ER 38:7. Upon enrolling, Mr. Davey declared a major in Pastoral Ministries and Business Management. ER 12:4. His religious beliefs were his sole motivation for pursuing a college degree and the only reason he selected his major. ER 12:2; ER 41:11. At this point, no one had raised any objection to Mr. Davey regarding his choice of an academic major. ER 12:6 ¶ 22.

The first inkling that something was awry came about October 28, 1999, when Ms. Walter told Mr. Davey that the HECB would not award the Scholarship to students majoring in theology. ER 12:5; ER 41:41. If Mr. Davey wanted to receive the Scholarship award, he would have to certify in

writing that he was not majoring in any theology-related field. ER 12:5 ¶ 21, 6-7 ¶ 27; ER 56:10. Shortly thereafter, Mr. Davey obtained Mr. Klacik’s memorandum, stating that pursuant to RCW 28B.10.814⁵ and the state constitution, “students who are pursuing degrees in theology are not eligible to receive *any* state-funded financial aid, including the new Washington Promise Scholarship.”⁶ ER 12:30. That memorandum was accompanied by a form that required Northwest to certify that “no student [awarded the Scholarship] is pursuing a degree in theology” before Mr. Davey’s Scholarship funds would be released to him. ER 12:29.

This forced Mr. Davey to choose among changing his religious beliefs that compelled him to become a minister; violating those same beliefs by lying about his major solely to obtain the funds, or standing firm in his faith and refusing to yield to the HECB’s discriminatory demand. ER 12:6 ¶ 27; ER 41:15. After much thought and prayer, he refused to relinquish his faith and the HECB denied him the Scholarship for the 1999-2000 school year. ER 12:6-8 ¶¶ 27-32. Mr. Davey again qualified for the Scholarship in the fall of 2000 under the neutral merit, financial, and enrollment criteria. ER

⁵ In its entirety, RCW § 28B.10.814 reads: “No aid shall be awarded to any student who is pursuing a degree in theology.” (Addendum B).

⁶ The discriminatory policy set forth in Mr. Klacik’s October 12, 1999 memo is denoted herein as the HECB’s “religious restriction.” The religious restriction is codified at WAC 250-80-020 § 12(f). (Addendum C).

68:3. He was again denied the Scholarship by Northwest at HECB's behest because of his Pastoral Ministries major. ER 68:4; ER 12: 6 ¶ 26, 8 ¶ 32.

SUMMARY OF THE ARGUMENT

The question in this case is whether the government may single out and discriminate against students that study religion when it distributes government benefits to serve its valid, secular public interests. Under well settled federal and state law, the answer is "no."

For the past two years, the HECB told Mr. Davey that he qualified to receive the Scholarship under its religion-neutral criteria for academic merit, family financial status, and enrollment in a qualifying institution. *Id.*, ER 68:3. The purpose of the Scholarship is to help academically accomplished students like Mr. Davey to go to college, develop a good career, and ultimately benefit the state. ER 12:26-27. Nevertheless, the HECB twice denied him the Scholarship, solely because he declared a major in Pastoral Ministries. ER 12:30, ER 68:4.

It is undisputed that Mr. Davey's choice of a major and his declaration thereof was an expression of his religious faith. ER 12:2, 4, 6-7. When the HECB refused to award Mr. Davey the Scholarship solely because of that religiously motivated speech and conduct, it violated the basic free exercise rule set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,

508 U.S. 520 (1993). If a law “infringe[s] upon or restricts practices because of their religious motivation,” the law is valid only if it is narrowly tailored to advance a compelling state interest. *Id.* at 533. As well, conditioning benefits in this way violates the rule in *McDaniel v. Paty*, 435 U.S. 618 (1978).

The religious restriction also violates the Equal Protection Clause, because all other Promise Scholars could freely choose an academic course of study, while religiously motivated students like Mr. Davey were denied the Scholarship.

The expressly anti-religious restriction chills Mr. Davey’s right to freely proclaim and pursue his chosen field of study, which fails the threshold Free Speech Clause requirement of content-neutrality. Additionally, the HECB created a limited public forum by funding the protected First Amendment activity of obtaining a college education. The religious restriction prohibits only the study of theology for religious reasons or from a religious perspective, and is thus viewpoint discriminatory. Viewpoint discrimination is blatantly unconstitutional under *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), regardless of the forum involved.

The religious restriction is also so vague that it infringes Mr. Davey's due process rights under the Fourteenth Amendment. The HECB failed to define the terms of the religious restriction and delegated crucial decisions to officials without giving them any implementation guidelines or later verifying their decisions. This left reasonable people to guess what the religious restriction really means.

Finally, Washington guarantees its citizens enhanced protection of their rights to religious free exercise and free speech. The lower court disregarded controlling law and failed to extend these guarantees to Mr. Davey. Instead, the lower court gave dispositive weight to HECB's fear that the Scholarship funds would somehow establish religion, in contravention of Washington Constitution art. I, § 11. This fear cannot take supremacy over Mr. Davey's federal constitutional claims. U.S. Const. art. VI, cl.2; *see also*, *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

Ironically, the supremacy issue need not even be reached, because HECB's fear of violating art. I, § 11 is unfounded under the recent decision in *Malyon v. Pierce County*, 935 P.2d 1272 (Wash. 1997). Under *Malyon*, the Scholarship funds would not "establish religion" because they were appropriated for purely secular purposes.

Despite *Malyon*'s clear holding, the HECB claims a *per se* compelling interest in enforcing a greater separation of church and state under art. I, § 11 than is required by the federal First Amendment. That argument must fail, given that similar state anti-establishment interests were rejected by the Supreme Court in *Widmar v. Vincent*, 454 U.S. 263 (1981), and by this Court in *Garnett v. Renton School District*, 987 F.2d 641 (9th Cir. 1993) and in *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993).

Even were this not true, the state's anti-establishment interest cannot be given dispositive weight because it rests wholly on *Witters v. State Commission for the Blind*, 771 P.2d 1119 (Wash. 1989) ("*Witters III*").⁷ But little weight can be given *Witters III*. It relied on now-vacated authority, was severely limited by the *Malyon* court, and is factually distinct from Mr. Davey's case. In any event, even were the state's interest valid, the religious restriction is not narrowly tailored to effect the interest.

As set forth below, the lower court erred on every issue and the lower court must be reversed.

⁷ The history of the *Witters* litigation is summarized in Argument § VII.B, *infra*.

ARGUMENT

I. THE RELIGIOUS RESTRICTION VIOLATES THE FEDERAL FREE EXERCISE CLAUSE.

The court below dismissed Mr. Davey’s federal free exercise claim even though the religious restriction made it more difficult for Mr. Davey to pursue his degree in pastoral ministries. ER 63:11. This holding is wrong because the lower court (A) failed to apply strict scrutiny to the HECB’s facially discriminatory policy; (B) misconstrued controlling authority and limited strict scrutiny of free exercise claims to cases involving unemployment compensation; (C) misconstrued controlling authority to conclude that the religious restriction did not infringe Mr. Davey’s free exercise of religion; and (D) relied upon inapposite authority to support its “funding” theory.

A. Strict scrutiny is required under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

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.

Id. at 532 (citations omitted). A law that burdens religious exercise and that is not both neutral and generally applicable “must be justified by a compelling government interest and must be narrowly tailored to advance that interest.” *Id.* at 531-32. This compelling interest standard is “not

‘water[ed] . . . down’ but ‘really means what it says.’” *Id.* at 546 (quoting *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888 (1990)).

The religious restriction mandates that “students who are pursuing degrees in theology are not eligible to receive *any* state-funded financial aid, including the new Washington Promise Scholarship.” ER 12:30. Thus, no Promise Scholar may study theology if that study is “devotional in nature and designed to induce faith and belief in the student.” ER 63:8 (citing *Calvary Bible Presbyterian Church of Seattle v. Board of Regents of Univ. of Washington*, 436 P.2d 189, 193 (Wash. 1968)); *cf.* ER 63:20 (apparently relying on *Calvary Bible’s* definition of religious instruction).

The lower court recognized that Promise Scholars may study theological materials from a secular viewpoint, but not from a religious perspective. ER 63:20. This does not validate the law, but rather shows it to be neither neutral nor generally applicable.

