Instructions

1. Do not cite to any case that was decided after the date in which certiorari was granted in this case.

2. Assume, unless otherwise noted in the Record, that all motions, defenses, and appeals were timely filed in accordance with the Federal Rules of Civil Procedure and that both issues may be litigated together in the same case.

3. Assume, for the purposes of your brief, that Petitioner has standing to bring its claim before the Court and that Daniela Sanchez is an appropriate Respondent.

4. Assume that there are no procedural issues in the case or the decisions below.

5. Discuss only the Free Exercise Clause issues for which the Court granted cert. Do not argue Establishment Clause issues, state constitutional law issues, or any others.

6. Assume there is no analysis of various defenses to 42 U.S.C. § 1983, such as absolute or qualified immunity.

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF HOYNES

Vidhya Kumar,	**:**	
Plaintiff	**:**	**CIVIL NO. 1:CV-17-092792**
v.	**:**	**(Judge Bahar)**
Daniela Sanchez,	**:**	
Defendant	**:**	

ORDER

Defendant Daniela Sanchez, in her official capacity as Director of the Hoynes Department of Education ("Department"), moves to dismiss the Complaint of plaintiff Vidhya Kumar. For the reasons set forth below, the Motion to Dismiss is GRANTED and this case is DISMISSED with prejudice.

I. BACKGROUND

Since the parties have stipulated to all key facts in this case, there are no contested dispositive issues of fact. Where the portrayal of minor facts differs between the parties, the standard of review for a Motion to Dismiss requires that the court accept the facts as portrayed in the Complaint and draw all reasonable inferences in favor of the plaintiff. *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007). The pertinent facts are below.

In the State of Hoynes, the Department operates a school voucher program that provides students with need-based funding to attend private schools. In order to qualify, students must demonstrate that: (1) their family's income is 150% below the federal poverty level; OR (2) they

have an Individual Education Plan (IEP) and have not already been placed in a private school at the district's expense. H.C.S. 22 § 350 (2017). If a student applies for the program and satisfies either of these requirements, the student will receive notice that they have qualified for the program. The student then notifies the Department of their school of choice. The Department will respond within 30 days to inform the student whether they will receive funding.

Despite its many benefits, the voucher program may run afoul of Article IX, § 4 of the Hoynes Constitution. This provision states "[t]hat no state funding may be appropriated or disbursed from the treasury that will be used for religious purposes, either directly or indirectly." Hoynes Const., art. IX § 4. To ensure adherence to the Hoynes Constitution, the Department issued a categorical rule prohibiting the use of voucher funding for religious purposes. The regulation states:

> Funding provided to students under H.C.S. 22 § 350 is subject to Article IX, § 4 of the Hoynes Constitution, and therefore no voucher funds may be used for religious purposes. Schools may apply for an exception to this regulation by submitting to an annual audit by the Department and by making quarterly financial disclosures demonstrating that voucher funds are not being used for religious purposes.

22 H.R. § 350.14. According to Daniela Sanchez, the purpose of this rule is to maintain balance between two compelling values: equal access to private education and separation of church and state.

Vidhya Kumar plunged into the center of this balancing act between the school voucher program and the Hoynes Constitution when she applied for a voucher on behalf of her daughter, Myra Kumar. Vidhya Kumar and her wife, Ira Kumar, had long hoped to send Myra to Joyce Academy, a school maintained by the Eckton Diocese of the Episcopal Church. Vidhya and Ira had met at an Episcopal church while they were in college, and ever since adopting Myra, they

had prioritized raising her in the faith so that Myra could experience the sense of dignity, purpose, and guidance that their faith had brought them. When the Eckton Diocese announced the opening of Joyce Academy, Vidhya and Ira initially disregarded the possibility that Myra would attend Joyce Academy because of the hefty tuition cost. When the Kumars learned about the voucher program, however, Joyce Academy seemed like a possibility. The Kumar family was excited about the possibility of sending Myra to Joyce Academy, particularly because the school integrated a faith perspective into every academic class. They applied for voucher funds so they could send Myra to Joyce Academy for sixth grade.

In the application, the Kumars demonstrated that their family income was 175% below the federal poverty level. The Department sent Myra Kumar an acceptance letter, and the available assistance was enough to cover Myra's entire tuition at Joyce Academy. The only remaining step was to submit the name of the school to the Department for final approval.

