

No. 26-193

In the Supreme Court of the United States

BETHANY M. HALL,

Petitioner,

v.

A. SCOTT FLEMING,

Respondent.

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

**BRIEF OF *AMICI CURIAE* ASSOCIATION OF
CHRISTIAN SCHOOLS INTERNATIONAL AND
AMERICAN ASSOCIATION OF CHRISTIAN
SCHOOLS IN SUPPORT OF PETITIONER**

Deborah Malamud
COVINGTON & BURLING LLP
30 Hudson Yards,
New York, NY 10001

Kevin B. Collins
Counsel of Record
Zachary G. Parks
MaKade C. Claypool
Brian T. Reiser
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
kcollins@cov.com
(202) 622-6000

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	4
I. <i>Locke's</i> Antiestablishment Rationale Lacks Historical Support.....	6
II. <i>Locke's</i> Religious-Degree Rationale Creates First Amendment Concerns.	16
CONCLUSION	25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Am. Legion v. Am. Humanist Ass’n</i> , 588 U.S. 29 (2019).....	6
<i>Cath. Charities Bureau, Inc. v. Wisc. Lab. & Indus. Rev. Comm’n</i> , 605 U.S. 238 (2025).....	22, 24
<i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).....	19
<i>Corp. of Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos</i> , 483 U.S. 327 (1987).....	23
<i>Dobbs v. Jackson Women’s Health Org.</i> , 597 U.S. 215 (2022).....	4
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968).....	19
<i>Espinoza v. Mont. Dep’t of Revenue</i> , 591 U.S. 464 (2020).....	4-5, 14, 16-18, 20
<i>Everson v. Bd. of Educ.</i> , 330 U.S. 1 (1947).....	10
<i>Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.</i> , 344 U.S. 94 (1952).....	22
<i>Kennedy v. Bremerton Sch. Dist.</i> , 597 U.S. 507 (2022).....	6, 14-15
<i>Locke v. Davey</i> , 540 U.S. 712 (2004).....	2, 6-8, 13-14, 17-20, 23

<i>Mahmoud v. Taylor</i> , 606 U.S. 522 (2025).....	18
<i>McDaniel v. Paty</i> , 435 U.S. 618 (1978).....	19-21
<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000).....	16
<i>New York v. Cathedral Acad.</i> , 434 U.S. 125 (1977).....	23
<i>Carson ex rel. O.C. v. Makin</i> , 596 U.S. 767 (2022).....	2-6, 15-17, 19, 24-25
<i>Rosenberger v. Rector & Visitors of Univ. of Va.</i> , 515 U.S. 819 (1995).....	12
<i>Sch. Dist. of Abington Twp. v. Schempp</i> , 374 U.S. 203 (1963).....	18, 21
<i>Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.</i> , 450 U.S. 707 (1981).....	18-19, 22
<i>Town of Greece v. Galloway</i> , 572 U.S. 565 (2014).....	6
<i>Trinity Lutheran Church v. Comer</i> , 582 U.S. 449 (2017).....	4-5, 17, 20, 23
<i>Trump v. Slaughter</i> , 146 S. Ct. 2283 (2026).....	4
<i>W. Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943).....	22
<i>Watson v. Jones</i> , 80 U.S. 679 (1872).....	22
<i>Witters v. Wash. Dep't of Servs. for the Blind</i> , 474 U.S. 481 (1986).....	5, 15

<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002).....	5, 15
<i>Zobrest v. Catalina Foothills Sch. Dist.</i> , 509 U.S. 1 (1993).....	13

Statutes

Act of Aug. 7, 1789, 1 Stat. 50.....	21
N.J. Const. art. XVII (1776).....	11
8 Va. Admin. Code § 40-71-10 (2022)	24
Va. Code Ann. § 23.1-631 (2016).....	24

Other Authorities

Carl H. Esbeck, <i>The Establishment Clause: Its Original Public Meaning and What We Can Learn From the Plain Text</i> , 22 Federalist Soc’y Rev. 26 (2021).....	8
<i>Constitutionality of Religious Restrictions on the Use of Federal Funds</i> , 50 Op. O.L.C. __, slip op. (2026)	12
James Madison, <i>Madison’s Amendments to the Declaration of Rights</i> (1776), in Nat’l Archives: Founders Online	2
James Madison, <i>Memorial and Remonstrance Against Religious Assessments</i> (1785), in Nat’l Archives: Founders Online	10, 14, 21
John Witte, Joel A. Nichols & Richard W. Garnett, <i>Religion and the American Constitutional Experiment</i> (5th ed. 2022).....	9, 14

