

Nos. 26-193 and 26-240

IN THE
Supreme Court of the United States

BETHANY M. HALL,
Petitioner,

v.
A. SCOTT FLEMING,
Respondent.

CAMERON JOHNSON, *et al.*,
Petitioners,

v.
A. SCOTT FLEMING, *et al.*,
Respondents.

*On Petition for Writ of Certiorari and Petition for Writ of
Certiorari Before Judgment to the United States Court of
Appeals for the Fourth Circuit*

BRIEF OF *AMICI CURIAE* NATIONAL
RELIGIOUS BROADCASTERS, LARRY WITTERS,
AND GREAT NORTHERN UNIVERSITY IN
SUPPORT OF PETITIONERS

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AMICI CURIAE'S INTERESTS

National Religious Broadcasters (NRB) is a non-partisan association of Christian broadcasters united by their shared purpose of proclaiming Christian teaching and promoting biblical truths. NRB's 1,035 members reach a weekly audience of approximately 141 million American listeners, viewers, and readers through radio, television, the Internet, and other media.¹

Since its founding in 1944, NRB has worked to protect its members against efforts to infringe on their constitutional rights. NRB believes firmly that religious commitment and practice should not be grounds for denying publicly available benefits.

Larry Witters, the petitioner in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), successfully argued that the Establishment Clause did not require the State to exclude him from broadly available educational benefits. However, this victory was erased on state law grounds on remand.

Without this funding, Witters was unable to pursue a religious vocation and worked in a medical laboratory for years before entering the computer programming field. He remains committed to the

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that no counsel for any party authored this brief in whole or in part. No person or entity other than *amici* furnished any monetary contribution for the preparation of this brief. Counsel further certifies that counsel of record were timely notified of the intent to file this brief pursuant to Supreme Court Rule 37.2.

protection of religious liberty and opposed to State efforts to discriminate against people whose religious convictions are deemed too religious.

Great Northern University (GNU), a private Christian college in Spokane, Washington, offers degrees in Christian Ministry and Biblical and Theological Studies, among others. The successor institution to the college Witters sought to attend with state aid—occupying the same campus, with a nearly identical mission—it opposes state efforts to discriminate against religious studies programs. Recently, Washington declared certain GNU majors ineligible for a state scholarship program, citing Washington’s constitution and *Locke v. Davey*. GNU and its students previously understood the degrees would be eligible, consistent with the plain language of Washington’s statute; GNU is working to challenge this new decision.

RELEVANT FACTUAL BACKGROUND

These appeals challenge two Virginia-run scholarship programs that discriminate against education programs they deem too religious. *Hall v. Fleming* challenges the Virginia Tuition Assistance Grant Program (VTAG). *Johnson v. Fleming* challenges VTAG and the Virginia National Guard State Tuition Assistance Program (VANGSTAP).

VTAG provides annual tuition stipends to “full-time” students who attend “a nonprofit private institution of higher education whose primary purpose is ... *not to provide religious training or theological education*” and who study in “educational programs *other than those providing religious*

training or theological education.” Va. Code § 23.1-631(A), (C) (emphasis added); *id.* § 23.1-628(A) (emphasis added). The State Council of Higher Education for Virginia, which administers VTAG, defines excluded religious training programs as “CIP [Classification of Instructional Programs] Code 39-series programs.” 8 Va. Admin. Code § 40-71-10. CIP code classifications are assigned by the National Center for Education Statistics (NCES).

Excluding only CIP Code 39 programs means that some religious studies programs are excluded, but not others. The following table shows a sample of the included and excluded programs.

Eligible for VTAG	Ineligible for VTAG
• Philosophy and Religious Studies • Religion/Religious Studies • Buddhist Studies • Christian Studies • Hindu Studies • Islamic Studies • Jewish/Judaic Studies • Talmudic Studies • Catholic Studies • Mormon Studies	• Bible/Biblical Studies • Theology/Theological Studies • Rabbinical Studies • Theological and Ministerial Studies
• Education • Curriculum and Instruction • Education, Other	• Religious Education • Youth Ministry

• Student Counseling and Personnel Services • Mental and Social Health Services and Related Professions	• Pastoral Studies/Counseling • Pastoral Counseling and Specialized Ministries, Other • Chaplaincy/Chaplaincy Studies
• Music • Music Performance, General • Music Theory and Composition • Music Technology • Sound Arts • Music, Other	• Religious/Sacred Music • Worship Ministry • Religious Music and Worship, Other

Browse CIP Codes, NCES, <https://nces.ed.gov/ipeds/cipcode/browse.aspx?y=56> (accessed Sept. 9, 2026) (expanded detail for CIP Codes 13, 38, 39, 50.09, 51).