The Department received notice that the Kumars had chosen Joyce Academy just as the Department completed an audit on Joyce Academy (another family had requested voucher funding to attend Joyce about a month prior, and Joyce Academy had submitted to an audit). As such, the Department had already gathered the pertinent information. The Episcopal Diocese of Eckton commissioned Joyce Academy at the urging of a local priest named Father Clayton. According to Joyce Academy's website, the school's mission is to "equip students to become pursuers of academic excellence, stewards of their talents, and ministers of the Lord in hope, faith, and love." Since its commission, Joyce Academy's statewide test scores have been consistently above Hoynes's average score. The administration at Joyce Academy worked with the National Association of Episcopal Schools to craft a curriculum that aligned with the Eckton Public School curriculum, while adding "spiritual formation activities."

These spiritual formation activities included a weekly chapel service, a weekly devotional study class, and a daily morning prayer. Joyce Academy also hired a full-time School Chaplain to oversee these spiritual formation activities and provide counseling for students and families. While the spiritual formation activities primarily focused on Episcopal teaching, Joyce Academy required that a faith leader from another religious tradition lead chapel at least ten times throughout the school year. Joyce admits students solely based on academic performance and does not consider a student's religious background for admission.

A week after the Department received Vidhya's application, the Department released the finding of their audit: there was no constitutional way to provide voucher funds to Joyce Academy. It was impossible to separate the voucher funds from religious uses, because the funds would in part pay the staff who were in charge of leading the devotional study period. In addition to this staffing concern, the Department concluded that voucher funds would inevitably support the chapel program, the salary of the chaplain, and the resources used to broadcast the daily prayer through the PA system. The Department concluded that both 22 H.R. § 350.14 and the Hoynes Constitution prohibited providing voucher funds to Joyce Academy.

Because Joyce Academy was ineligible, the Department denied funding to the Kumar family for Myra's attendance at Joyce Academy. In their denial, the Department encouraged the Kumars to apply voucher funding toward tuition at other private schools in Eckton, many of which were closer than Joyce Academy to the Kumar residence. Vidhya Kumar then filed this suit in the District Court of Hoynes against Daniela Sanchez in her official capacity as Director of the Department of Education. Vidhya complained that the Department violated her First Amendment right to freely exercise her religion by denying the voucher. Plaintiff requests

declaratory and injunctive relief to prohibit the Department from denying her family voucher funds because they chose a school that was religious.

II. DISCUSSION

May a state take affirmative steps to ensure that public funds do not subsidize devotional instruction? Since the Constitution of Hoynes requires the state to take such steps and the precedent of the Supreme Court of the United States permits such steps, the answer is yes. As such, this Court finds in favor of Sanchez and dismisses this Complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. Pro. 12(b)(6).

The religion clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Both the religion clauses have been incorporated through the Due Process Clause of the Fourteenth Amendment, so that they restrain the actions of state government as well as the federal government. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (applying the Free Exercise Clause to the states); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (applying the Establishment Clause to the states). Some state actions are neither prohibited by the Establishment Clause nor mandated by the Free Exercise Clause, and for such actions, "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Com. of New York*, 397 U.S. 664, 669 (1970). This case exists within this play in the joints.

As a preliminary matter, the State of Hoynes would not run afoul of the Establishment Clause if it permitted Myra Kumar to use her voucher funds at a school containing religious instruction, such as Joyce Academy. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Since the program depends on a student's private and independent choice in deciding where to use the

voucher funds, there is not a direct link between the public funds and religious instruction in violation of the First Amendment Establishment Clause. *Id.* at 652. Neither party contests that the federal Constitution would permit the Department to distribute voucher funds that would cover Myra's tuition at Joyce Academy.

Yet no clause is an island, especially not the Establishment Clause. It appears directly next to the provision that is key to this matter: The Free Exercise Clause. The Court must here determine whether the Free Exercise Clause permits the State of Hoynes to deny a family a voucher that will inevitably fund religious instruction. Hoynes Const. art. IX, § 4. Since such a denial does not violate the Free Exercise Clause of the First Amendment, the denial is permitted.

The Free Exercise Clause does not require exemptions from generally applicable, neutral laws that incidentally impact a person's religious exercise. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878 (1990). If a law is not generally applicable or neutral with regards to religion but instead targets religious conduct for distinctive treatment, the law must be in pursuit of a legitimate government interest that is advanced by the least restrictive means. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993). If a government agency is unable to justify the law under strict scrutiny, the law is unconstitutional. *Id.* at 547.

The State of Hoynes placed no burden on the Kumar family's religious exercise by refusing to direct voucher funds to their preferred private school. Kumar argues to the contrary, characterizing the voucher denial as both discriminatory religious targeting and as a denial of a generally available government benefit. Both characterizations are inaccurate, so no burden exists. Even were her free exercise right burdened, however, the burden would be justified by the government's compelling anti-establishment interest under strict scrutiny.