Kurt T. Lash, <i>Power and the Subject of Religion</i> , 59 Ohio St. L.J. 1069 (1998).....	12
Liberty University, <i>Bachelor of Music in Music Education: Choral–Career Opportunities</i>	24
Mark Storslee, <i>Church Taxes and the Original Understanding of the Establishment Clause</i> , 169 U. Pa. L. Rev. 111 (2020)	9-13, 16
Michael W. McConnell, <i>The Establishment Clause: Co-Guarantor of Religious Freedom</i> , Nat’l Const. Ctr.....	12
Michael W. McConnell, <i>Establishment and Disestablishment at the Founding, Part I: Establishment of Religion</i> , 44 Wm. & Mary L. Rev. 2105 (2003)	8, 9, 10, 15
Nat’l Ctr. for Educ. Stat., <i>Detail for CIP Code 38.0299</i>	24
Nat’l Ctr. for Educ. Stat., <i>Detail for CIP Code 39</i>	24
Nat’l Ctr. for Educ. Stat., <i>Bachelor’s Degrees Conferred by Postsecondary Institutions, by Field of Study: Selected Academic Years, 1970-71 through 2020-21</i>	20-21
Nathan S. Chapman & Michael W. McConnell, <i>Agreeing to Disagree</i> (2023)	14
Nathan S. Chapman, <i>Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause</i> , 96 Notre Dame L. Rev. 677 (2020).....	10

State Council of Higher Educ. for Va., <i>C01A1: Completions by Broad Program</i>	20
Stephanie H. Barclay, Brady Earley & Annika Boone, <i>Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis</i> , 61 Ariz. L. Rev. 505 (2019).....	8, 14
Stephanie H. Barclay, <i>The Religion Clauses After Kennedy v. Bremerton School District</i> , 108 Iowa L. Rev. 2097 (2023)	22
Thomas C. Berg & Douglas Laycock, <i>The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions</i> , 40 Tulsa L. Rev. 227 (2004)	14-16
Thomas Jefferson, <i>A Bill for Establishing Religious Freedom</i> (1786), <i>in Nat'l Const. Ctr.</i>	11

INTEREST OF *AMICI CURIAE*¹

Amicus Association of Christian Schools International (“ACSI”) is a nonprofit association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 2,300 Christian preschools, elementary and secondary schools, and over 50 post-secondary institutions in the United States. Member schools educate some 5.5 million children around the world. ACSI accredits Protestant pre-K–12 schools, provides professional development and teacher certification, and offers member schools high-quality curricula, student testing, and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. Its calling relies upon a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in ensuring expansive religious liberty with strong protection from government attempts to restrict it.

Amicus American Association of Christian Schools (“AACS”) is an association of 38 state, regional, and international associations that promote high-quality Christian education. AACS represents more than 750 K–12 schools and higher education institutions and provides high-quality services such as school and childcare accreditation, teacher certification, student testing, teacher benefit programs, legal consultation, and government outreach. AACS supports each

¹ Pursuant to Rule 37.2, all counsel of record received timely notification of *amici*’s intent to file this brief. No party or party’s counsel authored any part of this brief, and no one other than *amici*, their members, and their counsel made any monetary contribution intended to fund this brief’s preparation or submission.

school as they carry out their mission immersing scholarship into faith and forming the next generation of Christian leaders through services that include accreditation, professional development, and advocacy.

SUMMARY OF ARGUMENT

Just over 250 years ago, James Madison articulated a fundamental principle of religious liberty: “[N]o man or class of men ought ... [to be] subjected to any penalties or disabilities” “on account of [their] religion.”² Time and again, this Court has reaffirmed that bedrock protection. And most recently, it has rebuffed attempts to “exclude some members of the community from an otherwise generally available public benefit because of their religious exercise” where such discrimination was animated by an interest to “separat[e] church and state more fiercely than the Federal Constitution” requires. *Carson ex rel. O.C. v. Makin*, 596 U.S. 767, 781 (2022) (modified). In such circumstances, the Constitution demands that benefits be equally available to and enjoyed by all—even when the “anticipated ... use of the benefits” is “religious,” and especially when the “choices of private ... recipients” dictate that religious use. *Id.* at 781, 789.

Except, of course, in the religious training context. Under *Locke v. Davey*, states face *no* scrutiny when denying public funding to individuals seeking “vocational religious instruction.” 540 U.S. 712, 725 (2004). And as a result, states can demote certain

² James Madison, *Madison’s Amendments to the Declaration of Rights* (1776), in Nat’l Archives: Founders Online, <https://perma.cc/X3MW-Q3BU>.

students to second-class status precisely because of their sincere religious pursuits. Here, that meant Virginia could repeatedly deny Petitioner Bethany Hall a grant award she qualified for simply because she had chosen majors aligned with her “conviction that God is calling her to minister through music and worship to youth.” Pet.App.25a.

To say *Locke* stands in tension with the constitutional protections above would be an understatement, and thus the Court’s efforts over the years to cabin *Locke* come as no surprise. See, e.g., *Carson*, 596 U.S. at 788-89. Today, *Locke* teeters on two remaining justifications: (1) “the historic and substantial state interest against using taxpayer funds to support church leaders,” and (2) its “narrow” application in the “vocational religious degrees” context. *Id.* (modified).

But neither justification withstands scrutiny. The first—*Locke*’s antiestablishment rationale—faltered from the start. Justice Scalia’s dissent disproved this flawed historical analysis, showing what subsequent scholarship has confirmed: Founding-era concerns centered on *coerced* contributions to *specific* religious establishments, not clergy participation in even-handed public benefit programs. The second justification—*Locke*’s narrow focus on vocational degrees—is a distinction without a constitutional difference. Pursuing religious training *is* a form of free exercise that cannot be logically differentiated from other forms of religious use protected by the Constitution. Yet by permitting such distinctions, *Locke* sanctions discrimination against religious minorities and encourages religious entanglement—anathemas to both Religion Clauses.

