

No. 26-193

IN THE
Supreme Court of the United States

BETHANY M. HALL

Petitioner,

v.

A. SCOTT FLEMING, DIRECTOR, VIRGINIA
STATE COUNSEL OF HIGHER EDUCATION,

Respondent.

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

**AMICUS CURIAE BRIEF OF
NC VALUES INSTITUTE
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae respectfully urges this Court to grant the Petition, reverse the Fourth Circuit decision, and overrule *Locke v. Davey*.

NC Values Institute, formerly known as the Institute for Faith and Family, is a North Carolina nonprofit corporation that works in various arenas of public policy to protect faith, family, and freedom. See <https://ncvi.org>.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Government aid to religious organizations has generated heated debate over the course of American history. This nation's unique protection for religious liberty guards against both government compulsion and interference. Since absolute separation is neither wise nor feasible, courts have tried to flesh out the appropriate church-state relationship over decades of litigation. A strict "no-aid" position prevailed in this Court after the tripart test inaugurated in *Lemon v. Kurzman*, 403 U.S. 602 (1974). That approach was eventually replaced by a growing trend toward nondiscrimination, resurrecting and strengthening

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

the weak nondiscrimination principle evident in *Everson v. Board of Education*, 330 U.S. 1 (1947). Since *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), this Court has increasingly advanced nondiscrimination over the no-aid standard that previously prevailed.

A strong consensus has emerged that state funds may reach religious organizations as the result of private choices. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 652-653 (2002). Initially, this line of authority failed to articulate exactly if or when the state *must* include religious organizations among other eligible recipients. *Locke v. Davey*, 540 U.S. 712 (2004) appears to say "no" but only under narrowly defined circumstances. Later cases—*Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), *Espinoza v. Mont. Dept. of Revenue*, 591 U.S. 464 (2020), *Carson v. Makin*, 596 U.S. 767 (2022)—have eroded *Locke* but not explicitly overruled it. The time has now come to bury *Locke*, just as this Court buried *the Lemon* “ghoul” that once “stalked” this Court’s Establishment Clause jurisprudence. “*Locke* was wrongly decided. It betrays the founding generation's commitment to religious liberty, and [this] Court should formally overrule it.” *Hall v. Fleming*, 175 F.4th 510, 516 (4th Cir. 2026) (Richardson, J., concurring).

Many state constitutional provisions, e.g., Wash. Const., Art. I, § 11 (*Witters* and *Locke*), Miss. Const., Art. I, § 7 (*Trinity*), and Mont. Const., Art. X, § 6(1) (*Espinoza*), rigidly deny even indirect financial aid to religion. These discriminatory provisions are

antithetical to the Religion Clauses, which prohibit both favoritism and animosity toward religion.

Nondiscrimination principles promote the "benevolent neutrality" that should characterize all levels of American government. The Virginia Tuition Assistance Grant Program ("VTAG") uses neutral criteria to select academically qualified students but then rigidly excludes those pursuing theology degrees. This is neither benevolent nor neutral. This Court should reach the logical conclusion in its trend toward nondiscrimination, overrule *Locke v. Davey*, and require VTAG to grant equal treatment to all students who are otherwise qualified for the scholarship program.

ARGUMENT

I. FEDERAL ESTABLISHMENT CLAUSE JURISPRUDENCE HAS SHIFTED FROM A RIGID "NO AID" POSITION TO PRINCIPLES OF NONDISCRIMINATION.

The establishment threat that drove the outcome in *Locke v. Davey* is out of step with this Court's current approach to the Religion Clauses. Providing scholarships to academically qualified students to use at schools of their choice is far removed from "[t]he coercion that was a hallmark of historical establishments . . . coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring), citing *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).

