UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Cameron Johnson; **Luke Thomas**; and **Trace Stevens**,

Plaintiffs,

v.

A. Scott Fleming, in his official capacity as the Director of the State Council of Higher Education for Virginia; **John Jumper**, in his official capacity as the Chair of the State Council of Higher Education for Virginia; **Major General James W. Ring**, in his official capacity as The Adjutant General of Virginia; and **Donald L. Unmussig**, in his official capacity as the Chief Financial Officer of the Virginia Department of Military Affairs,

Defendants.

Case No. 3:25-cv-00407-RCY

Plaintiffs' Brief in Support of Motion for Preliminary Injunction

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INTRODUCTION

Cameron Johnson and Luke Thomas are recent high school graduates who will start college at Liberty University this fall. Trace Stevens, a Specialist in the Virginia Army National Guard, is a current Liberty student. All three are Christians who believe God has called them to pursue religious majors: Pastoral Leadership for Cameron, Music and Worship for Luke, and Religion (General Track) for Trace. Although all three are open to ministry work in some capacity and at some point, they are considering several different secular and religious careers.

Under Virginia's Tuition Assistance Grant Program ("VTAG"), Virginia-domiciled students attending private, nonprofit colleges can receive a $5,250 grant per year regardless of financial need. Students can use the grant for any major, except certain religious ones. The State Council of Higher Education for Virginia ("State Council") denied Cameron a VTAG award for the upcoming academic year because it considered his program to be for "religious training or theological education" and thus automatically excluded. Va. Code § 23.1-631(C). The same goes for Luke's Music and Worship major, which he will declare by October 20, 2025, thereby making him ineligible for the spring 2026 semester and future semesters.

Similarly, Trace was denied a National Guard Grant because the Virginia Department of Military Affairs ("Department") arbitrarily decided his program was for "religious training or theological education" and thus ineligible. The Department did so even though (1) the Department recruited Trace by assuring him the grant could be used for a religious major, and (2) the National Guard Grant statute doesn't exclude certain programs, only certain schools with a "primary purpose" of "religious training or theological education." Va. Code § 23.1-610. Worse, Trace's major is eligible for the VTAG award, but the Department rejected him anyway.

Cameron, Luke, and Trace are entitled to a preliminary injunction ending this religious discrimination. First, they are likely to succeed on the merits. Defendants' exclusions violate the Free Exercise Clause because they "exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits." *Carson v. Makin,* 596 U.S. 767, 789 (2022). Nor are the exclusions neutral or generally applicable. There is "nothing

neutral" about excluding religious observers from public benefits. *Id*. at 781. The VTAG religious exclusion is also underinclusive: it permits many religious programs that prepare students for ministry or seminary and even allows grants for "ineligible" religious majors if paired with another major. Likewise, the Department makes individualized assessments about whether a program is too religious and thus ineligible. *See Fulton v. City of Phila.*, 593 U.S. 522 (2021). And both exclusions violate the Religion Clauses because they discriminate among religions and cause excessive entanglement. Defendants approve some religious programs and exclude others based solely on their discretionary decisions about a program's religiosity. *See Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n*, No. 24-154, 2025 WL 1583299 (U.S. June 5, 2025). So Defendants' religious exclusions must face strict scrutiny.

Defendants cannot satisfy that demanding test. There is no compelling interest that justifies such highly discretionary exclusions. Nor can Defendants rely on any purported interest in not funding the clergy. For one, Cameron, Luke, and Trace are *not* clergy and may never be. For another, that so-called historical interest related specifically to the levying of taxes on the public to directly and preferentially fund the clergy. That's night and day from the generally available education funding at issue here. And Defendants' exclusions are not even rationally related, let alone narrowly tailored, to achieve any such interest, especially because Defendants willingly fund other religious programs that prepare students for religious vocations. In short, the exclusions are "odious to our Constitution and [cannot] stand." *Carson*, 596 U.S. at 779 (cleaned up).

Second, Cameron, Luke, and Trace will suffer irreparable harm absent an injunction. The unconstitutional religious exclusions alone constitute irreparable harm. On top of that, Trace enlisted mainly because of the tuition assistance benefits, paid $2,009.99 out-of-pocket for the spring 2025 semester, and would soon receive a reimbursement grant but for the exclusion; this Court should order the Department to issue that grant. And Cameron would receive a $2,500 grant at the start of the fall semester but for the VTAG exclusion. As a result, he had to take out extra student loans. Luke will also be denied VTAG starting in spring 2026. Because sovereign

immunity likely bars damages, the Court should issue immediate injunctive relief before Cameron, Luke, and Trace are permanently deprived of this generally available public funding.

Third, the requested injunctions harm no one. Both grant programs recently received large appropriations from the General Assembly. Allowing Cameron, Luke, and Trace to receive college grants like everyone else holds Defendants accountable to the United States Constitution and benefits the public interest.

The Court should grant the Motion for Preliminary Injunction and end the discrimination.

STATEMENT OF FACTS

A. The State Council excludes students who major in certain religious programs from the Virginia Tuition Assistance Program.

The Virginia Tuition Assistance Grant Act provides non-need-based grants to Virginia-domiciled students who are enrolled full-time at a nonprofit private college. *See* Va. Code § 23.1-628 *et seq.* To receive an award, students must meet certain criteria: (1) be "a domiciliary resident of Virginia" for at least one year before the "first day of classes" (or meet the statutory domicile exception for military personnel dependents); (2) be a full-time student "in an eligible program at a participating eligible institution"; (3) comply with "federal selective service registration requirements"; (4) apply for an award by the deadline (currently, no later than December 1); and (5) "[n]ot participate in the Virginia Women's Institute for Leadership[1] at Mary Baldwin College." 8 V.A.C. § 40-71-40(C); *see also* Va. Code § 23.1-631 (statutory eligibility criteria). The award amount for the 2025-2026 academic year is $5,250 for undergraduate, non-distance students. Doc. 1-1 at PageID 46 (VTAG Webpage).

The statute defines an "eligible institution" as a "nonprofit private institution of higher education whose primary purpose is to provide collegiate, graduate, or professional education and not to provide religious training or theological education." Va. Code § 23.1-628. Although the statute excludes private colleges with the "primary purpose" of providing "religious training

[1] The State offers separate financial assistance for this program. *See* Va. Code § 23.1-603.

or theological education," many private religious colleges are approved as eligible institutions. *See* Doc. 1-1 at PageID 45 (VTAG Webpage). But the State Council still excludes students if the Council believes their chosen *program* is for "religious training or theological education." Va. Code § 23.1-631(C) (Grants "shall" be used for "programs other than those providing religious training or theological education."). The State Council has determined, by regulation, that programs "that provide religious training or theological education" are those that are "classified as CIP Code 39-series programs" by the National Center for Education Statistics. 8 V.A.C. § 40-71-10. The State Council's exclusion of students who major in Code 39 religious programs from the Tuition Assistance Grant is called the "VTAG religious exclusion."