The Hoynes voucher program does not unfairly target religion in a discriminatory fashion. A government subjects its citizens to unconstitutional religious targeting when it is motivated by hostility to impose significant burdens on conduct that is motivated by religious belief. *Lukumi*, 508 U.S. at 543. In *Lukumi,* the Court struck down city ordinances that penalized the religious practices of a Santeria church, because it was clear that these ordinances singled out Santeria and penalized its followers for adhering to it. *Id.* The situation is much different here. The Department did not impose criminal or civil penalties on the Kumar family whatsoever, but rather still provided them with access to the voucher, so long as they used the voucher for a qualifying school.

This case is also distinct from *McDaniel v. Paty*, 435 U.S. 618 (1978), in which the Court found that the Tennessee government had violated the Free Exercise Clause by categorically precluding religious ministers from running for public office. *Id.* at 631–34. That case is distinct from these facts because the Department here did not exclude the Kumar family from participation in the state's political affairs because she was Episcopalian. The Department was motivated by concerns about the separation of church and state when it passed 22 H.R. § 350.14, rather than by targeting Episcopalians. As in *Locke*, "[i]n the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind." *Locke v. Davey*, 540 U.S. 712, 720 (2004). The facts at hand simply do not possess any hallmarks of religious hostility or religious discrimination.

Furthermore, the Kumar family did not face a choice between following their religious faith and receiving a government benefit. A person's free exercise rights may be burdened if the person must choose between receiving a generally available public benefit and following their religion. *See, e.g.*, *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987);

Sherbert v. Verner, 374 U.S. 398 (1963). The Kumar family was not threatened with such exclusion—in fact, they remained free to use a voucher at another school. They could not send Myra to the private school that was their top preference, but they could have sent her to a private school of their choice nonetheless.

The Kumar family also relies heavily upon *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), but that case does not apply to these facts. In *Trinity Lutheran*, the Court declared a state's policy unconstitutional when it excluded organizations from a playground resurfacing program due solely to that organization's religious status, forcing such organizations to choose between retaining their religious status and receiving funding to resurface the church's playground. *Id.* The *Trinity Lutheran* Court took affirmative steps to articulate the limited nature of the holding, emphasizing that their decision involved "express discrimination based on religious identity with respect to playground resurfacing" and that the Court did not "address religious uses of funding or other forms of discrimination." *Id.* at 2024 n.3. (plurality op.). The facts before us in no way pertain to playground resurfacing, yet they expressly address the religious use of funding. This is exactly the type of case that the *Trinity Lutheran* Court clarified it was *not* addressing. Since the school voucher program remained available to the Kumar family and was not based on the Kumar family's religious status, it did not violate the Kumar family's constitutional rights.

This case is analogous to *Locke v. Davey*, 540 U.S. 712 (2004), in which the Court found that a similar program did not burden the plaintiff's free exercise rights. In *Locke*, the Court upheld a program in Washington State that provided need-based scholarships to qualifying college students, so long as they were not pursuing a degree in devotional theology. *Id.* at 715–16. Washington chose not to fund devotional theology degrees because the Washington

Constitution prohibited indirectly funding religious instruction that would prepare students for the ministry. *Id.* at 720. The Washington Legislature did not unconstitutionally target religion, but instead acknowledged the view established since the Founding that religious education requires special treatment. *Id.* at 722. As the *Trinity Lutheran* Court clarified, *Locke* stands for the proposition that a state does not violate the First Amendment by treating the funding of religious *activity* as distinct, so long as the state does not discriminate on the basis of religious *status*. *Trinity Lutheran*, 137 S. Ct. at 2016. The situation here is similar to *Locke*. The Department enacted the regulation not to target organizations based on their religious status, but to ensure that public funds did not subsidize religious training activity. As long as a school could establish that voucher funds would not fund such religious activity, religious schools could still receive voucher funds. Because Joyce Academy structured itself such that the voucher funds would inevitably support religious training (training with the mission of creating "ministers for the Lord in faith, hope, and love), it could not receive funds. The denial of funding had nothing to do with the school's status as Episcopalian.

Even if Hoynes's carefully crafted program was treated as a burden on the free exercise of the Kumar family, however, the program would be justified under strict scrutiny. As described above, there is a valid, long-held government interest in keeping public funds separate from religious education. *Locke*, 540 U.S. at 722. This interest is even more compelling for the Department, since it is enshrined in the Hoynes Constitution. Not only is the interest compelling, but the means of pursuing that interest here are the least restrictive imaginable. Religious schools possess the opportunity to structure their programs in such a way that would allow them to receive voucher funding. Families who qualify for the program, but prefer a non-qualifying school such as Joyce Academy, still may use the voucher funding at another private school of

their choice. The Department has affirmatively ensured both that taxpayer dollars remain separate from religious training and that qualifying parents may choose a qualifying school. Because the program would pass strict scrutiny, the program would remain constitutional even if it incidentally burdened a family's free exercise.