Over several decades, Establishment Clause jurisprudence has gradually progressed from a strict "no aid" stance to a point where "federal constitutional restrictions on funding religious institutions have collapsed." Douglas Laycock, Comment, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 156 (2004). Instead of "a substantive liberty, triggered by a burden on religious practice," there emerges "a form of nondiscrimination right, triggered by a burden that is not neutral or not generally applicable." *Ibid.*

A. Financial aid to religion was long viewed with suspicion and rigidly regulated.

For many decades, this Court hesitated to approve anything but remote, incidental, indirect, inconsequential benefits. *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984); *Widmar v. Vincent*, 454 U.S. 263, 273-274 (1981); *Comm. for Public Educ. v. Nyquist*, 413 U.S. 756, 771 (1973). There was a pervasive paranoia that somehow, somewhere, a nickel might inadvertently slip through the public fingers to bestow a slight benefit on religion. This Court "struck down in their entirety state statutes that contained insufficient safeguards against the direct funding of pervasively sectarian institutions." *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1245 (10th Cir. 2008); see, e.g., *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976) ("no state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones," citing *Hunt v. McNair*, 413 U.S. 734 (1973)).

Early history (pre-*Lemon*). Decades ago, this Court rightly found "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952). At that time, the Court began to consider state programs funding religious and secular education. Both "no aid" and nondiscrimination principles were evident in *Everson*, when this Court upheld state-funded bus rides that included a Catholic high school. The Court concluded that New Jersey could not exclude individuals of a particular faith from receiving the benefits of public welfare legislation (330 U.S. at 16), essentially applying a "weak form of the nondiscrimination principle" that "permitted equal funding, but did not require it." Laycock, *Theology Scholarships*, 118 Harv. L. Rev. at 164. At this point, "[f]ew judges took seriously the possibility that equal funding might be constitutionally required." *Ibid.* But the decision was far from unanimous. Four dissenting justices advocated the rigid no aid position that later prevailed for a long stretch, insisting the Establishment Clause "broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes." *Everson*, 330 U.S. at 33 (J.J. Rutledge, Frankfurter, Jackson, Burton, dissenting).

In *Everson*, this Court "articulated a historically inaccurate metaphor" – the infamous "wall of separation" – "that would pervert First Amendment jurisprudence for the next seventy-five years." Patrick M. Garry, *The Supreme Court Corrects a Seventy-Five-*

Year Distortion in Establishment Clause Jurisprudence, 56 Ind. L. Rev. 95, 100 (2022). The “wall” led to the creation of “a chaotic and unpredictable patchwork of constitutional tests” (*id.* at 95) and tended to “shield a secular society” (*id.* at 107). The resulting “confused muddle of contradictory mandates” left the erroneous impression that the Religion Clauses conflict with one another. *Id.* at 95. One court characterized the confusing case law as “a sort of jurisprudential schizophrenia.” *Thomas v. Anchorage Equal Rts. Comm’n*, 165 F.3d 692, 717 (9th Cir. 1999), *rev’d en banc*, 200 F.3d 1134 (9th Cir. 2000). That “schizophrenia” is displayed in cases about public prayer—allowed at a city council meeting (*Town of Greece v. Galloway*, 572 U.S. 565 (2014), applying the historical traditions test) but not at a high school football game (*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), using the coercion test). Garry, *The Supreme Court Corrects a Seventy-Five-Year Distortion*, 56 Ind. L. Rev. at 99. It has taken decades to return to sanity.

Everson involved bus transportation, a religiously neutral benefit that hardly raised establishment concerns. A few years later, this Court approved a state program loaning textbooks to children in both public and parochial schools. Building on *Everson*, the Court found this program did not advance religion, but furthered educational opportunities for the young. *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968). But a strong dissent objected “even to the extent of one penny” toward religious school buildings, books, teachers, or maintenance. *Id.* at 253-254 (Black, J., dissenting).

Following these early decisions, this Court "struggled to reconcile two competing intuitions"—the rigid no aid position that prevailed from *Lemon* through the mid-1980's, and the nondiscrimination approach that later won the day. Douglas Laycock, SYMPOSIUM: Educational Choice: Emerging Legal and Policy Issues: *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments*, 2008 BYU L. Rev. 275, 276 (2008).