1. The religious restriction is not neutral.

“[T]he minimum requirement of neutrality is that the law not discriminate on its face.” *Lukumi*, 508 U.S. at 533. The religious restriction fails even this minimum requirement because it proscribes “pursuing a degree in theology.” As the lower court pointed out, the “pursuit of

theology” bars only religiously motivated pursuit. ER 63:20. Thus, the religious restriction discriminates on its face against religious conduct and fails *Lukumi*’s neutrality test. Even if this were not true, *Lukumi* instructs us that even an apparently neutral law will not survive unless it is generally applicable.

2. The religious restriction is not generally applicable.

A government regulation is not generally applicable (i.e., imposes a selective burden) when it is substantially underinclusive. *Lukumi*, 508 U.S. at 533. For example, in *Lukumi*, the defendant city proscribed slaughter of domestic animals, (including the ritualistic killing of chickens by adherents of the Santeria religion) to advance its interest in preventing cruelty to animals and preserving public health. 508 U.S. at 524, 526-28. However, one section of the city ordinance exempted small-scale commercial slaughter from the ordinance. *Id.* at 545. The Court held Hialeah’s ordinance to be facially underinclusive because the defendants could not explain how small scale commercial killing furthered its interest in preventing cruelty to animals. *Id.*

The HECB’s religious restriction is similarly underinclusive. First, the HECB grants the Scholarship to Promise Scholars who either do not declare a major or declare a non-theological major, even if they study the

same or similar courses as does Mr. Davey. ER 41:20, 24, 33. More specifically, at Northwest only majors provided through the Religion Department are construed as “pursuing a degree in theology.”⁸ ER 41:34-35. This means that a psychology major (offered through the Education Division) is automatically not pursuing a degree in theology, ER 41:37-38, while a music major (offered through the Religion Department) would be. ER 41:36. Yet both students would take the same core religion courses. ER 41:39-40; *see also* ER 12:16-21 (syllabi listing mandatory religion courses). Indeed, the record shows that fifteen NW students received the Scholarship, but only two were barred. ER 41:28-30,33.

The religious restriction is thus underinclusive, not generally applicable, and is subject to strict scrutiny under *Lukumi*.

B. Strict scrutiny is required under *Employment Division, Department of Human Resources of Oregon v. Smith*.

The lower court refused to apply strict scrutiny under Mr. Davey’s Free Exercise Clause claim, holding that “the compelling interest test formerly common in First Amendment jurisprudence would only be applied

⁸ Ms. Walter apparently used this criterion in Mr. Davey’s case. However, as discussed in the vagueness argument, § VI *infra*, Ms. Walter also conflated personal faith with her perception of the religious restriction and would counsel all Promise Scholars to decline the Scholarship if they intended to enter the ministry, regardless of their chosen major. ER 41:41-44.

in *Sherbert's* limited factual context.” ER 63:13 (citing *Smith*, 494 U.S. at 883-85).

The lower court was wrong. *Smith* holds that a law that impinges upon free exercise interests and fails either threshold element of neutrality and general applicability “must be justified by a compelling government interest and must be narrowly tailored to advance that interest.” *Lukumi*, 508 U.S. at 531-32 (discussing *Smith*). As set forth in Argument § I.A, *supra*, the HECB’s religious restriction is neither neutral nor generally applicable and is subject to strict scrutiny under *Smith*.

Moreover, even if the law were facially neutral and generally applicable, strict scrutiny would still obtain because Mr. Davey raised a hybrid claim. A hybrid claim is one that shows a “colorable claim of infringement” of a constitutional right; i.e., something less than an outright violation of a companion right yet more than a simple allegation; such claims merit strict scrutiny. *Swanson v. Guthrie Ind. Sch. Dist.*, 135 F.3d 694, 700 (10th Cir. 1998); *see Smith*, 494 U.S. at 881 (discussing hybrid rights); *see also Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692 (9th Cir. 1999) (favorably citing *Swanson* for hybrid rights analysis), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000).

Mr. Davey's free exercise arguments implicate colorable claims under the Equal Protection Clause, *see* Argument § II; the Free Speech Clause, *see* Argument §§ IV, V; and the Due Process Clause, *see* Argument §§ VI, VII. The lower court simply ignored Mr. Davey's hybrid claim. This error alone is sufficient to reverse the lower court.

Finally, the lower court's limitation of *Sherbert* to unemployment cases is wrong for an even simpler reason: the Supreme Court applied the *Sherbert* rule when it decided the *McDaniel* case, which considered Tennessee's barring of ministers from serving in the legislature, not unemployment compensation. *See McDaniel*, 435 U.S. at 626.

C. The rule in *McDaniel v. Paty*, 435 U.S. 618 (1978) prohibits conditioning government benefits upon a person's religious status.

Absent any significant analysis, the lower court held *McDaniel* to be inapposite because Mr. Davey had no right "to have Washington fund his religious instruction," ER 63:13, and thus supposedly was not forced by the HECB to forego his religious calling. This misstates the case. It is irrelevant that Mr. Davey lacks an independent right to claim state aid, because Mr. Davey was entitled to the benefit under neutral merit, financial, and enrollment criteria. Once he was so qualified, *McDaniel* teaches us that the HECB must not force him to choose between exercising his individual

liberties and receiving the honorary and monetary benefits of the Scholarship.

In *McDaniel*, a religious minister successfully challenged a Tennessee constitutional provision that barred “ministers of the Gospel or priests of any denomination” from serving as delegates to the state’s constitutional convention. 435 U.S. at 620. This forced the minister to choose between exercising his religious calling or pursuing elective office. *Id.* at 626. The *McDaniel* Court struck the provision because conditioning the availability of a government benefit upon a person’s “willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties.” *Id.* (alterations in original) (quoting *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

Clearly, the religious restriction threatened Mr. Davey with the loss of his financial aid and forced him to choose between being a Promise Scholar and seeking to become a minister. ER 12:6-7 ¶ 27; ER 41:15; *see also Corporation of Haverford Coll. v. Reeher*, 329 F. Supp. 1196, 1203 (E.D. Pa. 1971) (losing financial aid may have “drastic effect” on a college student). Such a coerced choice between individual liberty and receipt of

government benefits is unlawful under *McDaniel*, and the lower court erred by dismissing his claim.

D. Neither *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988) nor *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) support the HECB’s position.

1. *Lyng* did not consider religious discrimination by the state against an individual.

The lower court cited *Lyng* for the proposition that “the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.” ER 63:10 (quoting *Lyng*, 485 U.S. at 451). But Mr. Davey’s case is not *Lyng*.

In *Lyng*, the forest service planned to pave an existing logging road within forest lands that were also used by Native Americans for religious practices. 485 U.S. at 442. The plaintiff Native Americans claimed under the Free Exercise Clause that the plan could not be executed because it would blight the “visual, aural, and environmental qualities of the high country” and thus interfere with their religious experiences. *Id.* at 444-45.

This Court rejected that argument, characterizing the complaint as imposing a “religious servitude” on government lands. *Id.* at 452. The Supreme Court affirmed, observing that upholding the free exercise claim

would forbid all commercial timber harvesting and road construction within 17,000 acres. *Id.* at 453. This would allow *de facto* ownership of huge amounts of government property for anyone claiming a need for public lands in which to practice his or her religious faith. *Id.*

On the other hand, the *Lyng* Court carefully noted that a religiously discriminatory law “prohibiting the Indian respondents from visiting the [disputed] area would raise a different set of constitutional questions.” *Id.* That is precisely the type of law which Mr. Davey confronts. The HECB’s religious restriction prohibits Mr. Davey from becoming a Promise Scholar, solely because he exercised his faith in pursuit of a religious calling. ER 41:11-12; *cf.* ER 12:2 ¶ 4, 6 ¶ 26.

Adapting *Lyng* to Mr. Davey’s case, the question becomes whether the state may build a road for Promise Scholars to use, then bar Mr. Davey from that road solely because the state fears Mr. Davey might travel that road to a religious destination? The answer would be no. Properly read, *Lyng* bars such state discrimination and the lower court must be reversed on this point.