Although religious schools are eligible to participate in the Tuition Assistance Grant Program, their students alone face the VTAG religious exclusion. According to the State Council's website, all of the excluded Code 39 religious programs are at Christian colleges—Bluefield University, Christendom College, Eastern Mennonite University, Liberty University, and Regent University. *See* Doc. 1-2 at PageID 49–53 (Code 39 Degree Search Results); *see also* Doc. 1 at PageID 9, ¶ 72 (Verified Complaint).

What's more, the State Council awards grants to students who choose government-approved religious degrees—those classified as CIP Code 38 programs instead of Code 39. *See* Doc. 1-3 at PageID 56–61 (Code 38 Degree Search Results). Many private colleges, including secular schools, offer Code 38 religious programs. *Id.* Several such colleges promote that their Code 38 religion programs prepare students for future ministry vocations and/or further religious training, like preparation for seminary school. For example, Hampton University states that its Religious Studies program—an approved Code 38 program—is "designed to sharpen the skills of students already in ministry" and to "prepare students for advanced studies, especially in religious education and theology." Doc. 1 at PageID 10, ¶ 79 (Verified Complaint). Similarly, Virginia Union University's Religious Studies major—an approved Code 38 program—"prepare[s] persons for graduate work in the discipline of religion and ministerial studies as well as those who seek to pursue religious vocations (i.e. youth ministers, pastoral assistants,

associate ministers, etc[.])." *Id.* ¶ 80. And Averett University states that its Religion Program—also an approved Code 38 program—prepares students "for a career in Christian ministry" and "aims to graduate future leaders for churches, faith-based organizations, and missions." *Id.* ¶ 81. Thus, the difference between an approved Code 38 program and an excluded Code 39 program is the arbitrary determination of how religious government officials think it is. *See* Program Comparison Chart, attached as Exhibit 1 (showing some examples of approved and excluded religious programs).

On top of the categorical exclusion, there are more ways that the State Council arbitrarily decides whether a program is too religious. First, "[s]tudents enrolled in a declared double-major that includes an ineligible degree program may receive an award only for those terms in which the student's enrollment includes an equal or greater number of courses required for an eligible major or concentration than the number of courses enrolled for an ineligible major or concentration." 8 V.A.C. § 40-71-10. So a student can double-major in an excluded Code 39 religion program and any other program and still get a grant for each semester so long as he takes at least as many eligible program courses as ineligible program courses. The State Council can also grant exceptions if it decides there are "circumstances beyond the control of the student." *Id.*

Second, nothing in the Virginia Tuition Assistance Grant Act nor State Council regulations prohibits a student from receiving a grant if he *minors* in an ineligible religious program. For instance, a student can major in Business and minor in Pastoral Leadership and still receive a grant. Yet colleges tout that their religion minors help prepare students for future careers in ministry and for further religious training. For example, Mary Baldwin University says that its minor in Religious Leadership and Ministry program gives students "the practical, theoretical, and ethical grounding needed to begin a vocation in the ministry of any faith." Doc. 1 at PageID 11, ¶ 90.

B. The State Council denies Cameron Johnson a Tuition Assistance Grant solely because he is majoring in Pastoral Leadership at Liberty University.

Cameron Johnson recently graduated high school and will be majoring in Pastoral Leadership—classified as a Code 39 program—at Liberty University starting this fall. Johnson Decl. ¶¶ 2, 18–19. Cameron is a Christian and his religious beliefs are based on and rooted in the Holy Bible, which he believes to be the authoritative Word of God. *Id.* ¶ 4. Cameron was raised in a Christian home where his parents taught him to prioritize his faith. *Id.* ¶ 5. Cameron does so, for example, by volunteering at his church and always looking for opportunities to share his faith and tell others about the Gospel of Jesus Christ. *Id.* ¶¶ 6–8.

Cameron always planned to go to college after high school. *Id.* ¶ 9. His mother encouraged him to pursue a college degree. *Id.* ¶ 10. Around age 15, Cameron believed that God was leading him to eventually, one day, go into ministry. *Id.* ¶ 11. Cameron wants to follow this calling, yet he does not know whether this means he will end up in a ministry vocation or if he will minister to others in a secular career. *Id.* ¶¶ 12–13. For example, in addition to becoming a pastor, Cameron is interested in working in real estate or running a non-profit that focuses on community building. *Id.* ¶ 15 He is also considering adding a minor, like business, to help prepare him for a secular career. *Id.* ¶ 16. In short, Cameron will follow whatever career path God leads him to after college. *Id.* ¶ 17.

Indeed, the State Council's own statistics show that Liberty University's Code 39 program graduates are more likely to pursue a secular career than a ministry career. The State Council's "Employment Outcomes" tool shows such graduates from 2016-2018, one-year postgrad, went into a variety of careers including health care, manufacturing, and retail trade, among others. *Employment Outcomes – Earnings, Virginia Institutions*, STATE COUNCIL OF HIGHER EDUC. FOR VIRGINIA, https://bit.ly/4441pvI (last visited June 19, 2025).[2]

[2] To view this data, select "Liberty University," "Four-Year Bachelor's Degree," "Theology and Religious Vocations," "2016-2018" cohort, and "1 year" postgrad. The "Employment by Industry" is then viewable at the bottom.

Although Cameron is open to careers other than those strictly in vocational ministry, he majored in Pastoral Leadership for several reasons. *Id.* ¶¶ 19–20. For one, no matter what career Cameron goes into, he wants to lead others and he believes that this major will develop necessary skills to do that. *Id.* ¶ 14. For another, this major will help prepare Cameron if he does eventually go into vocational ministry, or if he goes to graduate school. *Id.* ¶ 21.

In early 2025, Cameron was denied a Tuition Assistance Grant because his major in "Pastoral Leadership" is classified as a CIP code 39 program and therefore falls within the VTAG religious exclusion. *Id.* ¶ 24; *see also* Doc. 1-4 at PageID 63 (VTAG Denial Email) (noting Cameron's program is "not eligible for VTAG" per "SCHEV regulations"). Cameron satisfies all other eligibility criteria for a Tuition Assistance Grant and is being denied solely because of the State Council's VTAG religious exclusion. *Id.* ¶ 27. Cameron will owe over $22,000 in tuition and fees for the fall 2025 semester. *Id.* ¶ 29. But for the VTAG religious exclusion, Cameron would receive a $2,500 VTAG grant for the fall 2025 semester. In fact, if he was not excluded, he would receive over $20,000 in Tuition Assistance Grants over the next four years. *Id.* ¶ 33. He will have to take out additional student loans as a result. *Id.* ¶ 34.

C. Luke Thomas will be ineligible for a Tuition Assistance Grant because of his desired major in Music and Worship at Liberty University.

Like Cameron, Luke Thomas recently graduated high school and will be attending Liberty University this upcoming fall semester. Thomas Decl. ¶¶ 2, 17. Luke is passionate about music but is even more passionate about his Christian faith. *Id.* ¶ 3, 6–8, 16. He too was raised in a Christian home and always looks for opportunities to share his beliefs and faith in Jesus with others. *Id.* ¶¶ 5–8.