"No Aid" Era (1971-1985). *Lemon* ushered in a series of Establishment Clause challenges filed by taxpayers. *Hunt v. McNair* survived *Lemon* scrutiny because the Baptist college financed with state revenue bonds was not pervasively sectarian. But this era was largely dominated by a strict "no aid" policy that struck down many forms of state aid for private religious schools and their students: *Lemon* (teacher salaries); *Meek v. Pittenger*, 421 U.S. 349 (1975) (materials and services); *Wolman v. Walter*, 433 U.S. 229 (1977) (same); *Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (enrichment courses for private school students); *Aguilar v. Felton*, 473 U.S. 402 (1985) (salaries and special services). Some of these cases were overruled in whole or in part by *Mitchell v. Helms*, 530 U.S. 793 (2000) and/or *Agostini v. Felton*, 521 U.S. 203 (1997).

"The no-aid principle derived from eighteenth-century debates over earmarked taxes levied exclusively for the funding of churches." Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions*, 2008 BYU

L. Rev. at 276. The “no-aid” policy protected citizens from compelled support for religion and protected churches from financial dependence on the government. *Ibid.* The policy continued to dominate for many reasons, including lingering anti-Catholic sentiment that declined and ultimately faded in the 1950's and 1960's, and concerns about "white flight" in response to desegregation mandates. *Id.* at 285-288. Eventually, a broad Protestant-Catholic coalition reframed the issue in terms of private choice and neutrality (*id.* at 292), but meanwhile, "the no-aid principle predominated from then [*Lemon*] until its high-water mark in *Aguilar v. Felton* in 1985." *Id.* at 277.

Aguilar and *Ball*, filed the same day, were both "ideological, strict constructionist attacks on programs that brought public-school teachers onto the premises of parochial schools." William W. Bassett, SYMPOSIUM: Educational Choice: Emerging Legal and Policy Issues: *Changing Perceptions of Private Religious Schools: Public Money and Public Trust in the Education of Children*, 2008 BYU L. Rev. 243, 259 (2008). These rulings created "excessive costs to bus children from parochial schools to some 'neutral' premises to avoid the appearance of a church-state union." *Id.* The result was not only costly but chaotic. *Id.* at 263. The New York state legislature created a special school district to accommodate the needs of a religious group and its disabled children, but that raised its own Establishment Clause concerns. *Id.* at 264, discussing *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). But in *Kiryas Joel*, five of this Court's justices (Chief Justice

Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas) called for *Aguilar* to be overruled in a subsequent case and to return Establishment Clause jurisprudence to "government impartiality, not animosity, toward religion." *Id.* at 717-718 (O'Connor, J., concurring).

B. The tide eventually turned toward nondiscrimination principles.

"Even at the height of the Lemon era," this Court "approved financial aid from time to time." Laycock, *Theology Scholarships*, 118 Harv. L. Rev. at 165-166. This Court "never squarely repudiated the nondiscrimination principle," resulting in an incoherent body of law and leaving the no-aid position "vulnerable to new Justices measuring neutrality from a different baseline." *Id.* at 166; see, e.g., *Meek*, 421 U.S. at 359-62 (bus transportation); *Wolman*, 433 U.S. at 241-244, 244-248 (standardized testing, off-premises remedial instruction); *Mueller v. Allen*, 463 U.S. 388, 394-403 (1983) (state tax deductions).

This Court gradually modified its approach and discarded the absolute prohibition of funding for "pervasively sectarian" institutions. Indeed, "the application of the 'pervasively sectarian' factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell*, 530 U.S. at 828.

Beginning with *Witters*, "[this] Court progressively elevated the nondiscrimination

principle while subordinating the no-aid principle." Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions*, 2008 BYU L. Rev. 275 at 278. The Court subsequently upheld five additional programs allowing funds to reach religious institutions (*Bowen, Zobrest, Agostini, Mitchell, Zelman*), partially or wholly overruling several *Lemon* era rulings (*Meek, Wolman, Aguilar, Ball*). *Ibid.*

This Court decided *Witters* around the end of the "no-aid" era. *Witters* has several parallels to *Locke v. Davey*, the cornerstone of the Fourth Circuit's ruling against Hall. Petitioner was a blind student, studying to become a pastor, who applied for assistance under a vocational rehabilitation program. Wash. Rev. Code § 74.16.181 (1981). The State of Washington—the same state where *Locke v. Davey* originated—denied the application based on the state constitution (Wash. Const., Art. I, § 11). *Witters*, 474 U.S. at 483-484. The Washington Supreme Court upheld the denial in a decision based on the *federal* Establishment Clause rather than the *state* constitution. This Court reversed, finding no establishment violation. *Id.* at 489.