2. *Regan* considered a subsidy demanded by persons not otherwise qualified for the subsidy.

Regan arose when TWR, a group advocating federal tax law reform, sought a tax exemption under 26 U.S.C. § 501(c)(3). 461 U.S. at 542. The

exemption was denied because it appeared that a substantial part of TWR’s resources would be devoted to influencing legislation. *Id.* Had it obtained (c)(3) status, contributors to TWR could have deducted their contributions from their federal income tax returns. *Id.* This would have encouraged donations to TWR and presumably have increased the resources with which it could lobby. *Id.*

The issue was thus “whether Congress is required to provide [TWR] with public money with which to lobby.” *Id.* at 551. Unsurprisingly, the answer was “no,” because “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe that right” *Id.* at 549 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). However, the Supreme Court later pointed out the difference between *Regan* and cases like Mr. Davey’s.

Although acknowledging [in *Regan*] that the Government is not required to subsidize the exercise of fundamental rights, we reaffirmed the requirement of viewpoint neutrality in the Government’s provision of financial benefits by observing that “the case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ‘ai[m] at the suppression of dangerous ideas.” *Regan* relied on a distinction based on preferential treatment of certain speakers—veterans organizations—and not a distinction based on the content or messages of those groups’ speech.

Rosenberger, 515 U.S. at 834 (plurality) (citations omitted; alterations in original).

The religious restriction discriminates with direct aim at the supposed danger to the state's constitution's "establishment" clause. This violates the First Amendment and the lower court must be reversed on this issue.

II. THE RELIGIOUS RESTRICTION VIOLATES THE FEDERAL EQUAL PROTECTION CLAUSE.

The United States Constitution guarantees that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV § 1. This clause requires that the government treat equally all persons who are similarly situated. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). The HECB did not treat Mr. Davey equally, but rather denied him the Scholarship because of his religiously motivated choice of an academic major, while, for example, awarding the Scholarship to fifteen similarly situated Promise Scholars who chose other majors (or no major at all). ER 41:33.

A. Strict scrutiny is required under the Equal Protection Clause.

When government action "impinge[s] on personal rights protected by the Constitution," the action is presumptively invalid and may survive only if it advances a compelling state interest by narrowly tailored means. *Cleburne*, 473 U.S. at 440 (emphasis added); ER 63:19. The court below refused to apply strict scrutiny, reasoning that none of Mr. Davey's

constitutional rights were abridged. ER 63:19. However, Mr. Davey has demonstrated violations of his First Amendment and Fourteenth Amendment due process rights. *See* Argument §§ I, IV-VI.

Even were this not so, *Cleburne* requires only that personal rights be “impinged,” not that the plaintiff establish an independent constitutional violation. 473 U.S. at 440. If it were otherwise, *Cleburne*’s “impingement of personal rights” test would be mere surplusage: the challenged laws would be stricken as violative of some other constitutional right.⁹ *Id.*

The *Cleburne* Court cited *Shapiro v. Thompson*, 394 U.S. 618 (1969) to illustrate how government action “impinges” personal rights. *Cleburne*, 473 U.S. at 440. At issue in *Shapiro* were state and District of Columbia laws that generally denied welfare assistance to persons who had not resided for at least a year within the relevant jurisdiction before applying for welfare. 394 U.S. at 622. This, the *Shapiro* Court reasoned, impinged on the inexplicit but well established personal right of interstate travel. *Id.* at 630-31.

⁹ This is analogous to the “colorable claim” analysis of hybrid free exercise claims mentioned in *Smith*, 494 U.S. at 881, and analyzed in *Swanson*, 135 F.3d at 700. Argument § I.B, *supra* (discussing same).

Put another way, the statutes in *Shapiro* did not prohibit interstate travel, but rather discriminated in the allocation of government aid between those indigent persons who did or did not exercise that right. In the same way, the HECB's religious restriction does not flatly prohibit exercise of religion or speech, but discriminates in the provision of government aid between Promise Scholars who make a religious choice of a theology major and those who do not. Thus, the court below erred by not applying strict scrutiny under *Cleburne*.

B. The religious restriction fails even the rational basis test.

Even if a state act is not subjected to strict scrutiny, it may be stricken under the rational basis test. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996).

The general rule is that a state may not

legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Reed v. Reed, 404 U.S. 71, 75-76 (1971) (citations omitted) (emphasis added).

The lower court opined that Mr. Davey's rational basis test was "confused" because it was "not the Promise Scholarship's purpose that is

relevant under *Reed*, but rather the purpose of RCW 28B.814.” That reasoning is incomplete, because both the purpose of the Scholarship and the basis for the HECB’s disparate treatment of Mr. Davey illuminate the equal protection analysis.

The purpose of the Scholarship is to help individuals “meet the challenges of the 21st century” by providing a “college education to earn a living wage” and classifies them as eligible under neutral criteria. ER 12:26. Discrimination under RCW § 28B.10.814 frustrates that purpose. It reduces, rather than enlarges, college opportunities by prohibiting Promise Scholars from studying within an entire academic discipline.¹⁰

The purpose of RCW § 28B.10.814, meanwhile, is to enforce state constitutional guarantees of separation of church and state. But to let that purpose justify itself would be circular. Any restriction furthers a purpose to implement that same restriction, but that does not *ipso facto* create a rational basis for the discrimination.

Moreover, the religious restriction fails under *Romer*. The *Romer* Court struck down a state constitutional provision that broadly prohibited any legal protections based upon sexual orientation. 517 U.S. at 624. The

¹⁰ HECB offered no evidence to show that a theological education would not lead to employment and a “living wage” as effectively as a major in philosophy, physics, or any other academic discipline.

provision failed the rational basis test because of, *inter alia*, the “inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.” *Id.* at 634.

The religious restriction was similarly born of invidious animus. In rejecting an Establishment Clause attack on aid provided directly to “pervasively sectarian” schools, the Supreme Court recently stated that “hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.” *Mitchell v. Helms*, 120 S. Ct. 2530, 2551 (2000) (plurality) (emphasis added). That pedigree is an historical antipathy to the Catholic Church that spawned federal and state constitutional provisions—including Article I § 11—in the 1800s to limit the influence of Catholics, particularly in public education. *Id.* (proposed Blaine Amendment reflected “open secret that ‘sectarian’ was code for ‘Catholic’”); *see generally*, Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 Hastings Con. L.Q. 451 (1988) (art. I § 11 rooted in anti-Catholic bigotry and related to Blaine amendment); Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38 (1992) (Blaine amendment reflected anti-Catholic bias).

Disadvantages born of such animus and imposed upon the citizenry by the government must be eliminated. *See, e.g., Romer*, 517 U.S. 620; *McDaniel*, 435 U.S. 618 (striking religiously discriminatory state constitutional provision dating to 1796). This Court should not hesitate to eliminate this invidious discrimination, however long its pedigree may be.

III. THE RELIGIOUS RESTRICTION VIOLATES THE FEDERAL ESTABLISHMENT CLAUSE.

The Establishment Clause requires neutrality and forbids hostility toward religion. *Mitchell*, 120 S. Ct. at 2551 (plurality) (Supreme Court would not reserve “special hostility” for those whose religion affects the whole of their lives); *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) (Court examines whether state aid has effect of advancing or inhibiting religion); *McDaniel*, 435 U.S. at 641 (Establishment Clause does not license government to impose special disabilities on religious persons).

As the Supreme Court explained in *Everson*, the Establishment Clause “requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.” *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947); *accord, Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (Establishment Clause forbids government to inhibit religion). The discriminatory suppression of

religious speech “would demonstrate not neutrality but hostility toward religion.” *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990).

Moreover, discriminatory exclusion of religious activities creates additional constitutional problems:

[state officials] would need to determine which words and activities fall within “religious worship and religious teaching.” This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

Widmar, 454 U.S. at 272 n.11 (internal quotation marks and citations omitted). On the other hand, treating religious expression on equal terms with secular expression “would in fact avoid entanglement with religion.” *Mergens*, 496 U.S. 248 (emphasis in original; citation omitted).