The time has come to blot out this “stain” on the Court’s religious liberty jurisprudence. Pet.App.14a, 21a (Richardson, J., concurring). *Locke* was “egregiously wrong from the start.” See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022). And it is finally time to “le[t] [*Locke*] go.” See *Trump v. Slaughter*, 146 S. Ct. 2283, 2302 (2026) (modified). *Amici* thus urge the Court to grant the petition and overturn *Locke*.

ARGUMENT

In a recent trilogy of public-funding cases, the Court again made clear that once states decide to provide public benefits, they cannot use religion to disqualify otherwise eligible recipients. *Trinity Lutheran Church v. Comer* affirmed the “unremarkable” conclusion that when a state “expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character,” it “imposes a penalty on the free exercise of religion” and “triggers the most exacting scrutiny.” 582 U.S. 449, 462 (2017). *Espinoza v. Montana Department of Revenue* similarly applied “the strictest scrutiny” to—and rejected—a state’s attempt to exclude schools from a scholarship program based “solely on [their] religious status.” 591 U.S. 464, 478 (2020). *Carson* then rounded out this reasoning, clarifying that “the prohibition on status-based discrimination under the Free Exercise Clause is *not* a permission to engage in use-based discrimination.” 596 U.S. at 788 (emphasized). These cases drew a clear line in the constitutional sand: States must surmount the strictest scrutiny when they discriminate based on either religious *status* or

“religious *uses* of governmental aid.” *Id.* at 786 (emphasized).

These cases also reiterated that Establishment Clause concerns do not justify restraining the flow of funding either. *See, e.g., Espinoza*, 591 U.S. at 473-74; *Carson*, 596 U.S. at 775. For decades, it has been established that a “government aid program [that] is neutral with respect to religion” does not implicate antiestablishment concerns if recipients “direct government aid to religious schools wholly as a result of their own genuine and independent private choice.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); *accord Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488 (1986). Thus, private choice in *Trinity Lutheran*, *Espinoza*, and *Carson* negated any Establishment Clause concerns, and the states could not use their desires to “separat[e] church and state more fiercely than the Federal Constitution” to justify overt religious discrimination. *Espinoza*, 591 U.S. at 484 (modified); *accord Trinity Lutheran*, 582 U.S. at 466 (state interests in “achieving greater separation of church and State than is already ensured under the Establishment Clause ... [are] limited by the Free Exercise Clause”).

Locke also made an appearance in this trilogy. The states each contended that *Locke* should shield from scrutiny their decisions to disfavor religion in public benefit programs. *See Trinity Lutheran*, 582 U.S. at 464; *Espinoza*, 591 U.S. at 479; *Carson*, 596 U.S. at 788. But the Court disagreed, instead cabining *Locke* to its facts. As *Carson* explained, *Locke* applies only (1) because of “the historic and substantial state interest against using taxpayer funds to support church leaders,” and (2) in the “narrow” context of an

individual “pursuing a vocational religious degree.” 596 U.S. at 788 (modified). *Locke* thus could not justify the states’ discriminatory funding restrictions that were neither backed by historical analogues nor narrowly applied to vocational religious degrees. *See, e.g., id.* at 788-89.

Limiting *Locke* was wise—but it remains binding precedent, directly controlling this and other cases. *See* Pet.App.7a. Only the Court can restore constitutional protections to Ms. Hall and others like her. *Amici* thus write to underscore the need to grant review and reconsider *Locke* because the decision’s reasoning cannot withstand scrutiny. Its antiestablishment worries are ahistorical, and its focus on religious degrees amplifies rather than resolves its disconnect with constitutional principles. As such, *amici* urge the Court to overturn *Locke*.

I. *Locke*’s Antiestablishment Rationale Lacks Historical Support.

In the Establishment Clause context, history matters. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535-36 (2022) (“line ... between the permissible and the impermissible” must “accord with history and faithfully reflect the understanding of the Founding Fathers” (modified)); *see also, e.g., Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014); *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 61 (2019). *Locke* was thus right to appeal to historical analogues to assess Washington’s alleged antiestablishment concerns. *See* 540 U.S. at 722-23. But as Justice Scalia pointed out in dissent, and as scholarship has subsequently confirmed, *Locke* misinterpreted that history.