So students are permitted to study various religions and skills—as long as they don’t sound like they are studying how to put their religion into practice in an applied setting, which is too religious for VTAG.

The only exception is if the student double-majors in a Code 39 program and a secular program with at least as many course requirements. 8 Va. Admin. Code § 40-71-10. If students want to devote themselves to religious study alone, that is too religious to qualify for a VTAG stipend.

VANGSTAP is even more subjective and arbitrary. VANGSTAP, which is overseen by the Adjutant General of Virginia, provides scholarships to

Virginia National Guard members enrolled at in-state colleges “whose primary purpose is ... *not to provide religious training or theological education*”—like VTAG. *VANGSTAP Summary*, VA. NAT’L GUARD, perma.cc/7EC5-TEDK; Va. Code § 23.1-610(A) (emphasis added). VANGSTAP’s command policy states that it won’t fund “theological degrees,” “seminary degrees,” “degrees in religious training or theological education,” “religious degrees,” or “religious studies,” but it will fund “religious ‘required’ course[s] for another type of degree.” C.A.J.A. 99, 108, 110, 120, 152, 154 (all caps omitted). Unlike VTAG, VANGSTAP doesn’t use CIP codes as a reference, instead requiring students to certify that the program isn’t excluded and independently reviewing the program using undisclosed criteria to determine if it agrees with a student’s or institution’s classification. C.A.Resp.Br. 14, 35–37, 40. And while the Virginia National Guard runs a Chaplain Candidate Program for current “religious ministry students” and requires the equivalent of a religious studies degree to qualify, it won’t fund even a chaplaincy degree or a similar degree that meets those qualifications. 56A Chaplain, ARMY NAT’L GUARD, perma.cc/YW7N-335E.

So secular programs and incidental religious studies pass muster, but students who wish to study their religion more closely are too religious for VANGSTAP.

SUMMARY OF ARGUMENT

Virginia’s exclusion of religious vocational training, at its core, discriminates against people or

programs that it deems too religious. Such discrimination is unconstitutional.

This Court has long held that the Religion Clauses prohibit courts and other government entities from wading into questions of religious doctrine and practice. As part of that bright line, States cannot draw lines about whether something is in keeping with a religion or how it fits into that practice.

Unsurprisingly then, the Establishment Clause can never be invoked on the basis that a private citizen's choices are too religious. As this Court made clear in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), programs that only support religion through the free individual choice of the beneficiary do not implicate the Establishment Clause.

Likewise, the Free Exercise Clause protects a person's individual religious choices from government determinations that the choices are either too religious or not religious enough. Any law that makes religious practice more costly burdens free exercise and triggers constitutional scrutiny. And any program that singles out religious persons or practices for disfavored treatment receives the strictest scrutiny.

Whether one characterizes the religious nature of the thing to be given up as religious identity, religious status, religious activity, or religious practice is irrelevant to the Free Exercise inquiry. There is no justiciable line that can be drawn distinguishing

religious identity or status from religious activity or practice. Any line-drawing is arbitrary semantical juggling. The Free Exercise Clause's plain language protects *exercise*, not merely belief or static identity.

Viewed in light of these principles, VTAG and VANGSTAP clearly violate the Free Exercise Clause. Both refuse to support degrees that they deem too religious and engage in the same arbitrary line-drawing on religious questions that the Constitution and this Court's precedents forbid.