The lower court disregarded Supreme Court authority and instead adopted a Maine state court’s view, that the Establishment Clause has “no role in requiring government assistance to make the practice of religion more available or easier.” ER 63:14 (citing *Bagley v. Raymond School Dep’t*, 728 A.2d 127, 136 (Me. 1999)). The lower court then turned to *Agostini* for support: “*Agostini* answered the question of whether New York could permissibly provide financial support to sectarian schools under a neutrally applicable funding scheme, not whether New York was *required* to provide such aid” ER 63:14.

If, absent the Scholarship program, some religious belief motivated Mr. Davey to insist that the state owed him financial aid, the lower court's position might be correct. However, Mr. Davey was already entitled to the state aid under neutral criteria. ER 12:25, ER 68:3. It was the state's imposition of a special disability on Mr. Davey that implicated the Establishment Clause. As the *Rosenberger* Court said when striking down a very similar religious restriction:

The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause demands.

515 U.S. at 845-46 (plurality). The lower court erred by failing to consider the Establishment Clause's requirement of true government neutrality toward religion.

IV. THE RELIGIOUS RESTRICTION VIOLATES THE FEDERAL FREE SPEECH CLAUSE.

The lower court repeatedly erred in evaluating Mr. Davey's federal Free Speech Clause claims when it: (A) found no restriction on his First Amendment rights; (B) held that the public forum doctrine was inapposite; and (C) failed to address Mr. Davey's overbreadth arguments; and (D)

ignored undisputed evidence to conclude that Mr. Davey's right to expressive conduct was not infringed.

Mr. Davey's First Amendment rights are clearly at issue in this case. Mr. Davey's written declaration of a major is pure religious speech. ER 38:17, ER 41:14. Mr. Davey was not required to make such a declaration, and his declaration was a voluntary expression of his faith and description of his intentions. ER 12:2 ¶ 4, ER 41:12. This declaration was the operative fact that triggered the denial of the Scholarship. ER 12:8 ¶ 32, ER 41:35.

Furthermore, the First Amendment protects Mr. Davey's course of study, which entails both speech and the reception thereof. The right of free speech is "afforded 'to the communication, to its source and its recipients both.'" *NAACP v. Jones*, 131 F.3d 1317, 1322 (9th Cir. 1997) (citations omitted). The rights are reciprocal and one who listens to protected speech has just as great an interest in the communication as does the speaker. *Id.* Students particularly have the right to receive information through their school. *See Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1028 (9th Cir. 1998) (student's First Amendment rights infringed when deprived of educational materials). Or, as the Supreme Court has put it,

[We have] recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure

of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.

Rust v. Sullivan, 500 U.S. 173, 200 (1991) (emphasis added) (citing *Keyishian v. Board of Regents of Univ. of New York*, 385 U.S. 589, 605-06 (1967)). Mr. Davey’s declaration and choice of major and material to study fall squarely within the protections of the First Amendment. We turn now to the lower court’s specific errors.

A. The lower court ignored Supreme Court authority to reach its “no restriction” conclusion.

The question in this case is whether the state may discriminatorily deny aid (offered for secular purposes under neutral criteria) to Mr. Davey because he expressed a choice of religious vocation. The lower court ignored the issue of discrimination, holding instead that there was “no restriction on [Mr. Davey’s] freedom to speak and [that he] has no basis for *requiring* the state to fund the exercise of his First Amendment rights.” ER 63:15. This mischaracterizes the case and contravenes Supreme Court precedent.

First, the religious restriction fails because it is a content-based regulation. The principal inquiry in free speech cases is whether the government has regulated protected First Amendment activity because of disagreement with the message it conveys. *Ward v. Rock Against Racism*,

491 U.S. 781, 791 (1989). A regulation is content neutral if it is justified without reference to the content of the regulated activity. *Id.* The religious restriction, with its express proscription of theological study, is clearly content based and subject to strict scrutiny. *Widmar*, 454 U.S. at 273. The religious restriction thus fails this threshold requirement of content-neutrality and the lower court must be reversed.

Furthermore, *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) is on point. In *Rutan*, low-level state employees challenged a governor's order which barred hiring or promoting executive branch employees without the governor's express permission. *Id.* at 65. The employees alleged that such permission was granted only for persons who supported the Republican party. *Id.* at 66. This, the plaintiffs argued, infringed their free speech rights because they were constrained from voicing their political views. *Id.* at 73.

The state officials countered by arguing that that the plaintiffs' "First Amendment rights have not been infringed because they have no entitlement to promotion, transfer, or rehire." *Id.* at 72. (emphasis added). The Supreme Court forcefully rejected that rationale.

[The Court] has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—

especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Id. (internal quotation marks and citations omitted, emphasis added). “Such interference with constitutional rights is impermissible.” *Id.*

The employees had no independent right to compel the government to hire or promote them. But if the employees were otherwise qualified, the government could not refuse to hire or promote them because of their political speech. *Id.* In the same way, Mr. Davey has no independent right to demand a state scholarship. But, once he met the HECB’s neutral merit, financial, and enrollment criteria, the HECB could not constitutionally refuse him the Scholarship because of his religious speech.

Religious speech merits all of the First Amendment protection offered political speech. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (private religious speech is as fully protected as secular private expression”); *Widmar*, 454 U.S. at 269 (and authorities cited) (religious worship, discussion fully protected). It cannot therefore be argued that conditioning government benefits is unlawful in respect to political speech, but lawful in regard to religious speech.

Nor is there any significant difference in the degree of coercion exercised by the *Rutan* patronage system, as opposed to the HECB’s

religious restriction. A lost promotion for a state employee is quite comparable to a college student losing financial aid he otherwise merited. In fact, for a college student, “[t]he loss of financial aid eligibility may have an even more drastic effect than expulsion or suspension” from school. *Corporation of Haverford Coll.*, 329 F. Supp. at 1203 (enjoining state law which required private schools to deny financial aid to students convicted of certain minor criminal charges).

An analogy helps illustrate the point. A given student may have no “right” to attend an elite academic program at a state school. But once the student is qualified for the program under neutral merit criteria, it would be obviously unconstitutional to condition participation in the program on the student’s registration as a Democratic voter. That would violate the constitution, just as does the religious restriction. The lower court’s holding must be reversed.

B. The Scholarship creates a limited public forum under *Rosenberger*.

The government creates a limited public forum when it subsidizes private speech through a generally applicable, neutral funding scheme. ER 63:15 (citing *Rosenberger*, 515 U.S. at 830 (plurality)); *see also Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997) (university funding of student groups created a public forum); *accord*,

National Endowment for the Arts v. Finley, 524 U.S. 569, 598-99 (1998) (Scalia, J., concurring in part and in judgment); *Board of Regents of the Univ. of Wisconsin System v. Southworth*, 120 S. Ct. 1346, 1354 (2000) (public forum doctrine is very instructive in university student fee cases). The Scholarship creates just such a forum. But the lower court wrongly concluded that the Scholarship “does not create a public forum” and dismissed Mr. Davey’s viewpoint discrimination claim. ER 63:16.

In *Rosenberger*, the defendant university subsidized independent student organizations by paying their printing costs for newsletters and similar items. 515 U.S. at 822. The independent organizations were each eligible for the subsidy under neutral criteria based upon the university’s mission. *Id.* at 825. When a student group that published a newspaper from a Christian viewpoint sought the subsidy, the university denied their request because they promoted belief “in or about a deity or an ultimate reality.” *Id.* at 827. Under these facts, the Supreme Court held that the principles of a limited public forum applied. *Id.* at 830.

Scholarship funds assist low- and middle-income students who have superior academic credentials to obtain knowledge and subsequently enjoy a “level playing field” in the employment marketplace. ER 12:26; ER 41:50. This creates a limited public forum under *Rosenberger*, and none of the

issues raised by the court below distinguish *Rosenberger* from the instant case.

1. HECB's religious restriction is unconstitutional because it is viewpoint discriminatory.

The lower court limited the HECB's religious restriction to theological study that amounts to religious worship, exercise or instruction. ER 63:20. Thus, no Promise Scholars may study theology from a religious viewpoint, while they may study of theology from a secular viewpoint. For example, a Promise Scholar can study "Modern Christian Theology," ER 41:68-69, which is state-taught from a purely secular point of view. ER 47:2 ¶ 5. Yet Mr. Davey could not, as a Promise Scholar, study Christian Theology that was presented from a Christian point of view. *See* ER 41:99-105. *Cf.* ER 21:4-6 (religion courses taught from secular viewpoint) with ER 12:17 (courses required of all Northwest students).