1. Start with *Locke* itself. The Court explained that “[s]ince the founding ... procuring taxpayer funds to support church leaders ... was one of the hallmarks of an established religion.” *Id.* at 722. In support, the Court pointed to a Virginia bill proposing to “assess a tax for Christian teachers” and “support ... their function of teaching religion” that was rejected and replaced with Thomas Jefferson’s bill to protect all from “be[ing] compelled to ... support any religious ... ministry.” *Id.* at 722 n.6 (citations omitted). The Court also cited early state constitutions protecting individuals from being “obliged” or “compelled” to support a specific “religious profession” or “ministry.” *Id.* at 723. From these precedents focused on coercion and targeted support, *Locke* concluded that states had a “substantial” and historical interest to “prohibi[t] any tax dollars from supporting the clergy.” *Id.*

Justice Scalia, however, saw through that logical leap. Instead, he argued, history demonstrated “the Framers’ hostility to funding the clergy *specifically*,” not concerns with allowing religious ministers to participate “in public benefits programs ... made available to all.” *Id.* at 727 (dissenting opinion). Indeed, the majority’s own history proved his point: The relevant Virginia bill proposed only to assess a *specific* tax for the *direct* support of Christian ministers; early state constitutions similarly rejected efforts to “*singl[e] out* the clergy for public support”; and neither affirmed efforts “to exclude clergymen from general benefits available to all citizens.” *Id.* at 728-29 & n.1 (emphasized). These analogues affirmed the Religion Clauses’ “minimum requirement of neutrality”—a protection “irreconcilable” with the

majority's thumb on the scale *against* a form of religious exercise. *Id.* at 726.

2. Justice Scalia was right. In the years following *Locke*, scholarship confirmed that *Locke* misunderstood the antiestablishment concerns that animated the Founding generation.

Consider first Professor McConnell's seminal work on the hallmarks of religious establishments. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003). He summarized the historical record by identifying several categories of impermissible establishments including controlling church doctrine, governance, and personnel; compelling church attendance; prohibiting worship in dissenting churches; privileging religious groups politically; and assessing compulsory tithes and taxes to support churches and ministers. McConnell, *supra*, at 2131, 2146-59. These establishments were impermissible because they were government attempts to "control and harness religion in service of the state" and single out particular religious denominations for state support. *Id.* at 2208. Other scholars have reached similar conclusions.³

³ See, e.g., Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn From the Plain Text*, 22 Federalist Soc'y Rev. 26, 35 (2021) (original public meaning of "establishment" included "[g]overnment financial support of the state church" such as coerced "assessments to pay ministers' salaries and rent on glebe lands"); Stephanie H. Barclay, Brady Earley & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61

(cont.)

Compulsory financial support in particular took specific forms. Around the turn of the eighteenth century, it was “typical” in New England to “allow each town to negotiate a salary with the minister, and to impose the level of taxes necessary to comply with the contract.” McConnell, *supra*, at 2152. North Carolina “assessed five shillings per year” to “all taxable persons” to “support the ministry.” *Id.* at 2154. Connecticut males would be fined if they failed “to pay for support of the minister.” *Id.* at 2152. And Virginia and South Carolina legislation established publicly funded salaries for ministers. *Id.* at 2152, 2154. These “church tax schemes at the Founding” all had “three elements in common: (1) they collected private resources through coercion, (2) earmarked those resources for religious actors, and (3) redistributed them for the purpose of financing religious functions.” Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. Pa. L. Rev. 111, 169 (2020). But over time, these early practices of “collect[ing] tithes for support of the church” and privileging “one favored religion” became “particularly controversial” and “were losing support by 1789 when the First Amendment was being forged.” Witte, *supra*, at 84.

Ariz. L. Rev. 505, 535-53 (2019) (corpus-linguistics study finding Founding-era uses of “establishment of religion” clustered around “legal or official designation of a specific church or faith,” “individual coercion,” “government interference with church affairs,” and “limitations on political participation”); John Witte, Joel A. Nichols & Richard W. Garnett, *Religion and the American Constitutional Experiment* 85-86 (5th ed. 2022) (“To the founders, the most notorious example of religious establishment ... was the Anglican establishment” which among other things “collect[ed] tithes and taxes for [its] support.”).

Against *that* backdrop of specific assessments to directly support the clergy, Virginia began to resist compulsory tithes, engendering what would become the “feelings which found expression in the First Amendment.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947). When Patrick Henry proposed legislation to require every taxpayer to “support the Christian denomination of his choice,” James Madison and Thomas Jefferson mounted their opposition that would become “the central defining event of disestablishment” during the Founding era. McConnell, *supra*, at 2155-56.

Madison authored *Memorial and Remonstrance Against Religious Assessments*, warning “that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment” as well. James Madison, *Memorial and Remonstrance Against Religious Assessments* § 3 (1785), in Nat’l Archives: Founders Online, <https://perma.cc/7YVL-89TF>. Madison also repeatedly criticized the assessment bill because it imposed financial support for religion through the coercive power of the state. *Id.* His objection, put differently, was against *compelled* tithes, not public benefit programs. See Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 Notre Dame L. Rev. 677, 682 (2020) (officials, “including Madison,” “operated with a relatively narrow conception of the anti-assessment principle, limited to government-forced tithes”); Storslee, *supra*, at 155 (distinguishing opposition to “demand[ing] money for the specific purpose of financing religious worship” from “funding

to support goods like education, even if those being funded might also engage in religion”).

