

No. 26-240

In the Supreme Court of the United States

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CAMERON JOHNSON; LUKE THOMAS; TRACE STEVENS,
Petitioners,

v.

A. SCOTT FLEMING, IN HIS
OFFICIAL CAPACITY AS DIRECTOR OF THE STATE COUNCIL
OF HIGHER EDUCATION FOR VIRGINIA, ET AL.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

**BRIEF OF *AMICI CURIAE* STATE OF WEST
VIRGINIA AND 21 OTHER STATES
IN SUPPORT OF PETITIONERS**

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE**

Locke v. Davey is an aberration. Under it, States can discriminate against religious students by excluding them from scholarship programs. So long as the State can claim some “historic and substantial” antiestablishment interest in refusing to fund the program, and so long as the burden on religious students can be characterized as “mild[]” or “minor,” the State can engage in acts that would otherwise run afoul of the Free Exercise Clause. *Locke v. Davey*, 540 U.S. 712, 720, 725 (2004). No strict scrutiny required.

Locke’s logic is counter to every Free Exercise case this Court has decided before or since. The basic rule provides that “[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). It “must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.” *Id.* (cleaned up). And there’s no vocational-scholarship-program exception to be found in the First Amendment.

Recognizing that *Locke* doesn’t sit right, this Court has scaled it back three times. *Trinity Lutheran* dismissed the mild burden excuse: religious discrimination stays odious even if it costs only a few scraped knees. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017). It confirmed, too, that the Free Exercise Clause limits antiestablishment interests—not the other way around. *Id.* at 466. *Espinoza* said that “[s]tatus-based discrimination remains status based even if one of

* Under Supreme Court Rule 37.2, *amici* timely notified counsel of record of their intent to file this brief.

its goals or effects is preventing religious organizations from putting aid to religious uses.” *Espinoza v. Mont. Dep’t of Rev.*, 591 U.S. 464, 478 (2020). And *Carson* erased a status-use line. *Carson v. Makin*, 596 U.S. 767, 788-89 (2022). It held that *Locke* doesn’t “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.” *Id.* at 789 (emphasis added).

Little of *Locke* thus remains. Yet because that little still stands, lower courts keep reaching for it. Indeed, each prior attempt to cabin *Locke* only marked out where the next court would go wrong. Stare decisis demands that the Court preserve and respect well-reasoned decisions that appropriately guide lower courts. But *Locke* doesn’t qualify. It is a decision this Court has drained of every supporting rationale. Especially considering how stare decisis “is at its weakest in constitutional cases,” *Trump v. Slaughter*, 146 S. Ct. 2283, 2302 (2026), *Locke* no longer deserves the deference the doctrine protects.

This petition and the companion petition in *Hall v. Fleming*, No. 26-193 (U.S. filed Aug. 11, 2026), highlight the danger of leaving even the few remaining scraps of *Locke* in place. Virginia targets religious students without ever facing strict scrutiny. Through two separate programs, the Virginia Tuition Assistance Grant Program and the Virginia National Guard State Tuition Assistance Program, the Commonwealth makes financial aid broadly available to students at in-state colleges and universities. But students who want to pursue majors the State deems too religious don’t get to participate. And who knows what “too religious” means? That answer is left up to Virginia’s officials’ discretion.

The Court should use these cases to do three essential things. *First*, the Court should grant the petition to overrule *Locke*. The decision was a stumble when the Court handed it down in 2004, and this Court's recent cases have since hollowed out the rationales it offered. *Second*, the Court should resist the temptation to distinguish *Locke*. This Court has already tried narrowing *Locke* three times, and lower courts still misapply it. Virginia's sweeping exclusion of degrees with religious flavor shows that fine line-drawing just isn't doing the job. *Third*, *Locke* inflicts real harm on the States, which is what brings Amici to this Court.