When a government restriction targets subject matter based upon "the specific motivating ideology or the opinion or perspective of the speaker," the violation is all the more blatant and will be stricken as impermissible viewpoint discrimination. *Rosenberger*, 515 U.S. at 829. The lower court disregarded this rule, holding that Mr. Davey's religious viewpoint was irrelevant, "because all religious pursuits are equally ineligible." ER 63:17.

That argument was squarely rejected in *Rosenberger*:

The . . . assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that anti-religious speech is the only response to religious speech. . . . The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong: the debate is skewed in multiple ways.

Id. at 831. The lower court erred by adopting the very argument rejected in *Rosenberger*.

2. *Rosenberger* cannot be distinguished based upon the nature of its funds.

The purpose of the funds in *Rosenberger* was “to support a broad range of extracurricular student activities that ‘are related to the educational purpose of the university.’” 515 U.S. at 824. The funds at issue in *Rosenberger* paid for printing costs for the group’s newspaper. *Id.* at 827. That is indistinguishable from the Scholarship, which pays expenses related to a student’s participation in the educational program itself. ER 8:2-3 ¶ 22, ER 12:28, ER 56:16-17. Indeed, both the funds in *Rosenberger* and the Scholarship funds went to third parties, not the religious institution, and paid for costs related to educational pursuits protected by the First Amendment. The lower court therefore erred by distinguishing between the purpose of the Scholarship funds and the funds in *Rosenberger*.

3. *Rosenberger* cannot be distinguished by the availability of its funds.

The lower court mischaracterized the *Rosenberger* funds as being “generally available,” ER 63:16, and distinguished the Scholarship as being “expressly limited by the constitutional, statutory, and HECB policy provisions that prohibit use of state funds to pursue religious education.” ER 63:17.

However, the *Rosenberger* funds were limited to a single class of independent student organizations associated with a single state university. 515 U.S. at 825. In contrast, Scholarship funds are available to all matriculating students in Washington who meet the academic, financial, and enrollment criteria. ER 12:11. Although both funds have limited availability, the Scholarship funds are actually more generally available than those in *Rosenberger* were.

C. The religious restriction is unconstitutionally overbroad.

The Defendants’ religious restriction casts a constitutional chill on any Scholarship applicant who responds to their religious faith by studying theology.

Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather

than risk prosecution or undertake to have the law declared partially invalid.

Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, 482 U.S. 569, 574 (1987) (internal quotation marks, citation omitted); *Keyishian*, 385 U.S. 589 (applying overbreadth to associational rights); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (applying overbreadth to expressive conduct). “[A]ny enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.” *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

The HECB’s religious restriction pressured at least three other Promise Scholars to choose a “non-theology” major or retract their declaration of a major. ER 12:7 ¶ 31; ER 41:9, 29-30, 45.¹¹ The religious restriction is therefore overbroad because it inhibits the free speech and association rights of other persons and this case must be reversed.

D. The lower court’s expressive conduct holding conflicts with undisputed evidence in the record.

It is well established that the “First Amendment protects not only the expression of ideas through printed or spoken words, but also symbolic

¹¹ Mr. Glidden did not change his major and lost the Scholarship, ER 41:9, while Ms. Hamer and Ms. Robinson ultimately declared no major. ER 41:5.

speech [which is] nonverbal ‘activity . . . sufficiently imbued with elements of communication.’” *Roulette v. City of Seattle*, 97 F.3d 300, 302-03 (9th Cir. 1996) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). This test is satisfied where the actor intends to convey a particularized message and the likelihood is great that the message would be understood by those who viewed it. *Spence*, 418 U.S. at 409.

Mr. Davey refused to sign the condition of award form. ER 12:6-8; ER 56:10. He intended to communicate his belief that the religious restriction was unlawful to his peers, the faculty, and others. 12:7 ¶¶ 28, 31. The message was received and understood, as evidenced by the attention and discussion that his stance generated. ER 41:10.

The lower court dismissed Mr. Davey’s claim, reasoning that the religious restriction did not infringe his right to declare a major of his choosing, but rather the “conduct being restrained is his use of state funds to prepare to enter the clergy.” However, Mr. Davey could have taken religious theology classes had he only been silent as to his major. ER 41:42. Thus, the constraint was not on the conduct of expending funds, but on his liberty to speak freely about his faith, his religious calling, and the inextricably linked choice of academic discipline. *See* ER 41:14-15; ER 12:6 ¶ 27.

Contrary to the lower court’s holding, the First Amendment “cannot be avoided by regulating the act of moving one’s lips.” *Hill v. Colorado*, 120 S. Ct. 2480, 2505 (2000) (Scalia, J., joined by Thomas, J., dissenting). The lower court’s hypertechnical evasion of the First Amendment must be reversed

V. THE RELIGIOUS RESTRICTION VIOLATES THE FIRST AMENDMENT RIGHT TO FREEDOM OF ASSOCIATION.

The “right to freedom of association is a necessary correlate to the constitutionally protected freedom of speech.” ER 63:17 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Infringement “on this freedom can take a number of forms” including imposing penalties or withholding benefits from individuals because of their membership in a disfavored group. *Jaycees*, 468 U.S. at 622-23 (emphasis added). Such infringement merits strict scrutiny. *NAACP v. Alabama*, 357 U.S. 449, 461 (1958).

There is no doubt that Mr. Davey’s enrollment at Northwest brought him into a protected association:

[A]ll members of the Northwest community desire meaningful involvement in the process of Christian higher education as they seek to express their faith in the context of an Assemblies of God college. . . . Students, by enrolling, join with them in accepting the responsibilities of membership in this community.

ER 41:110-11. Nor is there doubt that the HECB withheld benefits from Mr. Davey because of his association with the college's Religious Division. ER 12:8 ¶ 32, ER 41:35. Additionally, the religious restriction penalized Mr. Davey by reducing the time he has to associate for academic study and religious purposes, because he must work to make up the loss of Scholarship funds. ER 12:8 ¶ 39. Such government coercion of an individual because of their protected association is unlawful. *See Rutan*, 497 U.S. 62; *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976).

The lower court erred by failing to properly apply this well established law. Instead, it limited free association to only those situations where there is government intrusion "into the internal structure or affairs of an association." ER 63:17 (citing *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2451 (2000) (quoting *Jaycees*, 468 U.S. at 622)). This draconian limitation on First Amendment associational rights must be reversed.

VI. THE RELIGIOUS RESTRICTION IS IMPERMISSIBLY VAGUE UNDER THE FOURTEENTH AMENDMENT.

Under the Fourteenth Amendment, "it is a basic principle that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108. (1972)). A law is impermissibly vague when it (A) does not give a person a reasonable opportunity to know what is prohibited; (B) is delegated to administrators

absent explicit standards for implementation; or (C) leads citizens to “steer far wider of the unlawful zone” than necessary. The HECB’s religious restriction fails each of these three independent tests, and its narrowing construction of the statute, *see* § VI.D, *infra*, does not save the religious restriction from the Fourteenth Amendment’s strictures.

A. Mr. Davey did not clearly understand what “pursuing a degree in theology” meant.

When first confronted by the HECB’s religious restriction, Mr. Davey admitted that he “did not understand what I could or could not study” without violating the HECB’s requirement that I must not pursue a degree in theology.” ER 12:7 ¶ 29. When he was deposed several months later, he still was “not entirely sure what the restriction’s intent is” ER 38:29. This is *prima facie* evidence that the religious restriction is vague.

It is not surprising that a Promise Scholar found the religious restriction to be unclear, given that not one of the deposed HECB officials could define what “pursuing a degree in theology” meant. *See* ER 41:7 (Ms. Collins: “I’m not certain”); ER 41:19 (tautology offered by Mr. Gaspard); ER 41:22 (Mr. Klacik: “It’s the institution’s decision”); ER 41:26 (Ms. Schactler “I don’t know”). Ignorance is not transmuted to understanding by virtue of delegation. The religious restriction is unconstitutionally vague and must be stricken.