Jefferson’s Virginia Bill for Establishing Religious Freedom, which was enacted in 1786 in lieu of Henry’s proposal, reflected the same principle. The evil identified by Jefferson was compulsion, and the remedy was liberty: “[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, ... nor shall otherwise suffer[] on account of his religious opinions or belief; but [rather] all men shall be free to profess, and ... to maintain, their opinions in matters of religion” without “affect[ing] their civil capacities.” Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1786), in Nat’l Const. Ctr., <https://perma.cc/J46J-VR88>. Other colonies and states adopted similar laws precluding coercive monetary support to specific clergy or churches. See, e.g., N.J. Const. art. XVII (1776), in Yale L. Sch.: Avalon Project, <https://perma.cc/LZ8Y-9L8X> (“[N]o person shall ... ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry[.]”).

3. Unsurprisingly, these seminal debates on *direct* and *compulsory* religious aid did not address the permissibility of public funds *indirectly* benefitting the clergy based on the *voluntary* choice of private individuals. If anything, “[o]ur Nation’s” history shows a “tradition of allowing religious adherents to participate in evenhanded government programs” *without* offending antiestablishment sentiments. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515

U.S. 819, 862 (1995) (Thomas, J., concurring). To name a few, religious institutions received land grants, participated in education and charitable endeavors, and performed various public roles. See Michael W. McConnell, *The Establishment Clause: Co-Guarantor of Religious Freedom*, Nat'l Const. Ctr., <https://perma.cc/A4HH-7VES>. The federal government regularly provided “educational [aid] to religious organizations serving Native Americans.” Kurt T. Lash, *Power and the Subject of Religion*, 59 Ohio St. L.J. 1069, 1121 (1998). Congress repeatedly “set aside federal lands in the Northwest Territory and other territories for the use of schools” that were “undoubtedly ... church-affiliated sectarian institutions.” *Rosenberger*, 515 U.S. at 862 (Thomas, J., concurring) (collecting statutes); *accord* Storslee, *supra*, at 183. And the government continued to allow religious groups to participate directly in public aid programs as the decades progressed. See *Constitutionality of Religious Restrictions on the Use of Federal Funds*, 50 Op. O.L.C. ___, slip op. at 22-23 (2026) (collecting sources), *available at* <https://perma.cc/3JST-UL2G>.

Examples from New York City and Georgetown are particularly apt. Starting in 1777, New York’s state constitution prohibited coerced tithes while nevertheless “continu[ing] to provide tax support for religious organizations that performed public functions.” Storslee, *supra*, at 158. This practice continued for decades until the state legislature in 1812 proposed to “en[d] funding for all denominational schools in New York City.” *Id.* at 159. In opposition, a multifaith coalition led by the oldest Jewish synagogue in America, the Shearith Israel

Congregation, decried the proposal as a violation of the “liberal spirit of our constitution” because it would “direc[t] funds to some schools but not others based solely on a recipient’s religious activity.” *Id.* at 159-60. Separately and miles away, a Catholic congregation in Georgetown faced similar opposition from city council members who sought to deny the congregation’s request for public funding to defray the costs of its free school for indigent boys. *Id.* at 165. Like the Shearith Israel, councilmember Henry Addison pushed back, denouncing attempts to “exclud[e]” citizens “from a just participation of any investment of the public funds in consequence of a peculiarity of religious faith.” *Id.* at 166. “In both instances, religious minorities confronted with selective funding argued that such exclusions were unjust or even unconstitutional. And in both instances, their views prevailed.” *Id.* at 190-91.

In short, Justice Scalia was right again: “No one would seriously contend ... that the Framers would have barred ministers from using public roads on their way to church.” *Locke*, 540 U.S. at 728 (dissenting opinion). Were it otherwise, states would be able to withhold other “government benefits” such as “protect[ion] by the police and fire departments” or keeping “public sidewalk[s] ... in repair.” *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). But that is not the law. And there is no reason to treat even-handed educational subsidies any differently.

4. Properly understood, history supports the exact *opposite* of what *Locke* inferred from it. *Locke* equated opposition to the *direct* and *particularized* support of clergy with an entirely different scenario, *i.e.*, private individuals seeking to participate in generally

available public-benefit programs to pursue religious vocations of their own choice. *See* 540 U.S. at 722 & n.6. But that conflation cannot persuade. History makes clear that antiestablishment concerns did not center on religious individuals benefiting from public arrangements, but that citizens would be “compelled to ... support [a] religious ... ministry,” Nathan S. Chapman & Michael W. McConnell, *Agreeing to Disagree* 3 (2023) (citation omitted), resulting in “preference ... to one established church over all others,” Witte, *supra*, at 87; *see* Barclay et al., *supra*, at 510 (“public support of religious organizations” was an impermissible establishment if done in a preferential way); *Kennedy*, 597 U.S. at 535-37.

Even “the most famous example of public backlash” cited by *Locke*, 540 U.S. at 722 & n.6—Madison’s *Memorial and Remonstrance*—came in response to a Virginia bill that constituted “massive discrimination *in favor of* religious viewpoints,” not because the bill allowed religious groups to participate in public benefit programs, Thomas C. Berg & Douglas Laycock, *The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227, 242 (2004); *Memorial and Remonstrance*, *supra*, § 3; *accord Espinoza*, 591 U.S. at 480-81 & n.3.