Beyond the obvious harms of okaying religious discrimination, *Locke* hurts States like the Amici States. States run tuition-assistance programs for hundreds of thousands of students of every faith—and none. *Locke* traps them. A State that excludes religious degrees must first grade each program's religiosity—risking unconstitutional entanglement and denominational favoritism. A State that instead funds religious degrees invites Establishment Clause suits that lean on *Locke*. Amici speak from experience about a doctrine that leaves them nowhere safe to stand. Overruling *Locke* would free the States to do what they wish to do already: treat religious and secular students alike and leave the choice of what to study to the student.

This Court should grant this petition and the companion petition in *Hall* to end the aberration of *Locke* v. *Davey* once and for all.

SUMMARY OF ARGUMENT

I. *Locke* cannot be squared with Free Exercise jurisprudence—not under the law as it stood in 2004, when the case was decided, and even less today. By the time the

Court handed down *Locke*, it had already set up the familiar test for when a law intrudes on a person's religious exercise: strict scrutiny. But *Locke* dodged the test. Instead, *Locke* treated the "play in the joints" between the Religion Clauses as license to construct a *new* test—one where a religious student's burden gets weighed against a State's asserted antiestablishment interest in withholding funds. That improvisation was wrong, as the interaction between the Free Exercise Clause and the Establishment Clause does not provide a basis to ignore strict scrutiny. More, *Trinity Lutheran*, *Espinoza*, and *Carson* have recently rejected nearly every premise undergirding *Locke*. Only history is left, which *Locke* misread. Although the Founders opposed *compelling* citizens to fund the clergy, they did not intend to exclude the clergy from benefits open to everyone else. Given these many flaws, the Court should grant the petition and overrule *Locke*.

Even using its own test, *Locke* reached the wrong result. This Court had already held—as *Locke* recognized—that using public monies to fund a recipient's private choice to pursue religious study raises no Establishment Clause problem. So, Washington had no genuine antiestablishment interest; that side of the scale was empty. Meanwhile, the burden on Joshua Davey was substantial; the State denied him needed scholarship money solely because God called him to pursue ministry. The Court's botched handling of the test it had just created presaged the problems that continue to plague the test today.

II. If the Court grants certiorari, it should not, once again, merely limit *Locke*. True, the cases *could* be distinguished—the students lack Davey's fixed intent to enter the ministry, Virginia lacks a historic and

substantial antiestablishment interest, and Virginia’s exclusions are far more arbitrary than Washington’s. But this Court has tried that approach, and courts are still applying *Locke* incorrectly. (Just witness the Fourth Circuit’s eagerness to apply the decision here.) Limiting once again wouldn’t solve the problem. And none of the available distinctions can support a durable rule—least of all an intent-based one, which would require predicting the career of an eighteen-year-old.

III. As long as *Locke* remains good law, the States will suffer; *Locke* traps them coming and going. A State that excludes religious degrees must decide which courses of study are too religious to fund. That inquiry risks two forbidden practices—entanglement and denominational discrimination. Yet a State that tries to avoid that trap by funding religious majors invites Establishment Clause challenges built on *Locke*. Either way, States are left holding the bag.

REASONS FOR GRANTING THE PETITION

I. The Court should overrule *Locke*.

Locke was “egregiously wrong from the start,” and it is even more obviously wrong now. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022). It set aside settled law to let Washington’s Promise Scholarship Program discriminate against religious students without any heightened scrutiny. It did so by stretching the “play in the joints” between the Religion Clauses and by resting on a hollow historical interest against funding the clergy. This Court should grant this petition and the petition in *Hall* and overrule *Locke*.

A. *Locke* was wrong on the law—then and now.

1. Start with the law as it stood in 2004. The Free Exercise Clause’s text, at that time, as it is now, was “singularly absolute: ‘Congress shall make no law . . . prohibiting the free exercise [of religion].’” Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. Rev. 299, 300 (1986) (quoting U.S. CONST. amend. I). Its guarantee—a “substantive liberty”—was worthy of rigorous protection even then. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1114, 1137 (1990). So laws that “infringe[d] upon or restrict[ed] practices because of their religious motivation” were tested against strict scrutiny—as they still are today. *Lukumi*, 508 U.S. at 533.