B. The HECB's religious restriction vests unbridled discretion in the Scholarship's administrators.

A “vague law impermissibly delegates basic policy matters [to program administrators] for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned*, 408 U.S. at 108. Such a law “invites arbitrary and discriminatory enforcement by allowing unbridled discretion in its enforcement.” ER 63:20 (citing *Grayned*, 408 U.S. at 108-09).

The lower court clearly erred by stating that the religious restriction is absolute and that “there is no room reserved for individual determination.” ER 63: 20. Quite the contrary, the undisputed facts show that HECB gave financial aid administrators absolute discretion to determine who is or is not “pursuing a degree in theology.” ER 41:22. (Mr. Klacik: “It’s the institution’s decision”); ER 41:7 (Ms. Collins: Each institution “determines what they determine to be a degree in theology”).

Furthermore, the undisputed facts show that the HECB exercises no oversight of the evaluation process; they do not train school personnel; they do not verify their decisions; nor do they plan to. ER 56:12-13. Ms. Walter’s conflated standard, Argument § VI.C., *infra*, represents precisely the type of arbitrary enforcement resulting from delegating such unbridled discretion. The lower court erred in its holding and must be reversed.

C. At Northwest, Ms. Walters radically expanded the application of the religious restriction.

Ms. Walter, granted absolute discretion by the HECB to implement the religious restriction, ultimately conflated the state's religious restriction with her own religious faith and came up with a unique standard: "If you [the Scholarship applicant] plan to become a minister or to change your major to Religious Studies and you know that, and you know you want to be a minister or you know you want to go into the ministry, you should not accept this award no matter what your major." ER 41:41.

Thus, Ms. Walter would have told Mr. Davey (and any other Northwest student) that he "should not accept" the Scholarship if, for example, he declared a major in Psychology (a "non-theology" major at Northwest) but expressed an intent to enter a religious counseling ministry after college. ER 41:41-43. Ms. Walter's conflated standard clearly shows that she steered "far wider of the unlawful zone" than necessary. The religious restriction must fail under *Grayned*.

D. The lower court's narrowing construction leads to contradiction, not clarity.

The lower court opined that the religious restriction was clear in light of the state constitution's prohibition of state support to any religious worship, exercise or instruction. ER 63:20. This apparently refers to

Calvary Bible, 436 P.2d 189, which held that Art. 1, § 11 was an absolute bar against “religious instruction and indoctrination in specific religious beliefs or dogma” *Id.* at 193.

But this reading leads to inconsistency, not clarity. If the religious restriction means the same thing as the *Calvary Bible* standard, then no Northwest student should have received the Scholarship. This is because Northwest requires every student to make a statement of Christian faith, ER 38:25; attend chapel services, ER 38:23-24; to take core theology and religion classes, ER 41:39-40; and to “cultivate a Christian worldview supported by basic biblical and theological knowledge,” ER 12:16. These mandatory courses and activities are obviously within *Calvary Bible*’s proscription of indoctrination in religious belief or dogma.

However, only two Promise Scholars were actually denied the Scholarship in 1999 at Northwest. ER 41: 28-30, 45. And, contrary to the *Calvary Bible* standard, no less than fifteen Promise Scholars at Northwest did receive the Scholarship in 1999 when they declared “non-theology” majors or no major at all. ER 41:33. This evidences certain confusion by the Scholarship administrators, when the rule purportedly requires one result and quite another obtains. The religious restriction is unconstitutionally

vague under the Fourteenth Amendment and the lower court erred by holding otherwise.

VII. THE RELIGIOUS RESTRICTION VIOLATES THE STATE FREE EXERCISE CLAUSE, WASHINGTON CONSTITUTION ARTICLE I, § 11.

The lower court erred when it rejected Mr. Davey’s state free exercise because it: (A) did not recognize that state free exercise rights are stronger than the parallel federal right; (B) gave dispositive weight to *Witters III*, 771 P.2d 1119 (Wash. 1989), when that case did not consider a state free exercise claim and has been severely limited by subsequent state and federal decisions; and (C) misapplied *Malyon v. Pierce County*, 935 P.2d 1272 (Wash. 1997), because it assumed a fact for which there is absolutely no evidence in the record.

A. The court below ignored Mr. Davey’s enhanced free exercise rights under the Washington Constitution.

The lower court repeatedly discusses the “far stricter” state “establishment” clause, *See* ER 63: 7, 8, 17, and 20, but never considered Mr. Davey’s significantly stronger state free exercise rights. In relevant part, the Free Exercise Clause of the Washington Constitution states:

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of

licentiousness or justify practices inconsistent with the peace and safety of the state.

Wash. Const., art. I, § 11. This “language . . . is significantly different and stronger than the federal constitution.” *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 186 (Wash. 1992). State action under article I is constitutional only “if the action results in no infringement of a citizen’s right or if a compelling state interest justifies any burden on the free exercise of religion.” *Id.* at 187. A claimant need only prove “that their religious convictions are sincere and central to their beliefs” to find protection under article I. *Munns v. Martin*, 930 P.2d 318, 321 (Wash. 1997) (citations omitted).

Moreover, it is impermissible to impose a financial burden that acts as a prior restraint on conduct, or even to impose a generally applicable economic burden that “severely impedes” religious conduct. *First Covenant*, 840 P.2d at 183. Rather, the exercise of religion may be restricted “only to prevent grave and immediate danger to interests which the state may lawfully protect.” *Holcomb v. Armstrong*, 239 P.2d 545, 548 (Wash. 1952).

The HECB imposed a discriminatory financial burden upon Mr. Davey’s speech that was motivated by sincere and central religious beliefs. ER 12:2 ¶ 4, ER 41:12. That burden operated as a prior restraint at least in

2000-01, when this litigation had given Mr. Davey notice that he would be denied the Scholarship unless he changed his major. ER 68:3, ER 41:45; *see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (prior restraint denies access to forum in advance of expression). There was no evidence offered to show that studying for the ministry would promote licentiousness. Strict scrutiny therefore is required under article I § 11, and the lower court erred by failing to apply controlling state law to Mr. Davey's state free exercise claim.

B. *Witters III* is not dispositive of Mr. Davey's free exercise claim.

The lower court erred by giving *Witters III* dispositive weight when the case is readily distinguished from Mr. Davey's and its precedential value has been vitiated by subsequent state and federal case law.

Briefly, here is the history of the *Witters* litigation. Mr. Witters filed suit in state court after the state denied him vocational assistance for which he was otherwise fully qualified under neutral criteria, solely because he planned to study at a religious school for a career in the ministry. *Witters v. State Comm'n for the Blind*, 689 P.2d 53, 54-55 (Wash. 1984) [*Witters I*], *rev'd sub nom, Witters v. Washington Dep't of Serv's for the Blind*, 474 U.S. 481 (1986) [*Witters II*]; *on remand, Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989) [*Witters III*]. He eventually lost at the state

supreme court, which held that the aid would violate the federal Establishment Clause under the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Witters I*, 689 P.2d at 56.

Mr. Witters prevailed on appeal to the United States Supreme Court, which held that any benefit accruing to the religious school could not be attributed to the state, given the student's intervening private choice and the religion-neutral nature of the aid. *Witters II*, 474 U.S. at 489. On remand, the state supreme court ruled against Mr. Witters on state "establishment" clause grounds, and concluded that the state's interest in maintaining the strict separation of church and state was compelling. *Witters III*, 771 P.2d at 1121, 1123. *Witters III* was subsequently severely limited by the Washington supreme court's decision in *Malyon v. Pierce County*, 935 P.2d 1272, 1282 (Wash. 1997), as discussed in Argument § VII.B.2, *infra*.

The lower court erred in at least four ways.

1. *Witters III* did not consider a state free exercise claim.

The lower court erred the *Witters* cases did not even discuss a state free exercise claim. *See Witters I*, 689 P.2d at 67 (federal Free Exercise Clause analysis); *Witters III*, 771 P.2d at 371 (same). As set forth in Argument § VII.A, *supra*, Mr. Davey is guaranteed enhanced protection under the state Free Exercise Clause. *Witters III* is inapposite to Mr.