Luke didn't originally intend to go to college after high school but planned to start a small business. *Id.* ¶ 9. Luke, however, discovered that he could go to college and major in music. *Id.* ¶ 10. He believes that God is calling him to use his musical talents, at some point in his future, in the ministry field. *Id.* ¶ 11. Luke thinks Liberty University's Music and Worship program is a great combination of both music and religious instruction that can prepare him for

either religious or secular music careers. *Id.* ¶ 13. Although Luke is currently an "undeclared major," he will declare his major in Music and Worship no later than October 20, 2025, so that he will be able to register for the required classes needed for the Music and Worship major for the spring 2026 semester. *Id.* ¶ 20. Liberty's Music and Worship major is a CIP Code 39 program. When Luke declares his major he will automatically be ineligible for a Tuition Assistance Grant for the spring 2026 semester and beyond. *Id.* ¶ 23.

Also, like Cameron, Luke is open to various future careers, including in both a secular setting and in ministry. *Id.* ¶ 25. He believes that God may one day call him to be a worship pastor or director, but he is also interested in pursuing a career in commercial music or in starting a business. *Id.* ¶¶ 26–28. Simply put, Luke will follow the career path that he believes God leads him to. *Id.* ¶¶ 29–30.

D. The Department uses its discretion to exclude students who major in some religious programs from the National Guard Grant.

The Virginia Department of Military Affairs administers a similar Tuition Assistance Grant Program for members of the Virginia National Guard (the "National Guard Grant"). *See* Va. Code § 23.1-610. Students must meet four general criteria. They must (1) have at least two years of service remaining, (2) complete "initial active duty service," (3) be satisfactorily performing their duty, and (4) be in a program "at any public institution of higher education or accredited nonprofit private institution of higher education whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education." Va. Code § 23.1-610(A). The award amount covers the "difference between the full cost of tuition and any other educational benefits for which [the student] is eligible as a member of the National Guard." *Id.* The current award is capped at $20,000 per year per student. The grant statute authorizes the Department to "utilize grant funding in order to recruit qualified applicants for service in the Virginia National Guard." *Id.* § 23.1-610(D). Liberty University is an eligible institution in the National Guard Grant Program.

Although the National Guard Grant statute excludes students at colleges that have a "primary purpose" of providing "religious training or theological education," Va. Code § 23.1-610(A), the Department instead excludes students from a National Guard Grant if it deems that a student's chosen *program* is for "religious training or theological education." In this way, it is like the VTAG religious exclusion. Yet unlike the State Council, the Department has not adopted regulations explaining which degrees are for religious training or theological education but makes those determinations on a case-by-case basis. And some degrees are approved under one program but not the other. That's the case for Trace Stevens, whose Religion major is approved for VTAG, but was denied by the Department.

Indeed, the Department has only ambiguously said that "[i]n accordance with the Constitution of Virginia, Article I., Section 16, theological degrees are ineligible." Doc. 1-5 at PageID 68, § § 7(a)(6)(c) (Command Policy 22-023). Nor does the Department explain what qualifies as a "theological degree." The Department's exclusion of students from the National Guard Grant who are pursuing programs that the Department deems are religious or theological is called the "National Guard religious exclusion."

E. The Department denies Trace Stevens a National Guard Grant because he is majoring in Religion at Liberty University.

Specialist Trace Stevens is majoring in Religion (General Track) at Liberty University online. Stevens Decl. ¶¶ 2, 29–30, 60. Trace enlisted in the Virginia Army National Guard right before he graduated high school in May 2023. *Id.* ¶¶ 14, 19. Trace is also a Christian and believes the Holy Bible is the authoritative Word of God. *Id.* ¶ 3. Trace was raised in a Christian home, and he currently attends and volunteers at Crosswalk Community Church in Williamsburg. *Id.* ¶¶ 4–5.

Trace originally planned to enlist in the active-duty United States Air Force after high school graduation. *Id.* ¶ 9. Yet during his senior year, Trace believed God was leading him to go to college, so he intended to major in Ministerial Leadership at Southeastern University in Florida. *Id.* ¶¶ 11–12, 16. Trace was concerned with how he would pay for such an education,

but weeks before graduation, a Virginia Army National Guard recruiter told Trace that the U.S. Army Tuition Assistance Program and the Virginia National Guard Grant Program could help pay for his tuition at Southeastern if he enlisted. *Id.* ¶¶ 17–18. It was a win-win for Trace: he could still serve his country in the armed forces and would get a college degree without going into debt.

But it turns out that Trace's program at Southeastern was ineligible for the National Guard Grant Program because it was both at an out-of-state school, and a religious degree. *Id.* ¶ 23. Before shipping out for basic training in September 2023, Trace asked the Governor's Office to exempt him and award him a grant. *Id.* ¶ 24. Defendant Ring responded by telling Trace that he was eligible for the U.S. Army Tuition Assistance Program, but that his "desired theological degree program [was] ineligible" for the National Guard Grant, per the "Virginia state code." Doc. 1-6 at PageID 77 (Ring Letter).

After basic training, Trace enrolled at Liberty University because it was more affordable and he hoped he could use a National Guard Grant there because Liberty is in-state. Stevens Decl. ¶ 28. Trace majored in Religion because he has interests in perhaps one day working in ministry, including by becoming a chaplain in the National Guard. *Id.* ¶ 34. Like Cameron and Luke, however, Trace is not strictly set on vocational ministry and is considering secular careers as well. *Id.* ¶¶ 35–37. For example, Trace is interested in becoming a career officer in the National Guard and has considered going into law enforcement or doing aviation after his military service. *Id.*

Given the lack of any Department guidance as to what constituted a "religious" or a "theological degree" program, Trace asked Department staff if he would be eligible for a grant while attending Liberty University online. *Id.* ¶ 39. The Department said that online programs were eligible but reiterated that "religious degrees" were not. Doc. 1-7 at PageID 79 (Stevens-Gregg July 2024 Emails). As a result, Trace did not apply for a grant for the fall 2024 semester. Stevens Decl. ¶¶ 40–42.

Trace then learned that his Religion major was classified as a CIP Code 38 program, which meant it was *eligible* for a Tuition Assistance Grant (VTAG). Va. Code § 23.1-631(C). *Id.* ¶ 44. In other words, the State Council does not view the Religion major at Liberty as one for "religious training or theological education," while the Department does. So Trace applied for a National Guard Grant for the spring 2025 semester, noted this inconsistency to the Department, and asked whether he could receive a National Guard Grant for the spring 2025 semester. *Id.* ¶¶ 45–48; *see also* Doc. 1-9 at PageID 95 (Stevens 2025 Emails). Defendant Unmussig ultimately told Trace that "VTAG, is managed by another organization within the State government that [the Department] has nothing to do with. [The Department] cannot violate the law and award you a grant for your B.S. degree in religion from Liberty University using funds from [the National Guard Grant Program]." Doc. 1-9 at PageID 92 (Stevens 2025 Emails); *Id.* ¶ 51.