Yet *Locke* broke with that precedent by waving away *any* scrutiny. To account for the “tension” between the Establishment Clause and the Free Exercise Clause, the Court functionally adopted a balancing test instead. *Locke*, 540 U.S. at 718, 721-24. Under that test, States can discriminate against religious *use* if they have an animus-free “historic and substantial” antiestablishment interest in doing so, and the burden on free exercise is “minor.” *Id.* at 725. In other words, antiestablishment interests trump the Free Exercise Clause where the burden is of a “milder kind.” *Id.* at 720. But the right to free exercise couldn’t be balanced away so freely in 2004.

The only test—strict scrutiny—was the appropriate test, and it should have applied. See *Lukumi*, 508 U.S. at 533; *Trinity Lutheran*, 582 U.S. at 462. Pre-*Locke*, the “Court . . . repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest ‘of the highest order.’”

Trinity Lutheran, 582 U.S. at 458 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). In fact, the Court had just applied strict scrutiny to a law that “suppress[ed]” a religious use: “animal sacrifices of the Santeria religion.” *Locke*, 540 U.S. at 720 (referring to *Lukumi*, 508 U.S. at 535). *Locke*’s facts demanded strict scrutiny, too. Washington singled out Joshua Davey, excluded him based on his studies’ ties to his religious beliefs, and denied him a neutral government benefit.

Even in *Locke*, the Court never fully explained why strict scrutiny *didn’t* apply. It simply said that “the State’s disfavor of religion ... [was] of a far milder kind” than in recent cases and that Washington’s program wasn’t motivated by animus for religion. *Locke*, 540 U.S. at 720, 725. Those facts shouldn’t have and didn’t matter. The Court had “no authority for approving facial discrimination against religion simply because its material consequences [were] not severe.” *Id.* at 731 (Scalia, J., dissenting). It had never “required proof of ‘substantial’ concrete harm with other forms of discrimination.” *Id.* The same goes for animus. The Court had never “approached other forms of discrimination” by looking for animus. *Id.* at 732. If anything, the Court had rejected good intentions as inadequate to justify facial discrimination. *Id.* at 733 (citing *Paty*, 435 U.S. at 621, 628-29).

2. Even under *Locke*’s own balancing test, the Court weighed the interests incorrectly, and its “reasoning was exceptionally weak.” *Dobbs*, 597 U.S. at 231. The test’s malleability confirms it was the wrong one from the start.

Washington had no antiestablishment interest to trade against free exercise. By 2004, this Court had held that public funds reaching religious training through a recipient’s “genuinely independent” private choice raised

no Establishment Clause problem. *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488-89 (1986); see *Zelman v. Simmons-Harris*, 536 U.S. 639, 649-52 (2002). So, “the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology.” *Locke*, 540 U.S. at 719 (citing *Witters*, 474 U.S. at 489). But if funding these degrees doesn’t offend the Establishment Clause, then refusing to fund them serves no antiestablishment interest.

Davey’s burden also wasn’t of a “milder kind”—as anyone who has faced the prospect of paying for an expensive degree well knows. *Locke*, 540 U.S. at 720. The scholarship Davey otherwise would have received “was a substantial sum of money designed to create a ‘more level playing field’ by making higher education affordable for students from low and moderate income families.” Richard F. Duncan, *Locked Out: Locke v. Davey and the Broken Promise of Equal Access*, 8 U. PA. J. CONST. L. 699, 708 (2006). Davey faced “an immediate dilemma” because of the theology-degree exclusion—he could “remain faithful to religious belief or suffer the sanction imposed by law.” J. Brett Pritchard, *Conduct and Belief in the Free Exercise Clause: Developments and Deviations in Lyng v. Northwest Indian Cemetery Protective Association*, 76 CORNELL L. REV. 268, 294 (1990).