Put simply, *Locke* erroneously used historical opposition to coerced religious assessments as license to deny religious citizens from equal participation in neutral public programs. Just as *Carson* refused to extend *Locke* where there was “no historic and substantial tradition against aiding private religious schools,” 596 U.S. at 788 (modified), *Locke*’s reasoning ironically languishes in the same way.

5. Modern public scholarship programs, like the Virginia Tuition Assistance Grant (“VTAG”) program at issue here, are “fundamentally different” from the parochial assessments compelled in the early Americas. Berg & Laycock, *supra*, at 242. In establishing these programs and disbursing grant funds, “[n]o one proposes to fund the inherently religious functions of churches,” and “no one proposes to fund religious organizations preferentially over secular organizations providing the same service.” *Id.* at 243. Nor could it be said that these programs’ “dominant purpose” is “to control and harness religion in service of the state.” McConnell, *supra*, at 2208. Rather, the state provides a secular benefit—*i.e.*, tuition assistance in higher education—on a religiously even-handed basis. And aid makes its way towards religious purposes not because the state has established anything, but because of voluntary, private choice. See *Zelman*, 536 U.S. at 652; *Witters*, 474 U.S. at 488.

The analysis does not change when funds make their way towards paying for vocational religious degrees. Permitting students to use general scholarship funds to pursue religious vocational training on the same terms as all other students does not give preference to any particular religion or “coerce anyone” to believe or act in any religious way. *Kennedy*, 597 U.S. at 537. Permitting this flow of funds is simply “an incidental application of a vastly broader program” governed by private choice. Berg & Laycock, *supra*, at 243; see Pet.App.15a (Richardson, J., concurring) (“The difference between giving ministers special treatment and including them in programs available to everyone is one of kind, not

degree.”). If anything, *excluding* these students “powerfully interferes with private religious choice” and represents “a far greater departure from religious neutrality” than their inclusion. Berg & Laycock, *supra*, at 243; *see infra* Part II.2.a.

* * *

Locke cannot continue to claim historical support where it has none. The Court should thus grant the petition to stop *Locke*’s revisionist narrative from shielding states’ attempts to achieve greater separationist interests than the Constitution permits. *See* Storslee, *supra*, at 183-84, 190 (history makes “apparent that extending [antiestablishment concerns] ... beyond programs providing special funding for religious worship ... was a major mistake” and thus cannot be “use[d]” to justify “restrictions on religious use”); *Espinoza*, 591 U.S. at 492 (Thomas, J., concurring) (“*Locke* incorrectly interpreted the Establishment Clause and should not impact free exercise challenges.”); *cf. Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (disavowing “hostility to aid to pervasively sectarian schools” due to its “shameful pedigree”).

II. *Locke*’s Religious-Degree Rationale Creates First Amendment Concerns.

Locke’s remaining justification—that it applies only in the “narrow” context of “vocational religious degrees,” *Carson*, 596 U.S. at 788-89—cannot save the decision either. This carveout finds no support in the Constitution or this Court’s precedents; instead, it creates constitutional concerns by sanctioning religious discrimination and encouraging religious entanglement.

1. To justify Washington’s overt “disfavor of religion,” *Locke* dismissed any free exercise burden as being “of a far milder kind” because “[t]he State has merely chosen not to fund a distinct category of instruction.” 540 U.S. at 720-21. This focus on religious training served as a throughline for the Court to distinguish *Locke* in subsequent cases. *Trinity Lutheran* declined to apply *Locke* because the church was “denied a grant simply because of what it *is*—a church,” whereas “Davey ... was denied a scholarship because of what he proposed to *do*—use the funds to prepare for the ministry.” 582 U.S. at 464. *Espinoza* similarly dismissed *Locke*’s application because Montana had not “zero[ed] in on any particular essentially religious course of instruction at a religious school.” 591 U.S. at 480. *Carson* accorded, declaring that “*Locke* cannot be read beyond its narrow focus on vocational religious degrees.” 596 U.S. at 789.

Again, limiting *Locke* was prudent. But in situations where, as here, *Locke* does apply, this religious-degree rationale should be rejected.

Consider first principles; they do not support *Locke*’s reasoning. The Free Exercise Clause guarantees just that—“the free *exercise* of religion, not just the right to inward belief (or status).” *Trinity Lutheran*, 582 U.S. at 469 (Gorsuch, J., concurring). It protects “the ability of those who hold religious beliefs *of all kinds* to live out their faiths in daily life through the performance of religious acts,” especially when those acts stem from a “sacred obligation” or “God-given responsibility.” *Mahmoud v. Taylor*, 606 U.S. 522, 546-47 (2025) (emphasized); see *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963)

(“[T]he Free Exercise Clause” recognizes “the right of every person to freely choose his own course” of religious “observance.”); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715-16 (1981) (similar).

Accordingly, when deeply held beliefs impel an individual to pursue a calling to the ministry, that path—even when it involves formal educational training—unquestionably constitutes religious exercise. See *Locke*, 540 U.S. at 733 (Scalia, J., dissenting) (acknowledging “those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry”). This form of religious exercise should thus equally “receiv[e] a generous measure of protection from our Constitution.” *Mahmoud*, 606 U.S. at 547.