Nor can *Locke v. Davey*, 540 U.S. 712 (2004), rescue them. The *Locke* Court improperly short-circuited the Free Exercise Clause by assuming the existence of "play in the joints" between the Religion Clauses. "Play in the joints" is a practical outcome, not a legal rule. It cannot be used, as this Court previously did, to help excuse a lower level of scrutiny. Moreover, *Locke's* "historic and substantial state interest" in religious "antiestablishment" was a red herring. The Founders were only concerned with targeted support of particular religions, not generally available benefits. A general scholarship program where the beneficiary chooses the course of study does not trigger any religious establishment concerns. And there cannot be a valid state "antiestablishment interest" when the program in question does not trigger any Establishment Clause concerns.

ARGUMENT

I. BECAUSE VIRGINIA'S SCHOLARSHIP PROGRAMS DISCRIMINATE BASED ON LEVEL OF RELIGIOSITY, THEY ARE INHERENTLY UNCONSTITUTIONAL.

These cases represent the last vestige of a legal era that permitted religious persons and institutions to be denied equal participation in government programs.

When adopted, the Bill of Rights was “intended solely as a limitation on the exercise of power by the government of the United States” and was “not applicable to the legislation of the states.” *Barron v. City of Baltimore*, 32 U.S. 243, 250–51 (1833). Pre-incorporation, the protection of religious liberty was “left to the state constitutions and laws.” *Permoli v. Mun. No. 1 of City of New Orleans*, 44 U.S. 589, 589 (1845).

Although elements of disestablishment were adopted in many states between 1776 and 1791, in 1787 “11 of the 13 states’ constitutions required that state office holders be Protestant Christians. In what might be seen as a paradox, 11 of those same original states barred ministers from holding public office.” Isaac Kramnick & R. Laurence Moore, *A Constitution Day Reminder: Seven States Say Atheists Need Not Apply*, CORNELL CHRONICLE, Sept. 12, 2008, <https://news.cornell.edu/stories/2008/09/seven-states-say-atheists-need-not-apply>.

Heightening the paradox, “in no state did advocates for disestablishment push for clergy disqualification On the contrary ... clergy disqualification was an inheritance from the prior

establishmentarian regimes.” Nathan S. Chapman & Michael W. McConnell, *AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE* 56 (2023).

Of course, this Court has ruled both sides of this paradox unconstitutional. Religious tests for public office were overturned on Establishment Clause grounds in *Torcaso v. Watkins*, 367 U.S. 488 (1961); state constitutional rules barring ministers from public office were voided in *McDaniel v. Paty*, 435 U.S. 618 (1978).

Parity was reached. The Establishment Clause prohibited favoritism for religious believers, and the Free Exercise Clause prohibited special disabilities on believers no matter how deep their religiosity. Clergy members could be placed under no special disabilities.

But these equal-participation-by-religious-entities principles were not immediately applied in the context of public educational funding and benefits.

For a long time, this Court interpreted the Establishment Clause to require that tax dollars not be used for teaching that “inculcate[s] religion.” *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 779 (1973) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971), discussing its companion case *Robinson v. DiCenso*).

This Court course-corrected, however, in cases involving broad public education programs that allowed religious individuals equal access to such benefits. *Mueller v. Allen*, 463 U.S. 388, 391 (1983), held that the Establishment Clause did not preclude

parents whose students attended religious schools from equal participation in program that permitted tax deductions for some expenses relative to private education.

Any suggestion that the Establishment Clause would require a different conclusion if the participant in a broad general program wanted to study for the ministry was unanimously rejected in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). Witters wanted to use state vocational rehabilitation funds to study for the ministry at a Bible college. Justice Marshall wrote the majority opinion in *Witters* despite dissenting in *Mueller*.

However, Witters never got the desired aid. On remand, the Washington Supreme Court, in a 5-4 decision, ruled that the “far stricter” state establishment clause prohibited his participation in the state program. *Witters v. Wash. Comm’n for the Blind*, 771 P.2d 1119, 1119–20 (1989). This Court denied Witters’ request to review this decision, although Justice White subsequently noted his dissent from the denial of certiorari. *Witters v. Washington Dep’t of Servs. for the Blind*, 493 U.S. 850 (1989); *McMonagle v. Ne. Women’s Ctr., Inc.*, 493 U.S. 901, 903–04 (1989) (White, J., dissenting from certiorari denials). *Locke v. Davey*, 540 U.S. 712 (2004), affirmed the result of the *Witters* remand, holding that excluding ministerial students from a publicly available educational assistance program does not violate the Free Exercise Clause.