Yet *Locke* “never explains why the denial of funding on its own does not constitute a burden on religious practice.” Steven K. Green, *Locke v. Davey and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913, 925 (2004). In other words, *Locke* ignored tangible financial harms that ran alongside painful dignitary ones. And still, “[t]he indignity of being singled out for special burdens on the basis of one’s religious calling is so profound that the

concrete harm produced can never be dismissed as insubstantial.” *Locke*, 540 U.S. at 731 (Scalia, J., dissenting).

3. “Given how unmoored [*Locke*] was from the start, it might seem unlikely that later developments could have done more to undermine the decision.” *Ramos v. Louisiana*, 590 U.S. 83, 106 (2020). “Yet they have.” *Id.* The Court—in *Trinity Lutheran*, *Espinoza*, and *Carson*—has “rejected or ignored every premise of *Locke*”: the “play in the joints,” the supposed mildness of the burden, and the status-use distinction. App.17a & n.3, *Hall v. Fleming*, 26-193 (Richardson, J., concurring). Indeed, this Court has favorably cited *Locke* just once—the very next Term and only in passing, *Cutter v. Wilkinson*, 544 U.S. 709, 713-14 (2005)—while “erod[ing] *Locke*’s foundation” at every turn since, App.16a, *Hall v. Fleming*, 26-193 (Richardson, J., concurring). That *Locke* has never received further approval (apart from one cursory nod) suggests it is, at the least, “vulnerable to doubt.” BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 234 (1st ed. 2016).

Time has shown that Washington’s supposed antiestablishment interest is illusory. *Trinity Lutheran* confirmed that States’ antiestablishment interests are “limited by the Free Exercise Clause.” *Trinity Lutheran*, 582 U.S. at 466 (cleaned up). And a “policy preference for skating as far as possible from religious establishment concerns” “cannot qualify as [a] compelling” interest “[i]n the face of [a] clear infringement on free exercise.” *Id.* *Espinoza* reaffirmed that point. 591 U.S. at 485. And *Carson* held flatly that “[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.” 596 U.S. at 781. “A natural reading of [the First Amendment] would seem to suggest the [Establishment, Free Exercise, and Free Speech] Clauses have complementary purposes, not warring ones where one Clause is always sure to prevail over the others.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 533 (2022) (cleaned up).

The “mildness” rationale has fared no better. *Trinity Lutheran* refused to measure a free-exercise violation this way: even if only “a few extra scraped knees” resulted, discrimination was “odious to our Constitution all the same, and [could not] stand.” 582 U.S. at 467. In the end, a State need not put “a gun to the head” of religious observers to trigger strict scrutiny—“a thumb on the scale” will do. *Espinoza*, 591 U.S. at 514 (Gorsuch, J., concurring). “[T]he government cannot condition [the] availability” of a “public benefit” on a person’s “willingness to accept a burden”—that is, *any* burden—“on their religious exercise.” *Mahmoud v. Taylor*, 606 U.S. 522, 561 (2025) (emphasis added) (cleaned up).

Finally, *Locke*’s application to religious use—not status—has collapsed. *Carson* held that “any status-use distinction lacks a meaningful application not only in theory, but in practice as well.” 596 U.S. at 788. It stressed that the Constitution’s “prohibition on status-based discrimination ... is not a permission to engage in use-based discrimination.” *Id.* *Carson* thus “cabined *Locke* to its facts,” confining it to the “narrow focus on vocational religious degrees” and holding that *Locke* may 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.” *Id.* at 789; App.32a, *Hall v. Fleming*, 26-193. By “kill[ing] the status/use distinction,” the Court “effectively left *Locke v.*

Davey for dead.” Michael Bindas, *Using My Religion: Carson v. Makin and the Status/use (Non)distinction*, 2021-2022 CATO SUP. CT. REV. 163, 183 (2022).