Locke does the opposite. It places those who seek to exercise these beliefs “on the lowest rung of the Court’s ladder of rights, and precariously so at that.” *Espinoza*, 591 U.S. at 496 (Thomas, J., concurring). It relieves governments from having to surpass the strictest scrutiny. See *Locke*, 540 U.S. at 720-21. And it does so without “offer[ing] [any] authority” to support that constitutional carveout. *Id.* at 731 (Scalia, J., dissenting). The reality, however, is that “the First Amendment [does not] care” whether a state discriminates against someone because they are religious, because they study at a religiously infused school, or because they pursue a formal religious degree—“[i]t is unconstitutional all the same.” *Espinoza*, 591 U.S. at 510, 515 (Gorsuch, J., concurring). Just as there is no principled reason to distinguish between status- and use-based discrimination under the Free Exercise Clause, see *Carson*, 596 U.S. at 787, there is no constitutional

basis to accord protection to some religious uses (e.g., attending a faith-based university) but not others (e.g., pursuing ministerial training), see *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (“The Free Exercise Clause protects religious observers against unequal treatment.” (modified)); cf. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion[.]”).

2. Unmoored from constitutional principles, *Locke*’s religious-degree exception actually encourages First Amendment violations: overt discrimination and religious entanglement.

a. That *Locke* permits discrimination needs little discussion. Washington’s law disqualified students from using scholarship funds on religious grounds, and the Court approved that practice without scrutiny. See *Locke*, 540 U.S. at 715. But in any other context, such overt “disfavor of religion,” *id.* at 720, would have been branded as discrimination and subjected to “the most rigorous of scrutiny,” *Lukumi*, 508 U.S. at 546. That is because the Free Exercise Clause generally prohibits “target[ing] religious conduct for distinctive treatment,” *id.* at 546; forcing individuals “to choose between” their religious exercise “and participation in an otherwise available public program,” *Thomas*, 450 U.S. at 716; or “impos[ing] a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity” (i.e., clergy), *McDaniel v. Paty*, 435 U.S. 618, 632 (1978) (Brennan, J., concurring). Yet *Locke* stands alone, “odious[ly]” “endorses[ing] ... discrimination against religion,” *Trinity Lutheran*,

582 U.S. at 467-68 (Thomas, J., concurring), and blessing states' efforts to exclude certain religious students from generally available grant programs, see Pet.30-31 (collecting state laws).

This discrimination is especially pernicious because it disproportionately affects only a “far narrower set” of Americans that “dedicate their study and their lives to [the] ministry.” *Locke*, 540 U.S. at 733 (Scalia, J., dissenting). For example, from 2020-2021 fewer than 6,800 (or 0.3%) of bachelor's degrees nationwide were awarded in theological and religious vocational programs,⁴ with only 192 awarded in Virginia.⁵ To these few, *Locke* sends a clear but troubling message: If you are “apathetic about religion or passive in its practice,” you “w[ill] suffer little”; but to “[t]hose who take their religion seriously, who think that their religion should affect the whole of their lives,” you will “face the greatest disabilities.” *Espinoza*, 591 U.S. at 513-14 (Gorsuch, J., concurring).

Indeed, data tells a discouraging story. While the total number of religious vocational degrees awarded largely increased year over year from 1970 to 2005, that number flat-lined after 2005 and eventually fell 20% by 2022.⁶ During this decline, the ratio of religious vocational degrees to all bachelor's degrees

⁴ See Nat'l Ctr. for Educ. Stat. (“NCES”), *Bachelor's Degrees Conferred by Postsecondary Institutions, by Field of Study: Selected Academic Years, 1970-71 through 2020-21*, <https://perma.cc/RQY4-527D>.

⁵ State Council of Higher Educ. for Va., *C01A1: Completions by Broad Program*, <https://perma.cc/ZB6K-QWKN>.

⁶ See NCES, *Bachelor's Degrees*, *supra*.

slipped even more, falling from 0.5% in 2005 to 0.3% in 2022—a 40% decrease.⁷ Correlation may not be causation, but the clear downward inflection following *Locke* in 2004 hardly seems coincidental.

In our constitutional scheme of ordered liberties rooted in equality, one’s religious exercise should not “cease to enjoy the protection of the First Amendment when held with such depth of sincerity as to impel one to join the ministry.” *McDaniel*, 435 U.S. at 631 (Brennan, J., concurring). Nor can we “full[y] realiz[e] ... true religious liberty” where governments are permitted to “work deterrence” against a particular “religious belief.” *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring). Instead, we should “value ... religious training,” *id.* at 222, and recognize what the first Congress did: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 (reenacting the Northwest Ordinance of 1787); see *Memorial and Remonstrance*, *supra*, § 8 (“A just Government ... will be best supported by protecting every Citizen in the enjoyment of his Religion[.]”).

b. In addition to allowing discrimination, *Locke*’s religious-degree justification creates Establishment Clause concerns by encouraging religious entanglement.⁸

⁷ *Id.*

⁸ See Stephanie H. Barclay, *The Religion Clauses After Kennedy v. Bremerton School District*, 108 Iowa L. Rev. 2097, 2105 (2023) (entanglement remains an Establishment Clause concern following *Kennedy*).