Davey's case because it did not review a state free-exercise claim with its categorical requirement for strict scrutiny of state action infringing free exercise rights.

2. The *Malyon* decision severely limited *Witters III*.

Furthermore, the decision in *Malyon* severely limited *Witters III*. The *Malyon* court upheld a state funded sheriff's office counseling program operated by Christian chaplains, and recognized that "overzealous application of the anti-establishment clause could lead to 'the spectacle of the snake of the anti-establishment doctrine eating its tail of free exercise of religion.'" *Id.* at 1284 n.37 (citation omitted).

As an example of that spectacle, the *Malyon* court favorably cited the *Witters III* dissent, pointing out that Mr. Witters had been denied his religious freedom "merely because he made the personal choice to pursue a religious career." *Id.* (quoting *Witters III*, 771 P.2d at 1132 (Dolliver, J., dissenting)) (emphasis added). The *Malyon* court also favorably cited the *Witters I* dissent, pointing out that Article 1, § 11 has been applied primarily to devotional instruction issues in public primary and secondary schools, 935 P.2d at 1283 n.35 (citing *Witters I*, 689 P.2d at 67 (Utter, J., dissenting)), a context very different than the private post-secondary situation in Mr. Davey's case.

Indeed, there was “no indication the [constitution’s] framers had the slightest intention of making a secular career goal a constitutional prerequisite for any type of aid to the ‘poor and infirm.’” *Witters I*, 689 P.2d at 67 (Utter, J., dissenting) (citing Washington. Const. art. 8, § 7). Given that the Scholarship is predicated in part on the recipient having a financial need, Justice Utter’s remark is on point in the instant case. *Malyon* so limited (if not implicitly overruled) *Witters III* that *Witters III* cannot be dispositive of Mr. Davey’s claim.

3. *Witters III* is not persuasive because its central holding relies solely on vacated federal authority.

The *Witters III* court found a *per se* compelling interest in enforcing stricter separation between church and state than is required by the federal First Amendment. The only authority cited for that proposition was a single federal district court case. *See Witters III*, 771 P.2d at 1123 n.20 (citing *Garnett v. Renton School District*, 675 F. Supp. 1268, 1276-77 (W.D. Wash. 1987) (“*Garnett I*”) (holding that federal Equal Access Act (“EAA”) must yield to art. I § 11)).

Garnett I, however, was vacated soon after *Witters III* was decided, thus leaving the putative interest without a foundation. *Garnett I*, 675 F.Supp 1268, *aff’d* 865 F.2d 1121 (9th Cir. 1989) (“*Garnett II*”), *amended and superseded*, 874 F.2d 608 (9th Cir. 1989) (“*Garnett III*”), *vacated and*

remanded, 496 U.S. 914 (1990) (mem.) (“*Garnett IV*”) (for reconsideration in light of *Mergens*, 496 U.S. 226), *on remand*, 772 F. Supp. 531 (W.D. Wash. 1991) (“*Garnett V*”) (holding art. I § 11 not preempted by Supremacy Clause, because the EAA did not require state to comply with actions that would abridge constitutional rights), *rev’d*, 987 F.2d 641, 646 (9th Cir. 1993) (“*Garnett VI*”) (holding that “states cannot abridge rights granted by federal law.”), *cert. denied*, 510 U.S. 819 (1993)(“*Garnett VII*”).

Procedurally, vacated opinions like *Garnett I* have “no precedential authority whatsoever.” *Durning v. Citibank N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) (emphasis added, citations omitted), and little weight should be accorded to a case that rests on vacated authority.

Substantively, this Court rejected Washington’s asserted “compelling interest” in *Garnett VI*, 987 F.2d at 646, and should reject HECB’s similar claim now. *See also, Widmar*, 454 U.S. at 276 (rejecting alleged compelling state interest in enforcing Missouri’s state “establishment” clause).

4. *Witters III* is factually distinguished from Mr. Davey’s claims.

Contrary to the lower court’s holding that Mr. Witters “claimed that his chosen course of study was religiously compelled,” the *Witters III* court stated that Witters “was ‘not being asked to violate any tenet of his religious beliefs, nor is he being denied benefits ‘because of conduct mandated by

religious belief.’ This case is dissimilar to those in which persons have been pressured by state policies to choose between benefits or rights and practicing their religion.” *Witters III*, 771 P.2d at 1123 (emphasis added).

Davey’s choice of major was mandated by his religious beliefs, ER 12:6-7 ¶¶ 27, 30; ER 41:12. And, the HECB’s religious restriction coerced Mr. Davey to choose between the benefit of the Scholarship and his right to exercise his faith. ER 12:6-7 ¶¶ 27, 30; ER 41:15. *Witters III* is therefore distinguished on its facts.

Witters III is factually distinguishable, limited by the state high court, undercut by vacated authority, and the claimed *per se* interest in enforcing a state “establishment” clause has been rejected by this Court and the Supreme Court. *Witters III* is not dispositive of Mr. Davey’s case.

C. The lower court misconstrued *Malyon* and assumed facts not in the record.

The lower repeatedly erred in its application of *Malyon*: (1) there is a complete failure of proof that any Scholarship funds awarded to Mr. Davey would have been spent on his religious education; (2) Scholarship funds would not violate article I, § 11, because they are not appropriated for religious purposes; and (3) Scholarship funds payable to Mr. Davey are indistinguishable from the constitutionally sound expenditures in *Malyon*.

Briefly, the *Malyon* court upheld state funding of sheriff's department chaplains against an "establishment" challenge under art I, § 11. 935 P.2d at 1283-84. A nonprofit Christian ministry provided the chaplains under a contract to provide secular counseling services. *Id.* at 1275. The state supported the chaplain's work by supplying them with cars, insurance, radios, and so on. *Id.* at 1282. The funding for those things did not violate art. I, § 11 because it was "purposely 'appropriated' or 'applied' to accomplish a secular counseling objective." *Id.* That objective was to "serve the crisis intervention needs of . . . law enforcement personnel . . . their families . . . and the victims of crime." *Id.* The *Malyon* court authoritatively construed Washington's "establishment" clause:

"No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment. . . ." Const. art. I, § 11. The verb "appropriated" means "[t]o prescribe a particular use for particular moneys; to designate or destine a fund or property for a distinct use" Similarly, "applied" generally means "to use or employ for a particular purposes; to appropriate and devote to a particular use, object, demand, or subject matter." In this text the terms require one to determine whether our government has purposefully transferred, or made available, money or property for the defined objective. Ultimate utilization of the money or property is a necessary but insufficient part of the constitutional test; a religious purpose is the key.

Id. at 1282 (emphasis added).

The Scholarship funds are valid under *Malyon* because they are appropriated for secular, not religious purposes. ER 12:11, 41:50. The lower court erred by ignoring the threshold requirements set by *Malyon*, and further erred in its application of *Malyon*.

1. There is a complete failure of proof that any Scholarship funds would have been spent on religious education.

The court below decided that there was no violation of the state free exercise clause because “roughly \$1,125 of taxpayers money would be explicitly devoted each year to Davey’s religious instruction. [T]his court notes that the *Maylon* [sic] court found this distinguishing fact to be ‘the singularly most important undisputed fact of all.’” ER 63:9. This is false. There is no evidence in the record whatsoever regarding how Mr. Davey would have spent the funds, and it is clear error for the court to assume a fact that has no support in the record.

At a minimum, if the ultimate use of Scholarship funds would be material to resolving this case, then the lower court’s decision has raised a material issue of fact which merits remand for fact-finding in the court below. *Wendt*, 125 F.3d at 809-10.

2. Scholarship funds payable to Mr. Davey are valid under *Malyon*.

In any event, the funds that would (and should) have been paid to Mr. Davey are indistinguishable from the permissible funding in *Malyon*. Where the state in *Malyon* appropriated money to help its citizens cope with crime crises via a secular counseling program, *id.* at 1275, the state in this case appropriated money to help its citizens cope with the “needs of the 21st century” and compete for employment on a “level playing field” via a secular scholarship program. ER 12:26.