CONCLUSION

The Hoynes Department of Education, under the leadership of Daniela Sanchez, has provided a generous program that broadens access to private schools while also maintaining separation between taxpayer dollars and religious education. The Department has structured the program to avoid imposing a burden on the First Amendment rights of Hoynes's citizens. The Department did not violate the free exercise rights of Vidhya Kumar in the operation of this program. As such, Sanchez's Motion to Dismiss is GRANTED and this case is DISMISSED, with prejudice.

IT IS SO ORDERED.

Judge: *Judge Fatima Bahar*

Date: *11/11/2017*

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

No. 17-0623

VIDHYA KUMAR

v.

DANIELA SANCHEZ

Vidhya Kumar,
Appellant

On Appeal from the United States District Court
for the District of Hoynes
(D.C. Civil Action No. 1:CV-18-092792)
District Judge: Honorable Fatima Bahar

ARGUED: February 10, 2018

Before: KOUFAX, BEECHLY, and CHIANG,
Circuit Judges

OPINION OF THE COURT

CHIANG, *Circuit Judge*

The Court must answer a question of first impression before the Thirteenth Circuit: Does it violate a student's free exercise rights to deny their request to use a school voucher to fund religious instruction? This case raises important considerations of faith and public policy, as we weigh free exercise rights against a state constitution's mandate to withhold public funds from religious training.

This dispute began when Vidhya Kumar, Appellant, filed a suit with the district court against Daniela Sanchez, Appellee, in her official capacity as Director of the Hoynes Department of Education ("Department"). The Department denied the request of Vidhya and her wife to use a publicly funded school voucher to cover their daughter's tuition at Joyce Academy, an organization maintained by the Episcopal Diocese of Eckton. Vidhya alleged that this violated her rights under the Free Exercise Clause because she was denied the opportunity to send her daughter to the school of her choice solely because that school provided religious instruction. Sanchez filed a Motion to Dismiss Kumar's Complaint due to failure to state a claim upon which relief may be granted, Fed. R. Civ. P. 12(b)(6), and the district court granted this motion and dismissed Kumar's Complaint with prejudice. Kumar now appeals that dismissal.

We review *de novo* a district court's Motion to Dismiss, construing all reasonable inferences in favor of the nonmoving party. *See Retro Television Network, Inc. v. Luken Comm'ns, LLC,* 696 F.3d 766, 768 (8th Cir. 2012). We affirm.

I

As recounted in the district court opinion, there are no disputes between the parties concerning the relevant facts. As such, we adopt the district court's description of the facts. The State of Hoynes operates a need-based school voucher program that provides students with money to attend private schools. Vidhya Kumar and her wife, Ira, applied for a voucher on behalf of their daughter, Myra Kumar, who had just finished her fifth-grade

year. The Kumars demonstrated sufficient need in their application, and the Department informed them that they qualified for the voucher program. The Kumar family then submitted the name of the school to which they wished to send Myra: Joyce Academy, which was maintained by the Episcopal Diocese of Eckton. The Kumar family chose this school because both Vidhya and Ira wished to orient their family around the Episcopal Church, the faith tradition that initially brought Vidhya and Ira together. Because Joyce Academy was structured such that the Department could not ensure that none of the taxpayer funds from the voucher program would subsidize religious instruction, the Department denied the Kumar family's request to apply the funding toward Joyce Academy.

The Department denied the request to apply funding toward Joyce Academy both because of a long-standing provision in the Hoynes Constitution and a recently adopted categorical rule in the Department. The Hoynes Constitution forbids the use of taxpayer dollars for funding religious instruction, whether directly or indirectly. Hoynes Const. art. IX, § 4. In order to comply with this constitutional provision, the Department enacted a categorical rule to prevent the flow of school voucher funds into religious training programs at private schools. The regulation stated that voucher funds could not be directed toward religious purposes, but it allowed schools to apply for an exception to the regulation by submitting to an annual audit and issuing quarterly financial disclosures that demonstrated that the funds were not used for religious purposes. 22 H.R. § 350.14. Joyce Academy had applied for this exception, but because Joyce Academy was structured such that it was impossible to guarantee a strict separation between voucher funds and religious programming, the Department denied Joyce Academy's application. Since Joyce Academy had not taken the steps to qualify for this exception, the Department denied the Kumar family's request to apply the funding toward Joyce Academy. The Department offered, however, to apply the funding to any of the several other private schools in Eckton.

On August 29, 2017, Vidhya Kumar filed a Complaint in district court alleging that her right to freely exercise her religion was violated by the Department's policy of "unfairly targeting religious schools and those who wish to send their children to

them." Daniela Sanchez filed a Motion to Dismiss the Complaint for failure to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), and the district court granted that motion on November 11, 2017. It is from this order that Vidhya now appeals.