In subsequent years, this Court has repeatedly held that state constitutions or laws which prohibit

religious students or institutions from equal participation in broad educational benefits programs violate the Free Exercise Clause. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017) (holding church preschool entitled to participate in broad program funding playground safety); *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464 (2020) (holding Montana’s Blaine Amendment cannot justify blocking religious students from participating in a benefits program based on their religious status); *Carson as next friend of O.C. v. Makin*, 596 U.S. 767 (2022) (following *Espinoza* and rejecting Maine’s claim that the bar was based on religious “use” rather than “status”).

This leaves a single anomaly that goes to the heart of constitutional consistency and the supremacy of the First Amendment over laws denying the free exercise of religion. Students that are too religious are denied equal participation.

Without a doubt, if the G.I. Bill were written to exclude veterans who wanted to study for the ministry, it would be held to violate both the Free Exercise Clause and the Fifth Amendment’s equal protection principle. Post-incorporation, no historical or textual reason justifies religious discrimination against ministerial students by states. Nor is there any historical basis for drawing bright lines between state disestablishment laws and the First Amendment. In fact, this Court has routinely looked to the disestablishment experience in the states to justify its holdings regarding the federal Establishment Clause. *See, e.g., Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 11 (1947); *Engel v. Vitale*, 370 U.S. 421, 429 (1962); *see Town of Greece, N.Y. v.*

Galloway, 572 U.S. 565, 576 (2014) (“the Establishment Clause must be interpreted by reference to historical practices and understandings”).

The history of the Free Exercise Clause cannot be separated from the history of the Establishment Clause. Failed claims regarding establishment cannot justify an otherwise obvious violation of the Free Exercise Clause. And the violation here becomes even clearer when examining state methods for determining which courses of study are too religious to qualify for scholarships. This Court should reverse.

A. Courts cannot touch doctrinal questions, much less analyze the degree or merits of religious beliefs.

This Court has long held, across multiple areas of law, that the Religion Clauses prohibit courts and other government entities from wading into questions of “religious doctrine and practice.” *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449–50 (1969).

Take property disputes, for instance. “First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.” *Id.* So in property disputes that involve religious questions, “a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.” *Serbian E. Orthodox Diocese for U.S. & Canada v. Milivojevic*, 426 U.S. 696, 713 (1976).

This rule is longstanding. In one early case, *Watson v. Jones*, 80 U.S. 670, 726–27 (1872), this Court held that “whenever questions of discipline, or of faith” “have been decided by the highest ... church judicator[y]”, “the legal tribunals must accept such decisions as final” It cautioned strongly against the temptation to substitute a court’s judgment for that of the more competent religious authorities. *Id.* at 729. And it noted the practical impossibility of drawing a different line that would allow *some* court oversight, because any question would require inquiry into “the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination.” *Id.* at 733; *see also Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 249–52 (2025) (rejecting denominationally discriminatory penalizing of a religious group’s belief that it must serve the poor without proselytizing).

Applying this rule, this Court refused to adopt an implied trust theory that would require courts to decide whether a church “depart[ed] substantially from prior doctrine.” *Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. at 450. A court would have to interpret church doctrine to decide whether a departure had occurred and then assess “the importance of those doctrines to the religion.” *Id.* “Plainly,” the Court concluded, “the First Amendment forbids civil courts from playing such a role.” *Id.*

Employment law takes the same approach. There, the church autonomy doctrine and ministerial exception prevent governments from regulating churches and religious organizations in ways that would second-guess their hiring, firing, and other

decisions. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 737–38 (2020) (applying the ministerial exception to employment discrimination claims).

This Court’s reasoning parallels the property dispute analysis. “Judicial review of the way in which religious schools discharge [their] responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.” *Id.* at 738. “The Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion.” *Id.* at 746 (citation modified). As part of that, churches have “authority to select, supervise, and remove” ministers and other teachers “without interference by secular authorities.” *Id.* at 747.