Run the correct test, and Washington’s program would have failed it. Because the exclusion “expressly discriminates against otherwise eligible recipients ... solely because of their religious character,” it is subject to strict scrutiny. *Trinity Lutheran*, 582 U.S. at 462. “No field of study but religion” was “singled out for disfavor.” *Locke*, 540 U.S. at 727 (Scalia, J., dissenting); see WASH. ADMIN. CODE § 250-80-020(12)(g) (2003). And the law is not narrowly tailored or supported by a compelling interest. Excluding an entire field of study is the opposite of narrow tailoring. And an antiestablishment interest is not compelling, as shown. The Washington program could not survive the scrutiny the First Amendment required.

In short, *Locke* is “inconsistent with other First Amendment cases and has been undermined by more recent decisions.” *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 886 (2018). This Court should thus use this petition to overrule it.

B. *Locke*’s historical analysis was flawed, too.

What remains is *Locke*’s historical analysis. App.17a, *Hall v. Fleming*, 26-193 (Richardson, J., concurring). But the Court got that part wrong as well. *Locke* rested on two pieces of history, and neither bears the weight the Court placed on it.

First, *Locke* suggested that “[s]ince the founding,” Americans had resisted “procuring taxpayer funds to support church leaders.” *Locke*, 540 U.S. at 722. “That history”—however—“involved not the inclusion of religious ministers in public benefits programs like the

one at issue here, but laws that singled them out for financial aid.” *Id.* at 727 (Scalia, J., dissenting); see Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111, 150 (2020). Opposition to *compelling* the public to fund the clergy doesn’t equate to support for *excluding* the clergy from a neutral benefit the State makes available to everyone.

The Court’s “famous example,” the “defeat of ‘A Bill Establishing A Provision for Teachers of the Christian Religion’ in the Virginia Legislature” doesn’t support the Court’s thesis. *Locke*, 540 U.S. at 722 n.6. That bill would have forced Virginians to fund “Christian teachers.” *Id.* at 727 (Scalia, J., dissenting). And contrary to how the Court painted it, the bill’s defeat shows that Virginia was striving for religious equality and opposed compelled support for the clergy—not that it sought to bar clergy from public life.

A fuller view of Virginia’s history confirms as much. Virginia maintained an established religion until the Revolution. Michael W. McConnell, *Establishment and Disestablishment at the Founding*, 44 WM. & MARY L. REV. 2105, 2119 (2003). And Virginia’s disestablishment in the late 1700s was driven by evangelical religious revival, not growing secularism or rationalism. *Id.* The movement climaxed in 1785 and 1786, just as “the Virginia legislative body was about to renew Virginia’s tax levy for the support of the established church.” *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 11-12 (1947). Madison’s Memorial and Remonstrance—also cited in *Locke*—was directed at that renewal. J. Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), reprinted in *Everson*, 330 U.S. at 66 (appendix to dissent of Rutledge, J.).

In his paper, Madison urged that all people retain “an equal title to the free exercise of Religion according to the dictates of conscience.” Memorial and Remonstrance, *supra* (cleaned up). His objection was to “a system of compelled financial support for clergy, not a neutral program where public funds follow private choice.” Erin Hawley, *A Mandate to Discriminate?: Why the Establishment Clause Does Not Justify the Exclusion of Religious Charter Schools*, HARV. J.L. & PUB. POL’Y PER CURIAM, no. 9, Spring 2025, at 1, 21. When the bill failed, the Assembly enacted Thomas Jefferson’s Bill for Religious Liberty, which put “all religions on a footing of perfect equality; protecting all; imposing neither burdens nor civil incapacities upon any; conferring privileges upon none.” *Perry v. Commonwealth*, 44 Va. (3 Gratt.) 632, 641 (1846). And on the heels of disestablishment, the Virginia legislature supported religious colleges through land grants and surveyor fees. Storslee, *supra* at 131.

So founding-era sources applied more of an equal-footing doctrine towards religion—not the kind of “hands off” approach that *Locke* perceived. Accord *Shurtleff v. City of Bos.*, 596 U.S. 243, 261 (2022) (Kavanaugh, J., concurring) (“[A] government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations, and speech in public programs, benefits, facilities, and the like.”).