But the Court expressed "no opinion" on whether the Free Exercise Clause mandated the vocational aid petitioner sought. *Id.* at 489-490. The case was not a typical Establishment Clause challenge. As in *Locke v. Davey*—and Hall's case—an individual was denied funding for religious training. This Court cited nondiscrimination principles to support its ruling: "Washington's program is made *available generally*

without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited . . . and is in no way skewed towards religion." *Id.* at 487-488 (emphasis added). Nondiscrimination won the day in spite of the Court's simultaneous confirmation of both the "no aid" and nondiscrimination approaches. "[T]he Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution" but the state may not grant aid "where the effect is . . . a direct subsidy to the religious school . . . even though it takes the form of aid to students or parents." *Id.* at 486. Amazingly, this Court applied nondiscrimination principles to Witter's claims even *before* cases like *Ball*, *Aguilar*, and *Wolman* were overruled (in part or whole). The Court noted in dicta that "[o]n remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution." *Id.* at 489. Nevertheless, *Witters* is an intriguing step toward nondiscrimination in funding cases.

Nondiscrimination (1986 and beyond). The tide eventually turned and this Court began to apply nondiscrimination principles to funding cases, facilitating greater equality between religious organizations and comparable secular entities. This shift to nondiscrimination principles is also evident in other contexts, including speech and association: *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (equal access to funding for religious viewpoints); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (equal access to school facilities for religious groups); *Lamb's Chapel v.*

Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (same). In each of these cases, this Court invalidated a policy that categorically excluded religion from an otherwise available public benefit.

In 1988, this Court rejected a challenge to a statutory scheme allowing faith-based organizations to participate in funding for services related to adolescent sexuality. "[N]othing on the face of the Act suggests it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution." *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988). A few years later, several landmark cases inaugurated an era where religious and secular private schools began to enjoy equal access to funding opportunities, particularly where the services funded were unrelated to religion or where private choices directed the funds. In *Zobrest*, a deaf student at a Catholic high school requested a sign-language interpreter, as required by the Individuals With Disabilities Educational Act. The school district refused to provide the service based on fear of violating the Establishment Clause. The lower courts ruled against him but this Court reversed. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). In 1997, this Court overruled *Aguilar* and *Ball*, and implicitly overruled *Meek*, rejecting a taxpayer Establishment Clause challenge to a program allowing public school teachers to provide remedial education to low-income student in both public and private schools. The program did not define recipients with reference to religion. *Agostini*, 521 U.S. at 234. Three years later, this Court expressly endorsed nondiscrimination principles and condemned hostility

to religion, upholding a federally funded program distributing equipment to public and private schools on a per-student basis without reference to religion. Under these circumstances, “it is a mystery which view of religion the government has established,” and it would be “most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously.” *Mitchell*, 530 U.S. at 827-828. The same is true here—Petitioner Hall “take[s] [her] religion seriously” by choosing to devote her studies to theology, and she should not be met with “special hostility” for that choice.

Finally, in *Zelman*, this Court rejected an Establishment Clause challenge to a program that provided tuition and tutorial aid based on financial need and residence in a particular school district, thus affirming the constitutionality of “government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion.” 536 U.S. at 651 (internal citations and quotation marks omitted). *Zelman* and other cases “should be understood as evidence of [this] Court’s shift from a focus on effects and perceptions to a focus on the principle that government decisions which do not utilize religion as a standard for action or inaction do not violate the Establishment Clause.” Ryan A. Doringo, *Comment: Revival: Toward a Formal Neutrality Approach to Economic Development Transfers to Religious Institutions*, 46 Akron L. Rev. 763, 794 (2013).

C. The Court's shift to a flexible, permissible approach did not initially mandate the equal inclusion of religious beneficiaries.