II

This case is about a state's power to enact legislation, pursuant that state's constitution, that ensures a separation between taxpayer money and religious education. For the reasons set forth in the district court opinion, it seems apparent that the State of Hoynes acted well within constitutional limits. As such, this court adopts the district court's reasoning concerning Kumar's claim under the Free Exercise Clause. The voucher program did not burden the religious liberty of the Kumar family, and even if it did, that burden would be justified under strict scrutiny. This opinion, then, will merely touch briefly on the two cases that are essential to the matter at hand, adopting the district court's reasoning on all relevant matters.

First, the Court has ruled in *Locke v. Davey* that a state does not violate the First Amendment when enacting legislation designed to separate public funds from religious training. *Locke v. Davey* 540 U.S. 712, 720 (2004). The Department's policy is not part of a recent trend of distaste for religious education, but it is part of a long-held tradition among states of ensuring that taxpayer money does not fund religious education. *Id.* at 721–22, *citing* Pa. Const., Art. II (1776); N. J. Const., Art. XVIII (1776); Del. Const., Art. I, § 1 (1792); Ky. Const., Art. XII, § 3 (1792); Vt. Const., Ch. I, Art. 3; Tenn. Const., Art. XI, § 3 (1796); Ohio Const., Art. VIII, § 3 (1802). Just as the State of Washington's refusal to fund a student's devotional theology degree did not violate the student's free exercise rights, so also the State of Hoynes's refusal to fund a student's religious training does not violate Myra Kumar's free exercise rights.

Kumar reiterates her argument that the Department forced her to choose between her religious beliefs and receiving a generally available public benefit, but *Locke* again (perhaps ironically) provides the key. The *Locke* Court found that there was not an unconstitutional choice imposed on the student, in part

because the student was still able to access the Washington state scholarship money so long as he chose another major—he could even use the money at a pervasively religious college. *Locke*, 540 U.S. at 724–25. Here we confront a similar situation. The Kumar family may still access the voucher program funds, and they may even apply those voucher program funds to another religious school. They are only prohibited from using the funds to pay tuition at Joyce Academy because the Department determined that the funds would inevitably support the school's pervasive religious programming. The Department does not deny Myra Kumar a publicly available benefit. It merely ensures that this benefit is only used for purposes that are aligned with the Hoynes Constitution.

Second, despite Kumar's persistent claims and the dissent's odd contortions, *Trinity Lutheran* does not apply to the matter at hand. Even setting aside the ways in which *Trinity Lutheran* limits its own holding to its facts,[1] the reasoning from *Trinity Lutheran* does not apply. The *Trinity Lutheran* Court clarified that while the state may not categorically exclude organizations from funding programs solely on the basis of religious status, the state still may exclude organizations from public funding for certain activities. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017). The activity from which the state was allowed to withhold funds was "a distinct category of instruction"—specifically, religious instruction. *Id.* at 2023, *quoting Locke*, 540 U.S. at 721. Put succinctly, *Trinity Lutheran* held that states are not permitted to withhold funding due to an entity's religious status, although states are permitted to withhold funding from religious training activities.

The case at hand is distinguishable from *Trinity Lutheran* in precisely the same way that *Trinity Lutheran* distinguished itself from *Locke*. *Trinity Lutheran*, 137 S. Ct. at 2023. The Department did not exclude on the basis of religious status, but instead created an audit procedure in order to *include* religious schools. The Department did not withhold funding from religious organizations, but from the activity of religious training. Religious schools could participate in the program, so long as the funds did not go to the

[1] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 n.3 (2017) (plurality op.).

religious programming at that school. The school voucher program in Hoynes is precisely the sort of program to which *Trinity Lutheran* does not apply.

For these reasons, as well as those articulated in the district court opinion by Judge Bahar, the court affirms the district court's finding that the voucher program did not impinge on Kumar's religious exercise.

III

The First Amendment right to the free exercise of religion protects a sacred right that is of the utmost importance to our republic. When that right is violated, this court must provide redress. The court faces no such violation here. The right to free exercise exists alongside a right to be free of an establishment of religion. In implementing the Hoynes school voucher program, the Department has striven admirably to honor both Free Exercise and Establishment concerns. Since the Department has in no way infringed on the religious exercise of the Kumar family, this Court affirms the lower court's dismissal of the Complaint.

KOUFAX, *Circuit Judge, Dissenting*

Both Judge Chiang's majority opinion and Judge Bahar's district court opinion are remarkable exercises in missing the point entirely. Perhaps they will provide useful material to future Legal Writing professors who need examples of inadequate legal analysis. Beyond that, they provide no other use.