Trace satisfies all other criteria to receive a National Guard Grant and is being denied one solely because of the National Guard religious exclusion. Stevens Decl. ¶¶ 52, 55. Trace is currently receiving federal tuition assistance through the U.S. Army, but he still owes about $2,000 out of pocket for tuition for the spring 2025 semester. *Id.* ¶¶ 53–54. Trace also applied for a National Guard Grant for the summer 2025 semester, but he will likewise be denied because of the National Guard religious exclusion and will have to pay $3,000 out of pocket. *Id.* ¶¶ 56–59. After graduation this summer, Trace intends to enroll in Liberty's Master of Divinity program starting this fall. *Id.* ¶ 61. The National Guard Grant can be used for graduate degrees, but unless the National Guard religious exclusion is removed or enjoined, Trace will continue to be denied a grant for that graduate program.

LEGAL STANDARD

A plaintiff is entitled to a preliminary injunction if he establishes "'that that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 129 (2008)). And "in

the context of an alleged violation of First Amendment rights" courts "focus" on "the merits of [the] First Amendment claim" because it is "inseparably linked" to the irreparable harm factor. *Id.* (cleaned up).

ARGUMENT

I. Cameron, Luke, and Trace are likely to succeed on the merits of their claims.

The VTAG and National Guard religious exclusions violate the Free Exercise Clause because (1) they exclude Plaintiffs solely because of their religious character, exercise, and anticipated religious use of funds, (2) they are not neutral nor generally applicable, and (3) they are the result of bigotry and hostility to religion (to the extent that Defendants claim they are required by the Virginia Constitution). Both exclusions also violate the Religion Clauses because they discriminate among, and entangle the government with, religion.

A. Defendants' religious exclusions trigger strict scrutiny under the Free Exercise Clause.

1. Defendants' religious exclusions trigger strict scrutiny under *Trinity Lutheran*, *Espinoza*, and *Carson* because they deny Cameron, Luke, and Trace otherwise available grants solely because of their religious character, exercise, and use.

The Free Exercise Clause "protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Carson*, 596 U.S. at 778 (cleaned up). As a result, the Supreme Court has "repeatedly held" that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits" because of their religious "character," "activity," "use," or "exercise." *Id.* at 778–81, 789 (citations omitted); *see also Mahmoud v. Taylor*, 606 U.S. __, 32 (2025) (Slip Opinion) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017)). Although this principle stems from cases like *Everson* and *Sherbert*, the Supreme Court has reiterated it three times within the last eight years. *See, e.g.*, *Everson v. Bd. of Ed. of Ewing Tp*, 330 U.S. 1, 16 (1947) (state "cannot exclude" people "because of their faith, or lack of it, from receiving the benefits of public welfare legislation"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to

doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

First, in *Trinity Lutheran*, the Court held that Missouri violated the Free Exercise Clause by excluding "otherwise eligible" churches from a playground resurfacing grant program "solely because of their religious character." 582 U.S. at 462. There, Missouri had a policy—which it argued was required by its state constitution—that prohibited giving public grants to an "applicant owned or controlled by a church, sect, or other religious entity." *Id.* at 455. That exclusion, the Court explained, "impose[d] a penalty on the free exercise of religion that trigger[ed] the most exacting scrutiny." *Id.* at 462. And Missouri's claimed interest in "skating as far as possible from religious establishment concerns" could not "qualify as compelling" in the "face of the clear infringement on free exercise." *Id.* at 466.

Justice Gorsuch (joined by Justice Thomas) concurred in part, expressing his "doubts" that there was any meaningful distinction "between laws that discriminate on the basis of religious *status* and religious *use*." *Id.* at 469 (Gorsuch, J., concurring). To him, it did not matter whether a benefit was described as, "closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way." *Id.*

Second, in *Espinoza v. Montana Department of Revenue*, the Court struck down the "no-aid" provision of Montana's constitution because it barred religious schools from participating in a state scholarship program "solely because of the religious character of the schools." 591 U.S. 464, 476, 488 (2020). Montana's exclusion harmed families, too, by putting them to "a choice between sending their children to a religious school or receiving [government] benefits." *Id.* at 480. Like the exclusion in *Trinity Lutheran*, Montana's no-aid provision "disqualif[ied] the religious from government aid" which triggered (and failed) strict scrutiny. *Id.* at 478, 484–87.

Justice Gorsuch again concurred, explaining that there is no distinction between "religious status" and "religious use." *Id.* at 509 (Gorsuch, J., concurring). "So whether the Montana Constitution [was] better described as discriminating against religious status or use

makes no difference: It is a violation of the right to free exercise either way, unless the State can show its law serves some compelling and narrowly tailored governmental interest[.]" *Id.* at 511.

And most recently, in *Carson*, the Supreme Court held that Maine's prohibition on sending tuition assistance payments to "sectarian" schools violated the "'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza*." 596 U.S. at 775, 780. Maine tried to avoid those cases by arguing that it didn't exclude schools based on their religious *status* but based on their religious *activity*. Maine said a school was excluded "only if it promote[d] a particular faith and present[ed] academic material through the lens of that faith." *Id.* at 787. In other words, Maine advocated for the very distinction that Justice Gorsuch warned about in *Trinity Lutheran* and *Espinoza.* But the Court explained that any "attempt" to draw lines between religious status and use would "raise serious concerns about state entanglement with religion and denominational favoritism." *Id.* at 787. "In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination." *Id.* at 788.

Trinity Lutheran, *Espinoza*, and *Carson* resolve this case. First, Defendants offer a "benefit" that Cameron, Luke, and Trace are "otherwise eligible" for: Tuition Assistance and National Guard Grants. *Id.* at 779. Just like the playground resurfacing grants in *Trinity Lutheran*, the high school scholarships in *Espinoza*, and the tuition assistance payments in *Carson*, college tuition assistance grants are a quintessential government benefit.

Second, the State Council excludes Cameron and Luke, and the National Guard excludes Trace, solely because of their religious activity and exercise: picking religious majors that they believe God has instructed them to pursue. To Cameron, Luke, and Trace, ignoring this call violates their faith, just like a Seventh-day Adventist working on a Saturday, *Sherbert*, 374 U.S. at 399, or a Jehovah's Witness participating in the production of tank turrets, *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 710 (1981). And the Supreme Court trilogy cases make clear that excluding "religious *observers* from otherwise available public benefits" in this manner "violates the Free Exercise Clause." *Carson*, 596 U.S. at 778 (emphasis added).

To be sure, giving Cameron, Luke, and Trace these grants may mean that some public funds go towards a "religious use"—tuition for some religious courses that they take. *Id.* at 786. But Maine made the same argument in *Carson* and lost. There, the Court held that the government cannot "exclude religious persons from the enjoyment of public benefits on the basis of their anticipated *religious use* of the benefits," including using funds for religious instruction. *Id.* at 789 (emphasis added). Nor can the State Council claim an interest in not directing public funds for such "religious uses" because it already awards grants for some religious programs, including those that directly prepare students for the ministry or seminary.

Defendants have conditioned Cameron's, Luke's, and Trace's ability to get publicly funded grants on abandoning their desired religious programs. There's no dispute that Cameron and Luke could get a VTAG grant if they chose any major *other than* those classified as Code 39 programs. And there's no dispute that Trace would have received a National Guard Grant had he selected any secular major. Defendants' religious exclusions "specifically carve[ ] out" students who choose certain religious programs and "penalize[ ] the free exercise of religion." *Id.* at 780 (cleaned up). Whether classified as an exclusion based on religious character, exercise, activity, or use, such religious discrimination is "odious to our Constitution" and must face "the strictest scrutiny." *Id.* at 779–80 (citations omitted).