As this Court's jurisprudence shifted from a rigid denial of government aid to a more flexible nondiscrimination approach, Establishment Clause challenges focused on what the state was *permitted* to do rather than what it was *required* to do. The shift occurred almost exclusively in cases where the question of mandatory inclusion was not in front of the Court. "*Zelman* held that a state is *entitled* to offer school vouchers that can be cashed at sectarian schools but not that it is *required* to do so." *Badger Catholic, Inc. v. Washington*, 620 F.3d 775, 779 (7th Cir. 2010). Some states crafted programs "designed . . . to make funds available as broadly as was thought permissible under the Supreme Court's then-existing Establishment Clause doctrine." *Colorado Christian University*, 534 F.3d at 1251. The Tenth Circuit took the next logical step in analyzing a state scholarship program. It was not only "undisputed that federal law [did] not *require* Colorado to discriminate" against a religious university—it was also clear that the state could not constitutionally "choose to *exclude* pervasively sectarian institutions" from the program. *Id.* at 1253 (emphasis added).

Nondiscrimination principles promote government neutrality, eliminating the threat that religious entities could be denied generally available government services and benefits dispensed according to neutral criteria. Discrimination against religion stifles religious liberty rather than preserving it. The

First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers; *it does not require the state to be their adversary.*” *Everson*, 330 U.S. at 18 (emphasis added).

But initially the result of the Court’s shift was a “new middle ground . . . to *permit* most funding but to *require* hardly any.” Laycock, *Theology Scholarships*, 118 Harv. L. Rev. at 161 (emphasis added). “This position maximizes government discretion and judicial deference, but it threatens religious liberty.” *Ibid.*

In *Locke*, this Court admitted that “there is no doubt that the State *could*, consistent with the Federal Constitution, *permit* Promise Scholars to pursue a degree in devotional theology.” 540 U.S. at 714 (emphasis added). Nevertheless, the Court allowed the State of Washington to exclude theology degrees—facially discriminating against religion and eroding religious liberty.

D. The recent *Trinity-Espinoza-Carson* trilogy has moved the needle toward equal treatment of religion—but without explicitly overruling *Locke*.

In three recent rulings, this Court struck down state laws that “disqualif[ied] a religious organization . . . from a generally available benefit, solely because of [its] religious character.” *Trinity*, 582 U.S. at 462 (Missouri’s Scrap Tire Program “expressly discriminates” by “put[ting] Trinity Lutheran to a choice” to either “participate in an otherwise available

benefit program or remain a religious institution”); *Espinoza*, 591 U.S. at 476 (“Montana’s no-aid provision bars religious schools from public benefits solely because of the religious character of the schools”); The “unremarkable” principles applied in these two cases were sufficient to resolve the issues in *Carson*, where the State paid for private school tuition “so long as the schools [we]re not religious.” 596 U.S. at 780. “That is discrimination against religion.” *Id.* at 781.

Under such discriminatory programs, “*free* exercise isn’t *free*”. *Locke*, 540 U.S. at 731 (Scalia, J., dissenting) (internal quotation marks omitted, emphasis added). “[W]hen the State exacts a financial penalty of almost \$3,000 for religious exercise—whether by tax or by forfeiture of an otherwise available benefit—religious practice is anything *but* free.” *Ibid.* Similarly, the challenged statute in *McDaniel v. Paty* “require[d] [McDaniel] to *purchase* his right to engage in the ministry by sacrificing his candidacy,” thereby infringing the *free* exercise of his religion. 435 U.S. 618, 634 (1978) (plurality) (emphasis added). “[F]reedom comes at the cost of automatic and absolute exclusion” from an otherwise available benefit. *Trinity*, 582 U.S. at 462 (applying *McDaniel*). In *Espinoza*, likewise, “the no-aid provision” that prohibited all aid to religious schools . . . “put[] families to a choice between sending their children to a religious school or receiving [otherwise available] benefits.” 591 U.S. at 480.