This is a case about denying a family access to a generally available school voucher program on the basis of religion, and as such, it is a textbook example of a free exercise violation. The State of Hoynes designed a school voucher program to assist families in sending their children to the private school *of their choosing*, and the state denied the Kumar family that choice because they chose a school that is religious. The more strenuously the court attempts to brush these concerns under the rug by repeating incantations of "status" and "activity", the more convoluted and unhelpful the court's reasoning becomes. Because it appears clear to me that the court has today sanctioned a program that discriminatorily targets religion, I respectfully dissent.

I

Vidhya and Ira Kumar applied for a statewide, need-based school voucher program on behalf of their daughter, Myra Kumar. Vidhya and Ira viewed the Episcopal Church as a central element of their family, and they desired to send their daughter to a school that would educate her in that church's teachings. They had worried that the tuition cost of Joyce Academy was prohibitive, until they learned about the Hoynes school voucher program. This program provided need-based financial assistance to families whose income was at least 150% below the federal poverty level in order to assist families in sending their children to the private school of their choice. The Kumar family was denied the opportunity to send Myra to the private school of their choice because of that school's status as a religious organization.

II

The Free Exercise Clause of the First Amendment prohibits states from targeting the religious for "special disabilities" based on their "religious status." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017); *Church of Lukumi*

Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 542 (1993). This includes not only overt acts of religious discrimination, such as criminalizing religious practices, but also indirect acts of religious discrimination, such as barring the religious from an otherwise available benefit. *Trinity Lutheran*, 137 S. Ct. at 2022. The state impinges on an organization's Free Exercise rights when it denies the religious "a right to participate in a government benefit program without having to disavow its religious character." *Id.* at 2022; *Sherbert v. Verner*, 374 U.S. 398, 405 (1963). In order to justify any such burden on one's right under the Free Exercise Clause, the state's action must pass strict scrutiny. *McDaniel v. Paty*, 435 U.S. 618, 628 (1978).

The Free Exercise Clause restrains states from imposing "special disabilities" because of one's religion. *Lukumi*, 508 U.S. at 533. In *Lukumi*, the Court ruled that facially neutral ordinances forbidding ritual forms of animal slaughter violated the Church of Lukumi Babalu Aye's free exercise rights, because the ordinances targeted the Church's religious practices. *Id.* at 534–35. While these ordinances did not single out any religion by name, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534. The state used facially neutral language to target the practices that were essential to the church's religious character, thereby violating the church's free exercise rights.

On the other end of the spectrum from *Lukumi*, *Trinity Lutheran* involved special disabilities unrelated to the church's religious practices that were imposed solely because the church was religious. *Trinity Lutheran*, 137 S. Ct. at 2021. By prohibiting religious entities from participating in a government program providing renovated playground equipment, the state required a religious entity to make a choice: "It may participate in an otherwise available benefit program or remain a religious institution." *Id.* at 2021–22. Although this program allowed Trinity Lutheran to continue in its essential religious practices as a church, it required Trinity Lutheran to relinquish access to an otherwise available program as a consequence of remaining religious. *Id.*

Here, the Department burdened Kumar's free exercise rights by imposing special disabilities upon her family because of their religious convictions. In passing 22 H.R. § 350.14, the Department did not target any particular religion by name, but it did target certain types of religious schools: those that were structured such that it was difficult to separate voucher funds from religious programming funds. The structure that this regulation targeted, however, was the precise structure that appealed to the Kumar family because of their religious beliefs. As described in the lower court opinion, Vidhya Kumar was especially drawn to Joyce Academy because the school integrated a faith perspective into every academic class. Just as the ordinances against animal sacrifices targeted the church in *Lukumi* without ever mentioning the church's name, so the ordinance here targets schools that provide an integrated approach to religion and education without ever mentioning any particular school's name. By targeting schools that pursued this integrated approach, the Department restrained the Kumar family from receiving the chief benefit of the voucher program: the ability to send their daughter to their private school of choice.

In addition to targeting the type of school to which the Kumars wished to send Myra, the Department subjected the Kumar family to an unconstitutional choice between maintaining their religious identity and receiving an otherwise available benefit. Because the Hoynes school voucher program disqualified schools that did not silo their religious programming into a sufficiently insulated budget line, the Hoynes school required the Kumars to choose between maintaining their religious convictions about their preferred form of school and receiving funding for the private school of their choice. The Department communicated that the Kumars could send Myra to the private school of their choice so long as their choice was not overly influenced by their religious convictions. In short, the Department imposed a choice upon the Kumar family that is analogous to the choice that Missouri imposed upon Trinity Lutheran Church: maintain your religious identity or receive this government benefit.