2. *Locke v. Davey* is factually and legally distinguishable.

Like the states in *Trinity Lutheran*, *Espinoza*, and *Carson*, Defendants claim that *Locke v. Davey* controls. 540 U.S. 712 (2004). But it doesn't for several reasons. First, the Supreme Court has cabined *Locke*'s "narrow reach" to its precise facts, which differ significantly. *Carson*, 596 U.S. at 788. There, the Supreme Court upheld Washington's exclusion of Joshua Davey from a scholarship program, relying on the "State's antiestablishment interest in not using taxpayer funds to pay for the training of clergy." *Trinity Lutheran*, 582 U.S. at 465 (citing *Locke*, 540 U.S. at 722). Davey "had planned for many years to attend a Bible college and to prepare himself through that college training for a lifetime of ministry, specifically as church pastor." *Locke*, 540 U.S. at 717 (cleaned up). Indeed, it was undisputed that Davey's only goal was to receive

"training for [a] religious profession[ ]" and his "religious beliefs" were the "only reason" he sought a "college degree." *Id.* at 721. The Court's holding was based on Davey's intent to use his theology degree to be a pastor. *Carson*, 596 U.S. at 788.

That's not the case here. While Cameron, Luke, and Trace may consider ministry work at some point in their careers, none are going to college *solely* to prepare for religious vocations. For example, Cameron planned to attend college before choosing to major in Pastoral Studies and he's also considering careers in real estate or nonprofit work. Similarly, Luke decided to go to college after discovering he could pursue a music degree that integrated his faith. He's also interested in a commercial music career or starting a business. And Trace is *already* in a secular career—he serves in the Virginia Army National Guard. Trace is getting a college degree to become a military chaplain yet he's also considering careers in law enforcement or aviation. Unlike Joshua Davey, Plaintiffs are pursuing their college educations with several future vocations in mind; some ministry-related, some not. That alone distinguishes *Locke*.

Second, *Locke* "expressly turned on what it identified as the 'historic and substantial state interest' against using 'taxpayer funds to support church leaders.'" *Carson*, 596 U.S. at 788 (quoting *Locke*, 540 U.S. at 722, 725); *see Locke*, 540 U.S. at 722–24 (identifying the state interest as prohibiting "state-supported clergy," "supporting clergy with public funds," "state-supported clergy," and "support[ing] church leaders"). But that interest is inapplicable here because funding a religiously-based college degree does not equal training of the clergy. In fact, statistics show many students who purse a theology or religion degree end up in secular careers. For example, data from the U.S. Bureau of Labor Statistics shows that "theology" majors land occupations in a wide variety of fields, including management, sales, and office and administrative support. *See Occupational Outlook Handbook, Field of Degree: Theology*, U.S. BUREAU OF LAB. STAT., https://bit.ly/3HzrA5K (last visited June 25, 2025). And the State Council's own data confirms the same *for Code 39 Liberty University graduates*: one-year after graduation, theology students from 2016 to 2018 held jobs in several sectors, including retail

trade, manufacturing, and accommodation and food services. *See Employment Outcomes – Earnings, Virginia Institutions*, *supra* p. 6, https://bit.ly/4441pvI.[3]

Nor can Defendants rely on an interest in denying funds for religious education. The record shows that the State Council currently funds degrees that are used to prepare and train church leaders. And the Department presumably pays its chaplains, who certainly are closer to the "clergy"side of the line than college students. Government action that burdens First Amendment rights must be "narrowly tailored in pursuit of [its] interests." *Carson*, 596 U.S. at 780 (citation omitted); *see also infra* p. 26–27. Broadly excluding a category of students to avoid the possibility that some may pursue clergy vocations is radically overbroad. [4]

What's more, to support a state interest "against procuring taxpayer funds to support church leaders," *Locke* cited the "backlash" to this State's "Bill Establishing A Provision for Teachers of the Christian Religion." *Locke*, 540 U.S. at 722, n.6. But that bill levied a property tax across the Commonwealth to be "appropriated to a provision for a Minister or Teacher of the Gospel." A Bill Establishing A Provision for Teachers of the Christian Religion (reprinted in *Everson*, 330 U.S. at 72 (supplemental appendix to dissent of Rutledge, J.)). That history is "misplaced" because the bill "singled" out ministers "for financial aid," *not* "the inclusion of religious ministers in public benefits programs." *Locke*, 540 U.S. at 727 (Scalia, J., dissenting). More precisely, that bill pertained only to ministers, not a general program for all qualified students, only some of which may (or may not) become ministers. And the Supreme Court has since clarified that *Locke* does not "generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits." *Carson*, 596 U.S. at 789.

Third, *Locke* avoided interest balancing by downplaying Davey's religious burden as "a far milder kind" because he could've used his scholarship for a secular degree. *Locke*, 540 U.S.

[3] For the Court's convenience, a copy of these data search results is attached as Exhibit 2.

[4] Indeed, as time has shown, the exclusion in *Locke* was an extremely poor fit to achieving such an interest: Joshua Davey became a lawyer, not a pastor.

at 720–21, n.4. That's the same as claiming the *Carson* plaintiffs could have used Maine's tuition assistance at secular schools while still pursuing religious education elsewhere. The Supreme Court has clarified that a law that "excludes religious observers from otherwise available public benefits" "must be subjected to the strictest scrutiny." *Carson*, 596 U.S. at 778, 780 (cleaned up).

Finally, in their motion to dismiss, Defendants note that this Court recently applied *Locke* to dismiss a complaint in *Hall v. Fleming*, No. 3:25-cv-00186 (E.D. Va. May 9, 2025), *on appeal*, No. 25-1574 (4th Cir.). But this unpublished, nonbinding, and non-precedential order does not control here.[5] As Plaintiffs will explain more fully in their forthcoming response to Defendants' motion to dismiss, the plaintiff in *Hall* did not allege an intention to consider work beyond the ministry, did not assert any claims other than free exercise, and her free-exercise claim was limited to arguing that she was excluded from an otherwise available public benefit. And it is no surprise that the Court dismissed that complaint because the plaintiff in *Hall* did not oppose the motion to dismiss, but instead, agreed that *Locke* applied to foreclose her claim.[6] Here, Plaintiffs will offer a defense to the motion to dismiss, arguing that this case falls outside of *Locke*. Plaintiffs assert additional causes of action beyond free exercise. And Plaintiffs' free-exercise claim is not limited to their exclusion from otherwise-available public benefits, identifying additional infirmities that independently destroy neutrality and general applicability.

3. Defendants' religious exclusions trigger strict scrutiny because they are neither neutral nor generally applicable.

The most direct path to strict scrutiny is under *Trinity Lutheran*, *Espinoza*, and *Carson* because students are eligible for the grants for any major—except certain *religious* ones. As the Court held in *Carson*, "there is nothing neutral" about "exclud[ing] some members of the community from an otherwise generally available public benefit because of their religious exercise." 596 U.S. at 781; *see also Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S.