This Court rejected formalistic definitions of titles to avoid “privileging” certain religious traditions over others—here, “religious traditions with formal organizational structures over those that are less formal.” *Id.* at 753. Likewise, this Court declined to consider whether an employee is a “co-religionist” to avoid “judicial entanglement in religious issues.” *Id.* at 761. As Justice Thomas concurred, this judicial restraint was not “shirk[ing] their judicial duty”—it was “heed[ing] the First Amendment, which commands civil courts to decide [legal] disputes without resolving underlying controversies over religious doctrine.” *Id.* at 763 (citation modified).

Put differently, governments cannot decide religious questions. And governments cannot draw

lines about whether or how something fits into a religion's practice.

B. The Establishment Clause can never be invoked on the basis that a private citizen's choices are too religious.

Witters set the standard: The Establishment Clause can never be invoked on the basis that a private citizen's choices are too religious. This Court has repeatedly reaffirmed this core rule.

Witters involved a Washington program which provided financial educational assistance and other vocational services to visually handicapped persons. *Witters* held that the program could not use the Establishment Clause to withhold aid to a person who wished to use those funds to train at a Christian college to become a pastor or other religious leader. 474 U.S. at 489.

The Court emphasized the fact that “the decision to support religious education is made” “only as a result of the genuinely independent and private choices of aid recipients.” *Id.* at 488. Such choices, at least in the context of “neutrally available state aid,” are “not by the State.” *Id.* And they do not “confer *any* message of state endorsement of religion.” *Id.* at 489 (emphasis added).

Mitchell v. Helms, 530 U.S. 793 (2000), doubled down. Affirming the constitutionality of a state program that provided funding to all qualified schools, sectarian or otherwise, for educational materials, this Court explained that the “religious nature” of the recipient and, by extension, their “religious use” of the funding “should not matter to

the constitutional analysis.” *Id.* at 820, 827. If the program offers aid “to the religious (including the pervasively sectarian), the areligious, and the irreligious” alike, no one could rationally think the government had established any religion. *Id.* at 827.

The *Mitchell* Court sharply criticized those who “reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views” *Id.* at 827–28; *see also McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in judgment) (denouncing government discrimination against those “regard[ed] as overinvolved in religion,” because they “enjoy the [First Amendment’s] full measure of protection”). *Mitchell* found “the inquiry into the recipient’s religious views” required to exclude certain sectarian schools “not only unnecessary but also offensive.” 435 U.S. at 828.

C. The Free Exercise Clause likewise protects a person’s individual religious choices from government determinations that such choices are too religious or not religious enough.

The Free Exercise Clause “complement[s]” the Establishment Clause, further protecting a person’s individual religious choices from government determinations that the choices are either too religious or not religious enough. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 533 (2022).

First, the State may not withhold free exercise protections because someone isn’t religious enough.

For instance, in *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), the Court rejected the suggestion that a corporation’s profit-making objectives somehow precluded its free-exercise claims. Instead, it reiterated that “the ‘exercise of religion’ involves ‘not only belief and profession but the performance of (or abstention from) physical acts’ that are ‘engaged in for religious reasons.’” *Id.* at 710 (quoting *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)). “A law that operates so as to make the practice of ... religious beliefs more expensive”, even “in the context of business activities”, “imposes a burden on the exercise of religion.” *Hobby Lobby*, 573 U.S. at 710 (citation modified).

Second, the State may not penalize religious activity as *too* religious.

As this Court highlighted in *Trinity Lutheran*, 582 U.S. at 458, 460, the Court applies its “strictest scrutiny” to laws and programs “that single out the religious for disfavored treatment.” The Court distinguished these discriminatory programs from ones that did not “penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.” *Id.* at 460 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988)).

The Court also rejected efforts to minimize the significance of individual religious belief in *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989). “Never” has the Court even “suggest[ed] that unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference rather

than a religious belief.” *Id.* at 833. And the Court vigorously “reject[ed]” all attempts to require someone to cite “the commands of a particular religious organization” “to claim the protection of the Free Exercise Clause.” *Id.* at 834. Even if the State believes a person is more religious than the closest formal religious sect would require, that person is still entitled to the Free Exercise Clause’s full protection.

In short, even in the context of religious liberty disputes, both Religion Clauses prohibit State line-drawing and second-guessing of religious beliefs.