It is worth pausing here to address the two arguments advanced by Judge Chiang and Judge Bahar concerning whether *Trinitly Lutheran* applies to the facts at hand. The first argument

concerns the third footnote in the *Trinity Lutheran* opinion, which delineates the factual parameters of the Court's ruling. The second argument concerns a distinction between status and activity.

First, the third footnote in *Trinity Lutheran* by no means renders the opinion entirely irrelevant to the case at hand, both because of the footnote's content and because of the footnote's dubious authority as precedent. In the third footnote, the Court delineates the mandatory holding of the Court ("express discrimination based on religious identity with respect to playground resurfacing") from the issues that the Court has yet to address ("religious uses of funding or other forms of discrimination"). *Trinity Lutheran*, 137 S. Ct. at 2024 n.3. While such express delineations are somewhat anomalous, they exist implicitly in every case. *See Id.* at 2025–26 (Gorsuch, J., concurring). The Court in *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970) did not address whether the State of Washington could restrict Promise Scholarship funds from those pursuing a degree in devotional theology. *Id.* Yet when the *Locke v. Davey* Court addressed the use of Promise Scholarship funds for devotional theology, it still turned to *Walz*'s reasoning and insights for guidance. *Locke*, 540 U.S. at 718–19. In other words, the Court has no choice but to rely on past cases that addressed facts different than those facts that are before the current Court, because identical facts never present themselves. The Greeks said it best: No person enters the same river twice. The opinions of Judge Chiang and Judge Bahar extrapolate from this third footnote a principle of shocking absurdity: that because *Trinity Lutheran*'s facts concerned playgrounds rather than religious uses of funding, *Trinity Lutheran* cannot be useful to a Court hearing a case on religious uses of funding. If that is true, then what role can precedent ever play?

Second, the third footnote in *Trinity Lutheran* is not part of the majority opinion, so it is not mandatory authority. *Trinity Lutheran*, 137 S. Ct. at 2016. Justice Gorsuch and Justice Thomas signed onto every portion of Chief Justice Roberts's opinion except for footnote three, excluding footnote three from the majority opinion. *Id.* As such, even if one accepts the implausible interpretation of footnote three advanced by the majority, the footnote is not binding. If footnote three was intended to be such a

drastic limitation, a majority of the Justices refused to sign on to such a limiting construction of the opinion. While Justice Chiang and Justice Bahar retreat to footnote three as shelter from *Trinity Lutheran*'s holding, they retreat to a shelter that is built not on rock, but on sand. This shelter does not require rains, floods, and wind to knock it down, but only a judge sensitive to the requirements of the United States Constitution. If only two such judges were placed on the panel today.

Finally, *Locke v. Davey* does not decide the case at hand for two reasons. First, it is incorrect to categorize *Locke v. Davey* as a case about funding restrictions on religious education broadly, because it is in fact a case about funding restrictions on the training of clergy. *Locke*, 540 U.S at 722–23. Second, the status/activity distinction upon which Judge Chiang so heavily relies is almost entirely semantic. For both these reasons, *Locke* is not the governing case concerning the matter at hand.

First, *Locke* stands for the proposition that a state does not violate the Free Exercise Clause by taking affirmative steps to prevent public funds from subsidizing the religious training *of ministers*. *Id.* at 721 ("[t]hat a state would deal differently with religious education *for the ministry* than with education for other callings is . . . not evidence of hostility toward religion") (emphasis added). The *Locke* Court's ruling must be understood as aligned with the Court's precedent treating ministers as a distinct category subject to unique exceptions. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (establishing a ministerial exception that exempts religious employers from antidiscrimination laws concerning the hiring and firing of ministers). The *Locke* Court does not address chapel services for sixth graders, but the training of the chaplains that lead such services. The *Locke* opinion repeatedly frames its holding in terms of the narrow subset of religious training directed at those preparing for professional ministry, not in terms of religious instruction broadly. *Id.* at 721 (case concerns "training for religious professions" and "[t]raining someone to lead a congregation," as opposed to "training for secular professions"); *id.* at 722 (placing the case in context of a historic anti-establishment concern over "procuring taxpayer funds to support church leaders"); *id.* at 723 (placing the case in context of

prohibitions in state constitutions against "using tax funds to support the ministry" and prohibiting "tax dollars from supporting the clergy"); *id.* at 725 (the Court could not conclude that "the denial of funding for vocational religious instruction alone is inherently constitutionally suspect"). In fact, the Court emphasizes that the Washington scholarships were available for devotional religious instruction for all students except those majoring in devotional theology. *Id.* at 724–25. How much clearer could the Court have been that it was addressing the training of ministers, not devotional training broadly?