[5] The order in *Hall* was not publicized and is not currently available on Westlaw.

[6] *See* Hall Plaintiff's Response to Defendant's Motion to Dismiss, No. 3:25-cv-00186 (Apr. 24, 2025) (agreeing that the Court "is bound to dismiss the case" but stating her intention to appeal and seek a Supreme Court opinion expressly overruling *Locke*).

520, 533 (1993) ("the minimum requirement of neutrality is that a law not discriminate on its face"). Defendants' exclusions are facially discriminatory and non-neutral towards religion.

Although the Court need not go further, Defendants' religious exclusions also are not generally applicable. A law or policy is not generally applicable if it "treats *any* comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 593 U.S. 61, 62 (2021), or if it includes "a mechanism for individualized exemptions," *Fulton*, 593 U.S. at 533–34 (cleaned up). Both grant programs treat comparable activity better and contain systems for individualized exemptions.

VTAG. The VTAG program has at least three features that make it not generally applicable. First, it favors comparable activity over the "religious exercise at issue." *Tandon*, 593 U.S. at 62. Whether activity is comparable depends on "the asserted government interest that justifies the regulation at issue." *Id.* The only interest that the State Council could invoke is avoiding state aid for "educating students for religious vocations." *Virginia Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 690 (2000) (quotation omitted).[7] But the VTAG religious exclusion is fatally underinclusive because it only bars students in CIP Code 39 religious programs but allows grants for students in CIP Code 38 programs—even though many of those programs also prepare students for religious vocations:

- Hampton University's Code 38 Religious Studies Program is "designed to sharpen the skills of students already in ministry" and "to prepare students for advanced studies, especially in religious education and theology." *Religious Studies*, HAMPTON UNIV., https://bit.ly/4j2vvp9 (last visited June 19, 2025).

- Virginia Union University's Code 38 Religious Studies major "prepare[s] persons for graduate work in the discipline of religion and ministerial studies as well as those who seek to pursue religious vocations (i.e. youth ministers, pastoral

[7] Article VIII, § 11 of the Viginia Constitution expressly permits issuing public grants to students at nonprofit colleges, except colleges "whose primary purpose is ... to provide religious training or theological education." In *Lynn*, the Virginia Supreme Court explained that this restriction avoided "state aid" for "educating students for religious vocations." 538 S.E.2d at 690 (citing The Report of the Commission on Constitutional Revisions, 1969, p. 274, Public Views Document 100, p. 6).

assistants, associate ministers, etc[.])." *Virginia Union University Catalog*, p. 49, available at https://bit.ly/420ARKJ (last visited June 19, 2025).

- Averett University's Code 38 Religion Program prepares students "for a career in Christian ministry" and "aims to graduate future leaders for churches, faith-based organizations, and missions." *Religion Degree Program*, AVERETT UNIV., https://bit.ly/3YAsB31 (last visited June 19, 2025).

- Virginia Wesleyan University's Code 38 Religious Studies program allows students to get early admission at Duke Divinity School, guaranteed admission at Emory University's Candler School of Theology, or a dual degree through United Theological Seminary. *Graduate Dual Degrees*, VIRGINIA WESLEYAN UNIV., https://bit.ly/3Yd29fS (last visited June 19, 2025).

Plus, the State Council will award grants for some music programs that train for ministry work. For example, Bluefield University's Music Program (an eligible Code 50.09 "music" program) has a "Church Music" concentration that "prepares students for a professional vocational music ministry in the church." *Music (BA)*, BLUEFIELD UNIV., https://bit.ly/4iMlVX1 (last visited June 19, 2025). But Luke's program remains excluded. These eligible programs are "comparable" to Cameron's and Luke's programs because they create the same "risk" to the State's interest in not funding education for religious vocations. *Tandon*, 593 U.S. at 62. While this exception alone is enough to trigger strict scrutiny, *id.*, there are more.

Second, the State Council's double-major rule is another exception that undermines the government's interest. This regulation allows a student to receive VTAG if he double-majors in a Code 39 program with an eligible program and takes an "equal or greater number of courses required for [the] eligible major or concentration" than courses for the Code 39 program. 8 V.A.C. § 40-71-10. In short, this allows students to pursue religious vocations as long as they double-major and structure their schedules carefully.

And this exception has exceptions. The State Council has a "formal mechanism for granting exceptions," *Fulton*, 593 U.S. at 537, from the double-major rule if "based on circumstances beyond the control of the student," 8 V.A.C. § 40-71-10. Nothing in the law describes what "circumstances" are sufficient; instead exemptions are left to the Council's "sole

discretion." *Fulton*, 593 U.S. at 537. This "formal system of entirely discretionary exceptions" likewise defeats general applicability. *Id*. at 536.

Third, the State Council awards VTAG to students with secular majors and religious minors that prepare them for religious vocations. For instance, a student can receive a full grant while minoring in Religious Leadership and Ministry at Mary Baldwin University—a program that gives students "the practical, theoretical, and ethical grounding needed to begin a vocation in the ministry of any faith." *Religious Leadership and Ministry (Minor)*, MARY BALDWIN UNIV., https://bit.ly/4j22cmr (last visited June 18, 2025). Indeed, if Cameron *minored* in Pastoral Leadership and majored in business, he would be eligible for a VTAG award.

At bottom, there are several ways for students to use VTAG to prepare them for religious vocations—but the one thing that they cannot do is major in a Code 39 program. The State Council's interest in not funding education for future religious careers is "not applied in an evenhanded, across-the board way" and must undergo strict scrutiny. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022).

National Guard Grant. Unlike the VTAG religious exclusion, which identifies certain degrees as too religious, the National Guard religious exclusion is purely a "discretionary system" where Department officials make "[i]ndividualized assessments" about whether a program is, in their view, too religious and thus ineligible. *Canaan Christian Church v. Montgomery Cnty.*, 29 F.4th 182, 198 (4th Cir. 2022) (citing *Fulton*, 593 U.S. at 538).

The Department claims the National Guard Grant statute "clearly states" that grants "cannot be used to provide religious training or theological education." Doc. 1-9 at PageID 92, (Stevens 2025 Emails). The statute doesn't say that at all. It says a servicemember is ineligible if they attend a college "whose primary purpose" is to "provide religious training or theological education." Va. Code § 23.1-610. But the Department unilaterally extends that exclusion to individual *programs*: "theological degrees"—without defining that term—are "ineligible." Doc. 1-5 at PageID 68 (Command Policy 22-023). This "invites the government to decide" which programs "are worthy of solicitude" and eligible, and those that are not. *Fulton*, 593 U.S. at 537

(cleaned up). The government cannot permissibly make such calls. "This precise evil is what the requirement of general applicability is designed to prevent." *Lukumi*, 508 U.S. at 545–46.