Second, the Court pointed to founding-era state constitutional provisions that prohibited “using tax funds to support the ministry,” reasoning that “States ... sought to avoid an establishment of religion around the time of the founding.” *Locke*, 540 U.S. at 723 (citing state constitutional provisions). But those provisions go the same way as the popular uprisings: they reflect a desire

not to *compel* the public to fund religion, not a preference that the clergy be *excluded* from neutral benefits. As Justice Scalia put it, “[n]o one would seriously contend, for example, that the Framers would have barred ministers from using public roads on their way to church.” *Locke*, 540 U.S. at 727-28 (Scalia, J., dissenting).

Look at Ohio’s constitution. It provides “[t]hat all men have a natural and indefeasible right to worship Almighty God, according to the dictates of conscience” and thus “no human authority can, in any case whatever, control or interfere with the rights of conscience; that no man shall be *compelled* ... to maintain any ministry, against his consent; and that no preference shall ever be given, by law, to any religious society or mode of worship.” OHIO CONST. art. VIII, § 3 (1802) (emphasis added), reprinted in *Constitution of Ohio, 1802*, 51 CLEV. ST. L. REV. 665, 680 (2004). So, true, Ohio couldn’t *compel* citizens to support the clergy. But the Court should have read on. Article 8, Section 3 of Ohio’s 1802 Constitution mandated that the legislature encourage religious education, stating “*religion*, morality and knowledge, being essentially necessary to good government and the happiness of mankind, *schools* and the means of instruction shall forever be *encouraged* by legislative provision, *not inconsistent with the rights of conscience*.” *Id.* (emphasis added).

Without history to stand on, the last of *Locke* falls apart.

* * *

So, *Locke* is no more than “a decaying husk.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 410 (2024). The Court should now clear it away.

II. Trying to limit *Locke* again won't work.

The Court *could* once again distinguish *Locke* rather than overrule it. But it shouldn't. This Court has distinguished *Locke* three times already, yet courts keep reading it wrong. Each time the Court has narrowed *Locke*, it has just invited the next case. This petition, and the companion petition in *Hall*, are those next cases. The better course is to overrule *Locke*, not to limit it again.

A. Three features make this case and *Hall* distinguishable.

Principally, the petitioners here and the one in *Hall* lack Davey's unequivocal intent to enter the clergy. 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 a church pastor." *Locke*, 540 U.S. at 717 (cleaned up). And ultimately, *Locke* hinged on that fact; Davey "was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry." *Trinity Lutheran*, 582 U.S. at 464 (cleaned up). The students here and in *Hall* don't have such a laser-focused plan to become "church leaders" who "lead ... congregation[s]." *Locke*, 540 U.S. at 721-22. The *Hall* petitioner has changed her major three times, from "Music Education: Choral" to "Youth Ministries" to "Christian Leadership and Church Ministries" and finally to "Music and Worship." App.4a, 24a-25a, *Hall v. Fleming*, 26-193. And Petitioners here are weighing secular careers in music, real estate, nonprofit work, and the military. See Pet. 5-8.

The state interest differs in these cases, too. *Locke* credited Washington with an animus-free "historic and substantial" interest against using "taxpayer funds to support church leaders." *Locke*, 540 U.S. at 722. But

Virginia has no equivalent tradition. Virginia’s funding restrictions on religious education appear not in the Establishment Clause of its Bill of Rights, see VA. CONST. art. I, § 16, but in its Education article. And those provisions are not the product of principled founding-era anti-establishment conviction, like Washington’s supposedly was. See *Locke*, 540 U.S. at 723. Instead, Virginia’s no-aid provisions are the product of Blaine Amendments adopted more than 100 years after the founding, rooted in anti-Catholic animus. See VA. CONST. art. IX, § 141 (1902); VA. CONST. art. IV, § 67 (1902); 1 VA. CONST. CONVENTION (1901-1902), REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION 805 (1906) (Charles Meredith inquiring “is not the whole milk in the cocoanut [sic] the Catholic question”); *id.* at 812 (Meredith making case that government shouldn’t deny benefits to Catholics because they do charitable work). *Locke* declined to resolve what happens when a State’s no-aid provision has that pedigree. *Locke*, 540 U.S. at 723 n.7.