While Joyce Academy states that their mission is to produce "ministers of the Lord in faith, hope, and love," the mission statement concerns a different kind of minister than that in *Locke.* The *Locke* court spoke in terms of vocation, career, and clergy. *Id.* at 721–25. The Joyce Academy mission statement speaks in vaguer terms, expressing the school's desire that the students act as winsome ambassadors of their faith. Joyce Academy obviously does not mean that at the end of sixth grade, the students will celebrate both graduation from elementary school and ordination into a lifetime of professional ministry. Joyce Academy speaks of training ministers in a broad sense, while *Locke* spoke of training ministers in the narrow sense that results in ordination and (in some traditions) a collar. Thus, the anti-establishment concern against funding religious leaders that is enshrined in *Locke* is not in any way implicated here.

Second, the distinction between discrimination on the basis of religious status as opposed to discrimination on the basis of religious activity is hazy in the abstract, and it is meaningless in the concrete situation before us. Judge Chiang cites *Trinity Lutheran* for this distinction, although that opinion provides little more than ambiguous allusions toward this distinction. The closest *Trinity Lutheran* comes to enshrining a strong activity/status principle is in the statement, "Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*." *Id.* at 2016. If you only had Judge Chiang's description of *Trinity Lutheran*, you would think that the Court then launches into a detailed exploration of the metaphysical differences between the categories of status and action. The Court is actually much more helpful and prosaic in its approach. The

Court focuses on the specific action that Davey proposed to do: use public funds to train to join the ministry. *Id.* The point is not that *Trinity Lutheran* prohibits all forms of religious targeting based on status, while *Locke* permits all forms of religious targeting based on activity. The point is that *Locke* concerned a very specific category of action (training clergy), and that *Locke*'s treatment of that specific category should not confuse the long-established Free Exercise Clause prohibition against targeting some person or organization due to religious character.

Engaging in a good faith attempt to apply a status/activity distinction to this case reveals just how confusing this standard would be. Take, for example, the Department's decision to deny voucher funding to any family that chose Joyce Academy, in part, because the funds may be used to repair the PA system that Joyce Academy used for morning prayer. Is such a prohibition permissible under the First Amendment because it is phrased in terms of funding an activity (maintaining a PA system that is sometimes used to broadcast prayers) rather than in terms of status (funding the type of school that broadcasts prayers over its PA system)? If this constitutes funding religious activity, then what religious school could truly keep voucher funding separate from subsidizing religious instruction? The Department may deny a religious school voucher funding because the funding may subsidize repairing a door, and a religious studies teacher may then open that door before entering a classroom to lead morning devotions.

If a state's restriction on funding is permissible so long as it is based on the potential recipient's actions rather than its status, then when may a court ever find a Free Exercise Clause violation? Didn't the City of Hileah merely target a set of activities (animal sacrifices), rather than the Church of Lukumi Babalu Aye's status as a church? Could the state of Missouri deny organizations the ability to participate in its playground resurfacing program if the organization participated in any weekly group meetings that included the following activities: the singing of hymns, the preaching of a sermon, the eating of bread, and the drinking of wine? The protection of an organization's constitutional rights cannot depend on whether the state discriminates on the basis of an

organization's defining adjectives or on the basis of an organization's defining verbs.

Because the Department refused the Kumar family vouchers for their school of choice because their school of choice was not religious in the way that the Department found appropriate, the Department subjected the Kumars to discrimination due to their family's religious character. This creates a penalty on the Kumar family's free exercise of religion that is subjected to the "most rigorous scrutiny." *Lukumi*, 508 U.S. at 546. The only state interest alleged here, however, is the same state interest alleged by Missouri in *Trinity Lutheran*: "[S]kating as far as possible from religious establishment concerns." *Id.* at 2024. That state interest was insufficient in *Trinity Lutheran*, and it should have been insufficient here. Once this program reaches strict scrutiny, it should be dead on arrival. Yet for reasons that evade both reason and clear articulation in the opinion that will unfortunately bind this circuit, the court remains blind and mute in the face of unconstitutional religious discrimination.

For these reasons, I respectfully dissent.

No. 18-623

IN THE

Supreme Court of the United States

_____

VIDHYA KUMAR,
Petitioner,
v.

DANIELA SANCHEZ,
Respondent.

_____

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

_____

ON THIS DAY OF JUNE 13, 2018, THE PETITION FOR CERTIORARI IS GRANTED AND LIMITED TO THE FOLLOWING QUESTIONS:

(1) Whether the Department burdened the free exercise rights of the Kumars by refusing them school voucher funding solely because the funding may promote religious purposes?

(2) If a burden does exist, does the Department's decision to deny to the Kumars voucher funding pass strict scrutiny?