The Department has more discretion built right into its policy. Its Command Policy provides a base-line rule for eligibility: in addition to training and service requirements, servicemembers must be in a program at a school in Virginia and cannot be pursuing a "theological" degree. Doc. 1-5 at PageID 68 (Command Policy 22-023). But the Department can allow exceptions for "[s]pecial courses within a Virginia school's curriculum" evaluated "on a case-by-case basis." *Id.* Although the policy lists courses "such as study abroad" as an example, the language is illustrative, not limiting. *See Mauerhan v. Principi*, 16 Vet. App. 436, 442 (2002) ("'such as' means 'for example' or 'like or similar to'" (citation omitted)). And the Department has admitted it would fund a required religious course "for another type of degree," confirming that exceptions for religious education are possible. Doc. 1-7 at PageID 79 (Stevens-Gregg July 2024 Emails). If the Department will fund religious courses, it can fund Trace's "Religion" major. As the Ninth Circuit recently held in a free exercise challenge, a policy that "require[s] a case-by-case analysis is antithetical to a generally applicable policy." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 688 (9th Cir. 2023) (en banc).

And consider that Trace's "Religion" major at Liberty University qualifies for VTAG even though both grant programs exclude degrees for "religious training or theological education." Trace flagged this inconsistency for the Department, believing he should likewise be eligible for a National Guard Grant—which pays up to $15,000 more per year—but was rejected. The Department's exclusion makes even less sense given Trace's intent to become a military chaplain, directly benefiting the National Guard. The Department pays its chaplains; there's no valid reason to discriminate against those preparing to serve in that same role.

4. The Virginia Constitution does not justify Defendants' religious exclusions because the relevant provisions were adopted out of hostility to religion.

Defendants might say that the Virginia Constitution requires their religious exclusions. That argument still fails under *Trintiy Lutheran*, *Espinoza*, and *Carson* where the Supreme Court

rejected similar claims by Missouri, Montana, and Maine. *See, e.g.*, *Espinoza*, 591 U.S. at 488 ("Given the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have disregarded the no-aid provision and decided this case conformably to the Constitution of the United States." (cleaned up)).

Yet that argument loses for another reason too: any exclusion required by the state constitution is "born of bigotry" and "hostility" to religion. *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion). Start with Article VIII, § 10 of the Virginia Constitution, which contains a state Blaine Amendment that allows public funds to flow to "nonsectarian private schools" but bans funds for sectarian schools and colleges. The 1969 Commission on Constitutional Revision considered removing this Blaine Amendment but ultimately recommended leaving it to uphold the "separation of church and state." The Report of the Commission on Constitutional Revision, 1969, p. 272.

Next, when the state constitution was revised in 1971, Article VIII, § 11 was added to permit publicly funded scholarships (and later grants) to "assist non-profit institutions of higher education in Virginia (other than those whose purpose is to provide religious or theological education." *Id*. p. 273. This section was created to aid "students in private institutions" but it expressly excluded students who went to colleges with a "primary purpose" of "religious training or theological education" to "avoid involving the Commonwealth in religious activities." *Id.*, p. 274. Funding was thus permitted for students at "church-related" colleges but only those that "operate[d] like any other college." *Id.* So a religious label was fine; a religious use was not.

In short, these two provisions of the Virginia Constitution were created to exclude funding for students at overtly sectarian schools. Defendants have extended these Blaine Amendments to bar certain *programs* that, in their view, are still *too sectarian*. But that's even more egregious—Defendants now "reserve special hostility for those who take their religion seriously" and "who think that their religion should affect the whole of their lives." *Mitchell*, 530 at 827–28. The provisions remain in Virginia's Constitution but they are a product of "hostility to aid to pervasively sectarian schools"—a rejected and "buried" doctrine. *Mitchell*, 530 U.S. at

828–29. The "original motivation" for these discriminatory provisions is another reason why they violate the Free Exercise Clause. *Espinoza*, 591 U.S. at 497 (Alito, J. concurring).

B. Defendants' religious exclusions trigger strict scrutiny under both Religion Clauses because they discriminate among—and require excessive entanglement with—religion.

Defendants' exclusions also independently require strict scrutiny under both Religion Clauses because (1) they discriminate among religions and (2) require government officials to subjectively judge whether a particular college program is for "religious training or theological education." The First Amendment forbids this.

"'The clearest command of the Establishment Clause" is that the government may not 'officially prefe[r]' one religious denomination over another." *Catholic Charities*, at *5 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). This prohibition is "inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* (citation omitted). As a result, a "law that differentiates between religions along theological lines"—including along lines that "ultimately turn[] on inherently religious choices"—"is textbook denominational discrimination." *Id.* at *6–7; *see also Mitchell*, 530 U.S. at 828 (2000) (government is "prohibited ... from discriminating in the distribution of public benefits based upon religious status or sincerity"). Such a discriminatory law mandates strict scrutiny. *Id.*

The Tenth Circuit faithfully applied these principles in *Colorado Christian University v. Weaver* to strike-down Colorado's exclusion of "pervasively sectarian" colleges from state scholarships. 534 F.3d 1245 (10th Cir. 2008). The court first held that Colorado discriminated "on the basis of religious views or religious status" by "extending scholarships to students at some religious institutions, but not those deemed too thoroughly 'sectarian' by government officials." *Id.* at 1258 (cleaned up). The "discrimination [was] expressly based on the degree" of a college's "religiosity," *id.* at 1259, which transgressed the First Amendment's guarantee of "equal treatment of all religious faiths," *id.* at 1257.

Defendants' religious exclusions cause the same inter-religion discrimination. Defendants award grants for some religious degrees but not others, solely because they deem some as religious indoctrination, and others as a broader study of religion. The State Council does it on a categorical line between Code 38 and 39 programs; the Department does it through individualized examination of each program. Either way, drawing those lines is just like Colorado splitting "sectarian" and "pervasively sectarian" colleges—it's impermissible all the same. And the Religion Clauses forbid even subtler forms of discrimination among religions. For example, just weeks ago the Supreme Court held it unconstitutional for the government to "differentiat[e] between religions based on theological choice." *Catholic Charities*, 2025 WL 1583299, at *7. And forty years ago, the Court held it unconstitutional to give denominational preferences even when they were based on secular criteria about solicitation of funds. *Larson*, 456 U.S. at 246, n.23; *see also Colorado Christian*, 534 F.3d at 1259 (rejecting argument that Colorado does not "distinguish" "between types of religions"). Cameron, Luke, and Trace are penalized because the State favors programs with (what they deem) less religious "pervasiveness or intensity" than those they chose. *Colorado Christian*, 534 F.3d at 1259. Simply put, Defendants have unconstitutionally judged the religiosity of Plaintiffs' programs.

Colorado Christian also held that Colorado's exclusion caused unconstitutional "excessive entanglement between religion and government" because officials reviewed the religiosity of a college's curriculum and policies to determine whether it was "pervasively sectarian." *Id.* at 1261–63. Defendants' exclusions also require government officials to "troll[ ] through," *id.* at 1261 (citation omitted), a person's chosen program to decide whether it is one for "religious training or theological education." This is especially true for the Department who decides on a case-by-case basis whether a program meets that definition. And that the State Council has made a categorical exclusion makes no difference. *Lukumi*, 508 U.S. at 542 ("categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice"). In the end, "[t]he First Amendment does not permit government officials to sit as judges of the 'indoctrination' quotient of theology classes." *Id.* at 1263; *see also*

New York v. Cathedral Acad., 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.").