The object of the funds is similar. The funds in *Malyon* paid for equipment necessary for the chaplains to perform their job, such as departmental cars, official uniforms, bullet-proof vests, radios, and so on. 935 P.2d at 1276. So, too, the Scholarship funds could pay for items necessary to pursue a college education, such as secular reference books (purchased on or off-campus), room and board, calculators, and tuition if so desired.¹² ER 8:2-3 ¶ 22, ER 12:28; ER 56:16-17.

The *Malyon* court set forth a clear guideline: “Our responsibility is not to purge religion from society; it is to protect each citizen’s constitutional right to religious liberty.” 935 P.2d at 1274 (emphasis added).

¹² The HECB delegated the decision of what constitutes a valid educational expense to each institution. ER 56:14.

The court below failed to protect Mr. Davey’s constitutional rights under Washington state law and its decision must be reversed.

VIII. THE RELIGIOUS RESTRICTION VIOLATES THE STATE FREE SPEECH CLAUSE, WASHINGTON CONSTITUTION ARTICLE I, § 5.

The lower court erred because it failed even to discuss the stronger individual rights provided by the Washington free speech clause, which states: “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.” Wash. Const. art. I, § 5. Under Washington law, even neutral time, place, and manner restrictions must be justified by a “compelling” interest, rather than the lesser “significant” interest from federal jurisprudence. *Collier v. City of Tacoma*, 854 P.2d 1046, 1051 (Wash. 1993).

The HECB’s religious restriction is not neutral, but rather discriminates on the basis of viewpoint, as set forth in Argument § IV.B, *supra*. Under Washington law, “viewpoint neutrality is required in speech regulation, even when the area of speech being affected falls within a category traditionally afforded minimal or no protection.” *City of Bellevue v. Lorang*, 963 P.2d 198, 201-202 (Wash. Ct. App. 1998) (emphasis added) (adopting categorical test for viewpoint discrimination); *see also Soundgarden v. Eikenberry*, 871 P.2d 1050, 1058 (Wash. 1994) (state offers

broader protection under the overbreadth doctrine). Therefore, under the heightened “strict scrutiny” demanded by article I, § 5, the religious restriction is invalid and must be stricken.

Rather than apply controlling state law, the lower court summarily stated that Mr. Davey had failed “to identify the speech or expressive conduct being regulated” ER 63:10. The lower court then opined that Mr. Davey can still speak freely; “he just cannot demand that Washington pay for him to do so.” *Id.*

The lower court’s first statement is rebutted in Argument § IV, *supra*, which sets forth Mr. Davey’s protected speech and conduct. The second statement once again mischaracterizes this case as one in which Mr. Davey attempts to impose his religious beliefs on an otherwise neutrally acting government. To the contrary, the HECB’s religious restriction pressured him either to remain silent (not declare a major) or to change his major to one acceptable to the state. ER 12 ¶ 27, 41:15-17, 41. This was the HECB attempting to impose its will on Mr. Davey, not vice versa.

The lower court’s failure to apply controlling state law requires reversal.

IX. THERE IS NO STATE INTEREST SUFFICIENT TO JUSTIFY THE HECB'S RELIGIOUS RESTRICTION.

The HECB argued below that its express discrimination was justified because of its interest in enforcing art. I § 11 and RCW § 28B.10.814. The HECB is wrong.

This Court has squarely held that “even though[a state] [c]onstitution’s provision prohibiting governmental establishment . . . of religion may be broader than the United States Constitution, it, like the Establishment Clause of the Federal Constitution, must be limited by the Free Exercise Clause and the Free Speech Clause.” *Kreisner v. City of San Diego*, 1 F.3d 775, 779 n.2 (9th Cir. 1993) (emphasis added) (citing *Widmar*, 454 U.S. at 276) (upholding display of crèche within a public park).

The Supreme Court has repeatedly rejected state-imposed disabilities upon an individual’s right to the free exercise of religion—even when that disability was supposedly justifiable under state constitutional or statutory law. *See McDaniel*, 435 U.S. at 628-29; *Widmar*, 454 U.S. at 273; *Thomas*

v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 719-20 (1981); *Sherbert*, 374 U.S. at 409-10.¹³

In *Widmar*, a Missouri state university barred a religious group from using university facilities that were otherwise available under neutral criteria to similar secular groups. 454 U.S. at 265. The Supreme Court held that the facilities constituted a limited public forum, and strictly scrutinized the university's content-based discriminatory policy. *Id.* at 268-69.

The defendant university argued, *inter alia*, that Missouri had “gone further than the Federal Constitution in proscribing indirect support for religion,” and claimed that it had a “compelling interest in complying with the applicable provisions of the Missouri Constitution.” *Id.* at 275. But the Supreme Court held that Missouri's interest was not “sufficiently ‘compelling’ to justify content-based discrimination against . . . religious speech.” *Id.* at 276; *see also Witters II*, 771 P.2d at 1134-35 (Dolliver, J., dissenting) (citing with approval, *Widmar*, 454 U.S. at 275-76) (emphasis added); *Garnett VI*, 987 F.2d 641, 646 (9th Cir. 1993) (holding that “states cannot abridge rights granted by federal law”); *Hoppock v. Twin Falls Sch.*

¹³ The Washington Legislature recognized this principle by requiring “[a]ll student financial aid shall be granted by the [HECB] without regard to the applicant's . . . religion” WRC § 28B.10.812. (Addendum A). The HECB gave little regard to § 812, ER 45:4-5, and the lower court erred by not considering the state's interest in preventing religious discrimination.

Dist. No. 411, 772 F. Supp. 1160, 1163 (D. Idaho 1991) (same). Washington's interest, resting on the infirm foundation of *Witters III*, cannot trump individual rights guaranteed under the federal Constitution.

CONCLUSION

We have often heard Thomas Jefferson's declaration that the Establishment Clause erects "a wall of separation between Church and State." *See, e.g., Bagley*, 728 A.2d at 135 (citation omitted). It is time now to hear something else Mr. Jefferson said. Speaking against the exclusion of ministers from elected office, he stated "the clergy here seems to have relinquished all pretensions to privilege, and to stand on a footing with lawyers, physicians, &c. They ought therefore to possess the same rights." 9 Works of Jefferson 143 (P. Ford ed. 1905) (quoted in *McDaniel*, 435 U.S. at 624 n.4) (emphasis added).

Mr. Davey seeks only to have the same rights as any other Promise Scholar who studies to be, for instance, a lawyer or physician. The lower court deprived Mr. Davey of those rights when it misapplied substantive law and asserted facts for which there was no evidence in the record.

The lower court must be reversed on all counts and summary judgment entered in favor of Mr. Davey. Additionally, or in the alternative, if this Court determines that the ultimate use of Scholarship funds is material

to properly deciding this case, then remand is necessary for fact finding on that issue. *See* Argument § VII.C.1, *supra*.

STATEMENT OF RELATED CASES

There are no known related cases pending within the Circuit.

Respectfully submitted on this, the ____ day of December, 2000,

by:

Jay A. Sekulow
Kevin H. Theriot
The American Center for Law
and Justice
1000 Regent University Drive
Virginia Beach, VA 23484
(757) 226-2489

Stuart J. Roth
The American Center for Law
and Justice
120 Zeigler Circle E
Mobile, Alabama 36608
(334) 633-2154

Walter M. Weber
The American Center for Law
and Justice
1000 Thomas Jefferson Street, NW
Suite 609
Washington, D.C. 20007
(202) 337-2273

Richard A. Bersin
Law Office of Richard Bersin
601 Union Street, Suite 4900
Seattle, Washington 98101
(206) 343-2006

Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Plaintiffs-Appellants has been produced using proportionately spaced 14 point Times New Roman typeface. According to the “word count” feature in the Microsoft Word 2000 software, this brief contains 13,812 words, up to and including the signature lines.

by:

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true copies of the Brief of Plaintiff-Appellant and one true copy of the Excerpts of Record were served upon:

Christine O. Gregoire
Attorney General
Michael J. Shinn
Assistant Attorney General
900 Fourth Avenue, Suite 2000
Seattle, WA 98164

by depositing said documents in the United States Mail, First Class postage prepaid, this ____ day of December, 2000.

By:

Jay A. Sekulow
Kevin H. Theriot
The American Center for Law
and Justice
1000 Regent University Drive
Virginia Beach, VA 23484
(757) 226-2489