As *Trinity Lutheran* reaffirmed, “[i]t 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.” 582 U.S. at 463 (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). Even before *Sherbert*, it was clear that a State may not exclude individuals from public benefits “because of their faith, or lack of it.” *Everson*, 330 U.S. at 16.

These three landmark cases strongly suggest overruling *Locke*, but each of them stopped short of taking that step. *Trinity* explained that “Davey was not denied a scholarship because of who he *was* . . . but because of what he proposed *to do*—use the funds to prepare for the ministry.” 582 U.S. at 464. The opposition to government funding of such an “essentially religious endeavor . . . lay at the historic core of the Religion Clauses.” *Id.* at 465. *Espinoza* explained that in *Locke*, the State had “merely chosen not to fund a distinct category of instruction”—training a minister “to lead a congregation.” 591 U.S. at 479 (citing *Locke*, 540 U.S. at 721). *Carson*, likewise, explained *Locke*’s rationale as the “historic and substantial state interest” against using “taxpayer funds to support church leaders.” 596 U.S. at 788 (citing *Locke*, 540 U.S. at 722, 725).

Still, it “remains troubling” that this Court endorsed even such a “mild kind” of discrimination against religion. *Trinity*, 582 U.S. at 468 (Thomas, J., concurring). Like the scholarship program in *Locke*, VTAG “facially discriminates” against “those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry.” *Hall*, 175

F.4th at 516-517 (Richardson, J., concurring) (quoting *Locke*, 540 U.S. at 733 (Scalia, J., dissenting)).

II. *LOCKE* SHOULD BE BURIED IN THE GRAVE NEXT TO THE *LEMON* “GHOUL.”

“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again.” *Lamb’s Chapel*, 508 U.S. at 398 (Scalia, J., concurring). But now the “wicked witch” – the *Lemon* “late-night ghoul” – is dead. “The Court overrules *Lemon*” and “question[s] decades of subsequent precedents that it deems ‘offshoot[s]’ of that decision.” *Kennedy v. Bremerton*, 597 U.S. 507, 546 (2022); see also *Groff v. DeJoy*, 600 U.S. 447, 460 (2023) (*Lemon* is “now abrogated”). Indeed, this Court “long ago abandoned *Lemon* and its endorsement test offshoot.” *Bremerton*, 597 U.S. at 534; see *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29 (2019); *Town of Greece*, 572 U.S. at 575-577.

The *Lemon* “ghoul” should be left in its grave to rest in peace. But there’s a new “ghoul” in town, sneaking discrimination in through state constitutions and statutes that facially discriminate against religion by denying generally available public benefits, based solely on religion. In *Locke* and comparable cases, such denials signal a return to the troublesome “no aid” position that characterized past decisions. *Lemon*’s position was anything but neutral toward religion. “Aiding religion would certainly not be neutral toward non-religious people,” but *Lemon*’s

“secular purpose” and “primary secular effect” prongs are not “neutral toward religious people.” Falco Anthony Muscante II, "*Play in the Joints" Among the Religion Clauses: Rebuilding the Strong Joints the Framers Formed*, 22 Ave Maria L. Rev. 27, 35 (Spring 2024).

The pesky *Locke* “ghoul” should be stricken from this Court’s jurisprudence and buried next to *Lemon* before it does further damage to religious liberty.

A. *Locke*’s facial discrimination against religion assaults the First Amendment.

"The minimum requirement of neutrality is that a law not discriminate on its face." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). "Discrimination *on the face of a statute* . . . is not like a facially neutral law that happens to burden religious exercise, as in *Smith*." *Locke*, 540 U.S. at 731 (Scalia, J., dissenting). In *Locke*, as in this case, the statute’s facial discrimination causes an “indignity . . . so profound that the concrete harm produced can never be dismissed as insubstantial.” *Ibid.*; see Wash. Rev. Code § 28B.10.814 (1997) ("No aid shall be awarded to any student who is pursuing a degree in theology"); Wash. Const., Art. I, § 11; *Locke*, 540 U.S. at 716. Withholding a generally available public benefit “solely on the basis of religion . . . violates the Free Exercise Clause no less than if it had imposed a special tax.” *Id.* at 726-727 (Scalia, J., dissenting). That is precisely what Washington (*Locke*) and Virginia (*Hall*) have both done, establishing scholarship programs conditioned on neutral, non-

religious factors but categorically excluding students who choose theology degrees. These policies are “specifically directed at . . . religious practice” (*Employment Div. v. Smith*, 494 U.S. 872, 878 (1990)) and “will not qualify as neutral” (*Bremerton*, 597 U.S. at 526).