"It is fundamental to our constitutional order that the government maintain neutrality between religion and religion." *Catholic Charities*, 2025 WL 1583299, at *9 (cleaned up). Defendants' exclusions do not maintain that neutrality based only on their own subjective decisions about how much religion is too much religion.

C. Defendants fail strict scrutiny because they lack a compelling interest and the religious exclusions are not narrowly tailored to achieve any interest.

Defendants bear the burden to prove that their religious exclusions advance an "interest[ ] of the highest order" and are "narrowly tailored in pursuit of those interests." *Carson*, 596 U.S. at 780 (cleaned up); *Catholic Charities*, 2025 WL 1583299, at *6 (law must be "closely fitted to further a compelling governmental interest" (citation omitted)). They cannot.

Defendants lack a compelling interest in banning Cameron, Luke, and Trace from college grants when they are available to essentially every student in the Commonwealth. A government policy "that targets religious conduct for distinctive treatment will survive strict scrutiny only in rare cases." *Carson*, 596 U.S. at 781 (cleaned up). That's what the exclusions do. And a "State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." *Id.* Plus, *Locke* already held that the government is well within its lane to fund religious—even "devotional theology"—degrees. 540 U.S. at 719.

So Defendants are left with a purported interest in not funding the clergy. *Id.* at 722. That interest fails for at least five reasons. First, Defendants are not funding clergy, the only possible historical concern. They are broadly funding education, and only some who may possibly become clergy in the future. The only government interest has already dissipated. Second, Defendants must show that they have "an interest in denying ... exception[s]" to Cameron, Luke, and Trace, not an interest in enforcing the exclusions "generally." *Fulton*, 593 U.S. at 541. They

can't do so here because all three aren't clergy, and they may never be. Third, the fact that Defendants fund other programs that prepare students for the ministry "undermines" any "contention that its [exclusionary] policies can brook no departures." *Id.* at 542. Fourth, if the Department can pay its chaplains, it can likewise give grants to students who may become a chaplain, like Trace. Fifth, Trace received federal Army tuition assistance for the fall 2024 and spring 2025 semester while majoring in Religion. That the federal government willingly funds his program without issue undercuts any interest Virginia might claim. *See Carson*, 596 U.S. at 781 (An "interest in separating church and state more fiercely than the Federal Constitution cannot qualify as compelling in the face of the infringement of free exercise." (cleaned up)).

Neither are Defendants exclusions narrowly tailored because they are "overbroad or underinclusive in substantial respects." *Lukumi*, 508 U.S. at 546. Underinclusive because many other students can receive a VTAG or National Guard award for a degree that will ultimately prepare them for the clergy. *See id.* at 547 ("a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." (cleaned up)). And overbroad because many students—like Cameron, Luke, and Trace—can't receive an award even though they are not specifically preparing (nor may ever join) the clergy. *See Catholic Charities*, 2025 WL 1583299, at *9 ("overinclusiveness ... cannot be described as narrow tailoring"). There are less-restrictive alternatives that do not require Defendants to discriminate against some students because of their chosen fields of study. Defendants cannot survive strict scrutiny.

II. Cameron, Luke, and Trace satisfy the remaining preliminary injunction factors.

Irreparable harm. Cameron, Luke, and Trace satisfy the likelihood of irreparable harm factor. For one, Defendants' unconstitutional exclusions alone constitute irreparable harm because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (citation omitted); *accord WV Ass'n of Club Owners*, 553 F.3d at 298

("irreparable harm is inseparably linked to the likelihood of success on the merits of [a] First Amendment claim" (cleaned up)).

For another, Cameron, Luke, and Trace are suffering real, concrete harm because of the exclusions. The Department denied Trace a National Guard grant for the spring 2025 semester; he would soon receive a $2,000 reimbursement grant for that semester but for the religious exclusion. Stevens Decl. ¶¶ 54–55. Trace also applied for a grant for the current summer 2025 semester, but he'll again be denied thus costing him $3,000 out of pocket. *Id.* ¶¶ 56–58. And the Department will deny Trace National Guard Grants for his Master of Divinity program—which he will begin this upcoming fall semester—because it is a religious program. *Id.* ¶¶ 61–63.

Likewise, Cameron was denied VTAG for the 2025-2026 academic year, costing him an additional $5,250, forcing him to take out extra student loans to cover the difference. Johnson Decl. ¶¶ 31, 34. And Luke will declare his Music and Worship major no later than October 20, 2025, and will therefore be denied a $2,500 VTAG award for the spring 2026 semester and all future semesters. Thomas Decl. ¶¶ 20–23. These losses are "irreparable per se" because Cameron, Luke, and Trace likely "cannot recover damages due to [Defendants'] sovereign immunity." *Children's Hosp. of the King's Daughters, Inc. v. Price*, 258 F. Supp. 3d 672, 690 (E.D. Va. 2017), *aff'd in part, vacated in part on other grounds sub nom. Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615 (4th Cir. 2018) (cleaned up); *see also Mountain Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir. 2019) ("economic damages may constitute irreparable harm where no remedy is available at the conclusion of litigation"). Unless the Court ends Defendants' unconstitutional discrimination, Cameron, Luke, and Trace will continue to be penalized for following their faith.

Public interest and balance of equities. Enjoining Defendants' religious exclusions benefits the public interest and harms no one. The public "is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 191 (4th Cir. 2013) (cleaned up). In fact, the Virginia

legislature just appropriated over 100 million dollars for the Tuition Assistance Grant Program, and over 3 million dollars for the National Guard Grant Program, for fiscal year 2025. Va. Acts ch. 725, Items 130 and 461 (Reconvened Sess. 2025), at 229, 610.[8] No one will be harmed by permitting Cameron, Luke, and Trace to equally participate in these well-funded grant programs.

CONCLUSION

If the government opens a public benefits program, it cannot then exclude some people because "of their anticipated religious use of the benefits." *Carson*, 596 U.S. at 789. The Constitution demands Defendants treat Cameron, Luke, and Trace equally to others. And no compelling interest exists—either presently or historically—that justifies excluding some students from an otherwise neutral and generally applicable funding program simply because there is a chance they may enter the ministry at some point in the future. This Court should grant the preliminary injunction.

[8] The recent State Budget Bill is available at https://bit.ly/441rnQm.

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Respectfully submitted,

s/ *Jacob E. Reed*
Jacob E. Reed
VA Bar No. 97181
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, VA 20176
Telephone: (571) 707-4655
jreed@ADFLegal.org

Ryan J. Tucker*
AZ Bar No. 034382
Jeremiah J. Galus*
AZ Bar No. 030469
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
rtucker@ADFLegal.org
jgalus@ADFLegal.org

David A. Cortman*
GA Bar. No. 188810
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road, NE
Suite D-1100
Lawrenceville, GA 30043
Telephone: (770) 339-0774
dcortman@ADFLegal.org

Attorneys for Plaintiff
* Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed on June 27, 2025, using the Court's CM/ECF system.

s/ *Jacob E. Reed*
Jacob E. Reed
Counsel for Plaintiffs