Finally, *Locke* tolerated Washington’s choice because Washington “merely chose[] not to fund a distinct category of instruction” and imposed only a “minor burden” on students. *Locke*, 540 U.S. at 713, 724-25. Virginia’s exclusions look different. Virginia has drawn lines within religious education, delegated religious classification authority to state officials, and constructed an entirely arbitrary scheme. VTAG’s dual-degree rule highlights the arbitrariness. Virginia will fund a CIP Code 39 major—in other words, a major relevant to religious or theological vocations—if the student also pursues an eligible double major and takes at least as many courses in the eligible major per semester. 8 VA. ADMIN. CODE § 40-71-10. Virginia, thus, doesn’t even do what it purports it must: exclude religious vocational

instruction. And the burden isn't minor at all. For example, the *Hall* petitioner is denied VTAG funding for her entire course of study unless she picks up a secular double-major and restructures her course load around Virginia's proportionality rules.

On these facts, the Court could admittedly once again hold that *Locke* does not reach this case and stop there. That would at least provide a partial solution.

B. But the Court should decline that path. It has walked it three times recently, to no lasting effect. In *Trinity Lutheran*, *Espinoza*, and *Carson*, the Court distinguished and limited *Locke*—each time reversing a lower court that had applied *Locke* to approve of religious discrimination. *Trinity Lutheran*, 582 U.S. at 449 (Eighth Circuit); *Carson*, 596 U.S. at 789 (First Circuit); *Espinoza*, 591 U.S. at 482 (state high court applying a Blaine-era no-aid provision). And yet, after each one, the issue of *Locke*'s reach returned. The Court should recognize that *Locke*'s experiment has failed and end it.

This case and *Hall* are the latest examples of how lower courts are incorrectly interpreting *Locke*. The Fourth Circuit applied *Locke* broadly in *Hall*: it treated *Locke* as “directly analogous” to any case where a plaintiff pursues “a religious vocation at a private religious college”; the “state statutes” prohibit funds from going “toward an ineligible major”; and the plaintiffs’ “choice of majors” made them ineligible for scholarship money. App.7a, *Hall* v. *Fleming*, 26-193. The court didn't even engage with *Locke*'s balancing test, and it threaded a needle to resurrect *Locke* from the Court's recent decisions. The district court in this case used *Locke* to impose an even broader categorical bar. It said *Locke* was “too analogous” to any free exercise claim against educational grants that exclude some religious degrees “to

meaningfully distinguish” it. App.14a. It was good enough for the district court that *Locke* remained “good law.” App.17a. So, both courts applied *Locke* how it shouldn’t have been—the same problem the Court has stepped in to correct thrice before.

And any of the distinguishing features found here offer a poor basis to write a new rule. Rules based on state-specific historical interests or breadth of excluded programs are fact intensive and too easily distinguished away to provide any meaningfully clear line. An intent-based refinement would be unworkable. Few eighteen-year-olds know where they will end up, and their stated plans routinely change: about a third of bachelor’s students switch majors within three years. KATHERINE LEU, U.S. DEP’T OF EDUC., NCES 2018-434, BEGINNING COLLEGE STUDENTS WHO CHANGE THEIR MAJORS WITHIN 3 YEARS OF ENROLLMENT (2017), <https://perma.cc/BJU3-YY6Y>. Even a degree that sounds ministerial is a poor proxy: most clergy never majored in it. Of the 2026 class of Catholic ordinands who attended college, only 22% majored in theology or philosophy. CTR. FOR APPLIED RSCH. IN THE APOSTOLATE, GEO. UNIV., THE CLASS OF 2026: SURVEY OF ORDINANDS TO THE PRIESTHOOD 24 (2026), <https://perma.cc/P86G-9WED>. Davey himself proves the point. He ended up not at a pulpit, but at Harvard Law School. Elizabeth W. Green, *Jesus in the Ivory Tower*, HARV. CRIMSON (Feb. 18, 2004), <https://perma.cc/HZZ7-7S9R>.