VTAG's facial discrimination is comparable to both the discrimination in *Locke* and the exclusion of clergy from public office this Court denounced in *McDaniel v. Paty*. There—as in this case—the state “punish[ed] a religious profession with the privation of a civil right.” 435 U.S. at 626, quoting 5 Writings of James Madison 288 (G. Hunt ed. 1904). VTAG's exclusion violates the Free Exercise Clause.

B. The Religion Clauses are complementary, not contradictory.

The Religion Clauses are two sides to the same coin, both guarding religious liberty. It frustrates this purpose to penalize a religious institution or person simply because it *is* a religious entity. It also frustrates this purpose to imagine a tension between the Clauses that “did not exist for the Framers.” Muscante II, “*Play in the Joints*”, 22 Ave Maria L. Rev. at 28.

“[T]hree clauses appear in the *same* sentence of the *same* Amendment”—the Establishment, Free Exercise, and Free Speech Clauses. *Bremerton*, 597 U.S. at 533 (emphasis added). “A natural reading of that sentence . . . suggest[s] the Clauses have ‘complementary’ purposes, *not warring ones* where

one Clause is always sure to prevail over the others.” *Ibid.* (emphasis added); see *Everson*, 330 U.S. at 13, 15.

C. “Play in the joints” is a flawed phrase that should be abandoned.

“Play in the joints” is a judicially created phrase coined in *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664 (1970) and used only in rare cases, including *Locke*, *Trinity Lutheran*, *Espinoza*, and *Carson*. In *Locke*, this Court allowed the State of Washington to discriminate against religion, based on the alleged “play in the joints,” i.e., “state action that is permitted by the [Establishment Clause] but not required by the [Free Exercise Clause].” 540 U.S. at 718.

Locke permits government to “play” with religious liberty rights, allowing Free Exercise violations even where the Establishment Clause presents no obstacle. *Locke* “weaponized the doctrine against religious exercise.” Muscante II, “*Play in the Joints*”, 22 Ave Maria L. Rev. at 39. As this Court has “repeatedly held,” “the Establishment Clause is *not offended* when religious observers and organizations benefit from neutral government programs” (*Espinoza*, 591 U.S. at 474) but the Free Exercise Clause *is offended* “when [a State] excludes religious observers from otherwise available public benefits” (*Carson*, 596 U.S. at 778).

“Play in the joints” is not a viable doctrine and this Court should decline to apply it. *Bremerton*’s language, noting that the Clauses have

complementary purposes, not *warring* purposes (597 U.S. at 533), implies that this Court “has [already] rejected the notion of ‘play in the joints’ between the Free Exercise and Establishment Clauses—a notion on which the *Locke* majority heavily relied.” *Hall*, 175 F.4th at 518 n. 3 (Richardson, J., concurring).

If a government action *does not* violate the Establishment Clause, but it *does* infringe on free exercise by making an individual ineligible for an otherwise generally available benefit, then it violates the Free Exercise Clause—period. A state’s interest in “separating church and State more fiercely than the Federal Constitution” is not compelling “in the face of the infringement of free exercise.” *Espinoza*, 591 U.S. at 484-85 (quoting *Trinity*, 582 U.S. at 466) (cleaned up).

VTAG's categorical exclusion is clearly not warranted. “[C]onstitutional neutrality” is not “an absolutely straight line.” *Walz*, 397 U.S. at 669. Nondiscrimination promotes “benevolent neutrality.” VTAG's express exclusion of theology students, who are otherwise qualified for the scholarship program, is neither benevolent nor neutral.