Both at the individual and institutional level governments have no role in “prescrib[ing] what shall be orthodox ... in religion.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Individuals alone “dr[a]w a line” at what they do or do not believe. *Thomas*, 450 U.S. at 715; *Watson v. Jones*, 80 U.S. 679, 728 (1872) (“conced[ing] to all” the “full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine”). And institutions similarly “decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

Consequently, the Court repeatedly prevents governments from entangling themselves in individual or institutional religious matters. Just last year, for example, the Court rebuffed Wisconsin’s attempts to deny Catholic Charities a tax exemption based on the *state’s* view of what constituted a “distinctively religious activity.” *Cath. Charities Bureau, Inc. v. Wisc. Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 252 (2025). Or as Justice Brennan explained, attempting to “determin[e] whether an activity is religious or secular requires a searching case-by-case analysis ... result[ing] in considerable ongoing government entanglement in religious affairs.” *Corp. of Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987) (concurring opinion); cf. *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) (litigating “what does or does not have religious meaning”

violates “the constitutional guarantee against religious establishment”).

Locke invites states to make exactly the types of religious determinations that the Establishment Clause prohibits. If a state chooses to exclude certain religious degrees from a funding program, it must establish which degrees constitute “devotional theology” and which do not. *Locke*, 540 U.S. at 721. Apart from being constitutionally suspect, this inquiry would be factually fraught. Would a counseling degree with a pastoral emphasis be devotional? Is a vocational degree in Bible Studies, or a degree with required scripture courses, problematic if personally pursued for intellectual rather than vocational purposes? What about a Sacred Music degree to pursue a professional (but not ministerial) chorister career? Would a teaching degree program pose concerns if its childhood development or pedagogical approaches were rooted in religious principles? What if an individual planned to use a teaching degree to further an education-focused ministry at a religious private school or nonprofit? The list goes on. *See also id.* at 734-35 (Thomas, J., concurring) (highlighting potential nuances with a theology degree); *Trinity Lutheran*, 582 U.S. at 469-70 (Gorsuch, J., concurring) (highlighting similar framing nuances). In all events, states attempting to distinguish between degrees “would ... raise serious concerns about state entanglement with religion and denominational favoritism” (or, in this case, disfavor). *Carson*, 596 U.S. at 787; *see also Cath. Charities*, 605 U.S. at 250 (religious distinctions for benefit eligibility “establis[h] a preference for certain religions based on the commands of their religious doctrine”).

This case illustrates the entanglement problems created by *Locke*. Ms. Hall had originally planned to major in “Music Education: Choral,” which was eligible for a VTAG grant, Pet.App.4a, even though Liberty University listed “Music ministry” as a potential career opportunity.⁹ But when Ms. Hall changed her major to “Youth Ministries” and then “Music & Worship” she no longer qualified for VTAG. The difference? Virginia has decided that tuition assistance cannot go to certain degrees that qualify as “providing religious training or theological education,” adopting the National Center for Educational Statistics Classification of Instructional Programs (“CIP”) Code 39 to define excluded degrees. Va. Code Ann. § 23.1-631(C) (2016); 8 Va. Admin. Code § 40-71-10 (2022).¹⁰ But Virginia declined to exclude programs falling within CIP Code 38 “Philosophy and Religious Studies,” *see id.*, despite the possibility that those programs could also lead to a professional ministry.¹¹ In other words, Virginia has and will continue to engage in at least some scrutiny of religious degrees, raising the sorts of entanglement concerns that this Court has cautioned against. *See, e.g., Carson*, 596 U.S. at 787. Discarding *Locke*’s religious-degree rationale, however, would obviate the need for this problematic inquiry.

⁹ See Liberty University, *Bachelor of Music in Music Education: Choral–Career Opportunities*, <https://perma.cc/RA9L-P8TQ>.

¹⁰ NCES, *Detail for CIP Code 39*, <https://perma.cc/6UB5-BGR3>.

¹¹ NCES, *Detail for CIP Code 38.0299*, <https://perma.cc/F2DX-YAKB>.

CONCLUSION

For each of *Locke*'s failures, the remedy is straightforward: overturn the decision. It teeters on an antiestablishment rationale that lacks historical support, and a religious-degree carveout that contravenes precedent and encourages both religious discrimination and entanglement. But the Constitution neither supports nor permits these overt violations of fundamental religious liberties. Accordingly, *amici* urge the Court to grant the petition and abandon *Locke*.

Respectfully submitted,

Deborah Malamud
COVINGTON & BURLING LLP
30 Hudson Yards,
New York, NY 10001

Kevin B. Collins
Counsel of Record
Zachary G. Parks
MaKade C. Claypool
Brian T. Reiser
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
kcollins@cov.com
(202) 622-6000

September 11, 2026

Counsel for Amici Curiae