Distinguishing *Locke* a fourth time would only repeat this cycle. It would resolve Petitioners’ case while leaving the next court to guess (likely, wrongly) how to continue applying *Locke*’s ever-shrinking, *ad hoc* exception to free exercise.

III. *Locke* is causing concrete harm to the States.

For the States, these issues aren't academic. Amici States administer their own tuition-assistance programs for hundreds of thousands of students, religious and secular alike. And as long as *Locke* remains, Amici will face a catch-22. If a State decides to exclude religious degrees, it will inevitably be forced into entangling decisions on religiousness and denominational preferences—both of which are constitutionally forbidden. On the other side, if a State decides to fund religious degrees, it will face suits alleging violations of the Establishment Clause. Either way, *Locke*'s consequences land squarely on the States.

Consider first a Virginia-style regime that excludes religious majors. A State that conditions scholarship eligibility on whether a program is for religious training or theological education must conduct a risky entangling inquiry the Supreme Court has oft cautioned against. See *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 761 (2020). Simply, governments should not engage in inquiries that grade-out religiosity. See *id.* at 761; see also *Carson*, 596 U.S. at 787 (noting that “scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism”). Any kind “of state inspection and evaluation of the religious content of a religious organization is fraught with ... entanglement” concerns. *Larson v. Valente*, 456 U.S. 228, 255 (1982) (cleaned up). And entanglement aside, tackling the categorization assignment may be “an impossible task in an age where many and various beliefs meet the constitutional definition of religion.” *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (cleaned up).

Because the State will have to grade each major's religiosity, it will predictably engage in entanglement's byproduct: "denominational preference ... based on theological choices." *Catholic Charities Bur., Inc. v. Wis. Labor & Indus. Rev. Comm'n*, 605 U.S. 238, 250 (2025). The State will end up funding faiths that speak in academic terms while denying those that speak in devotional ones. Really, Virginia's VTAG program already does that. It funds Hampton University's Religious Studies program, for instance—designed to prepare students "already in ministry," *Religious Studies*, HAMPTON UNIV., <https://perma.cc/G3GN-5UQ3> (last visited Sept. 2, 2026)—while denying funds to students seeking a Pastoral Leadership degree. So, States cannot adopt a Virginia-style regime—kosher under *Locke* in the Fourth Circuit's view—without running into other constitutional problems.

And States that choose *not* to adopt Virginia-style exclusions face a different risk: Establishment Clause challenges. *Witters* and *Zelman* notwithstanding, those future plaintiffs could cite the Fourth Circuit's blessing of Virginia's approach as evidence that neutral, inclusive funding of religious programs is constitutionally suspect. Even if those challenges ultimately fail, they will impose real litigation costs and chill the very inclusivity the Free Exercise Clause demands.

Amici want no part of that choice. They prefer to serve religious and secular students alike and intend to keep doing so—without being forced into judgments about which degrees are too religious to fund. Overruling *Locke* would lift that burden and restore a rule the States can actually administer: treat religious and secular students equally, and leave the choice of what to study with the student (where it belongs).

Even more, Amici States’ students also suffer. They are forced to structure their education around what the government will fund—choosing the secular version of their desired major, doubling up on secular coursework to dilute the religious content, or abandoning their chosen religious program entirely. Those consequences are precisely the kind of choice between faith and public benefit that the Free Exercise Clause was designed to eliminate. See *Trinity Lutheran*, 582 U.S. at 463 (“[T]he Free Exercise Clause protects against ‘indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.’” (cleaned up)).

Locke thus forces an impossible choice on the States and an unconstitutional one on their students; overruling it would spare both.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

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