D. There is no Establishment Clause issue where the *government itself* does not advance religion.

Even under the defunct and widely criticized *Lemon* test, “[f]or a law to have forbidden ‘effects’ . . . it must be fair to say that the *government itself* has advanced religion through its own activities and

influence." *Mitchell*, 530 U.S. at 809, quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987). Here, it is not “fair to say” that the *government itself* has advanced religion. First, the chain is broken by the private choices of scholarship recipients who are selected according to neutral, non-religious criteria. Second, the government uses religiously neutral criteria to select those recipients.

Private Choices. VTAG distributes funds on behalf of qualified scholarship recipients “who *choose* to attend accredited, private, nonprofit colleges and universities in Virginia,” based on their enrollment *choices*. *Hall*, 175 F.4th at 511 (emphasis added).

In *Locke*, the Court cited “historic and substantial” state interests in prohibiting the use of state funds for clergy training, a restriction seen in many founding-era state constitutions. *Espinoza*, 591 U.S. at 480. But there were really no anti-establishment interests in *Locke*, because “[t]he State neither coerced students to study devotional theology nor conscripted taxpayers into supporting any form of orthodoxy.” *Espinoza*, 591 U.S. at 492 (Thomas, J., concurring). *Locke*’s flawed interpretation of the Establishment Clause “should not impact free exercise challenges” like the one this case presents. *Ibid.*

In *Locke*, Petitioner Davey sought no special benefit, but only *equal* treatment—“the right to direct his scholarship to his chosen course of study, a right every other Promise Scholar enjoys.” *Locke*, 540 U.S.

at 727 (Scalia, J., dissenting). Even the *Locke* Court admitted that “the link between government funds and religious training is broken by the independent and private choice of recipients.” *Locke*, 540 U.S. at 719, citing *Zelman*, 536 U.S. at 652; *Zobrest*, 509 U.S. at 13-14; *Witters*, 474 U.S. at 487; *Mueller*, 463 U.S. at 399-400. There is no direct funding in cases where private beneficiaries control the flow of funds, as they did in *Espinoza* and *Carson*, and as they do here. See *Espinoza*, 591 U.S. at 474 (“government support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools”); *Carson*, 596 U.S. at 775 (“private citizens direct government aid to religious schools wholly as a result of their own genuine and independent private choice”). As Justice Gorsuch explained, there were several layers of private choice in *Espinoza*—taxpayers who donated to independent scholarship organizations, who then selected scholarship recipients, and finally the recipients’ free choice of where to use the funds. 591 U.S. at 508-509 (Gorsuch, J., concurring). *Locke* upheld a ban that encompassed *indirect* funding. This is not the sort of state action required for a constitutional violation.

Selection Criteria. Another key to the analysis is the criteria used to select funding recipients. Where financial aid “is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion,” it is unlikely to advance religion or incentivize religious indoctrination. Bassett, *Changing Perceptions*, 2008 BYU L. Rev. 243 at 269, citing *Mitchell*, 530 U.S. at 817; *Agostini*, 521 U.S. at 231.

Trinity Lutheran Church Child Learning Center received high ratings based on factors unrelated to religion, “rank[ing] fifth among the 44 applicants in the 2012 Scrap Tire Program . . . but despite its high score, the Center was deemed categorically ineligible to receive a grant.” *Trinity*, 582 U.S. at 456. Similarly, Detroit determined eligibility for its downtown refurbishing program “in spite of, rather than because of” the religious character of applicants. *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 289 (6th Cir. 2009). The “program allocate[d] benefits to a broad spectrum of entities on a neutral basis.” *Id.* at 282.

In *Locke*, the State of Washington created a generally available scholarship program “conditioned only on academic performance, income, and attendance at an accredited school” but “then carved out a solitary course of study for exclusion: theology. Wash. Rev. Code § 28B.119.010(8) (Supp. 2004); Wash. Admin. Code § 250-80-020(12)(g) (2003).” *Locke*, 540 U.S. at 727 (Scalia, J., dissenting). Allowing that exclusion cannot be reconciled with this Court’s current approach to the Religion Clauses.

CONCLUSION

This Court should grant the Petition, reverse the Fourth Circuit decision, and overrule *Locke*.

Respectfully submitted,

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