D. There is no justiciable line between religious identity or status and religious activity or practice.

A program that requires an entity to give up some aspect of their religious character or practice to receive a publicly available benefit presumptively violates the Free Exercise Clause. *Trinity Lutheran*, 582 U.S. at 458, 462; *McDaniel*, 435 U.S. at 628 (plurality opinion). How one characterizes the religious nature of the thing to be given up—as religious identity, religious status, religious activity, or religious practice—is irrelevant to the Free Exercise inquiry. Indeed, there is no justiciable line that can be drawn distinguishing religious identity or status from religious activity or practice, despite occasional prior attempts by this Court to do so. “A law ... may not discriminate against some or all religious beliefs,” in whatever form. *Trinity Lutheran*, 582 U.S. at 461 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993)).

Take *McDaniel v. Paty*. In *McDaniel*, the Court struck down a state law that disqualified “minister[s]” or “priest[s]” from serving as delegates to the Tennessee constitutional convention. 435 U.S. at 620, 629. The plurality explained that it thought the question differed from prior cases involving discrimination on the basis “religious beliefs,” which “the Free Exercise Clause categorically prohibits,” because this case involved discrimination based on “*status* as a ‘minister’ or ‘priest.’” *Id.* at 627. It nonetheless held that government regulation of religious “*status, acts, and conduct*” was subject to strict scrutiny under the Free Exercise Clause. *Id.* at 627–28 (plurality opinion) (emphasis added); *id.* at 630–31 (concurrence).

Thus, *McDaniel* treated “status,” “acts,” and “practice” as constitutionally interchangeable. All that mattered was that “the challenged provision requires” a person “to purchase his right to engage in” a religious activity, there the pursuit of ministry, “by sacrificing” a publicly available good. *Id.* at 634 (Brennan and Marshall, JJ., concurring). That was enough to “impair[] the free exercise of his religion.” *Id.*

The concurrence pushed back even more firmly on the lower court’s attempt to distinguish “religious belief or religious action” from “career or calling.” *Id.* at 630–31. “[F]reedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief, even including doing so to earn a livelihood.” *Id.* at 631. Any attempt to distinguish the two was only a matter of framing and degree. “One’s religious belief surely does 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.” *Id.* Whether one *is* a minister, or *acts* as a minister, or *is called to be* a minister, all of these characteristics are functionally synonymous and part of the free exercise of one’s religion, just as one *is* a Christian, *acts* as a Christian, or *is called to* a Christian life. Owning a status *is* an act.

Justice Gorsuch further elaborated on the nonjusticiable semantic juggling required to distinguish between status and acts in his partial concurrence to *Trinity Lutheran*. “Is it a religious group that built the playground? or did a group build the playground so that it might be used to advance a religious mission?” *Trinity Lutheran*, 582 U.S. at 469. “[W]as it a student who wanted a vocational degree in religion? or was it a religious student who wanted the necessary education for his chosen vocation?” *Id.* at 470. The hypotheticals are infinite, but in each, “[t]he distinction blurs in much the same way the line between acts and omissions can blur when stared at too long.” *Id.* at 469. As it should. After all, the Free Exercise Clause’s plain language protects *exercise*, not merely belief or static identity. *Id.* No one should be denied participation in any public program or benefit on the basis that they are live out their religion to a greater degree than the State is comfortable with.

E. Virginia’s scholarship programs impermissibly discriminate against those the Commonwealth arbitrarily decides are dedicating too much of their lives to their religion.

With these principles in mind, the unconstitutionality of Virginia’s VTAG and

VANGSTAP programs is clear. At their core, they impermissibly discriminate against those the Commonwealth arbitrarily decides are dedicating too much of their lives to their religion.

Virginia’s programs claim to support people in the study of their religion—as long as they don’t want to teach it (VTAG) or study it *much* (VANGSTAP). VTAG allows students to study in any program other than the “CIP Code 39-series programs” because those programs allegedly are the ones that provide “religious training or theological education.” Va. Code § 23.1-631(C); 8 Va. Admin. Code § 40-71-10. And VANGSTAP likewise excludes “theological degrees,” “seminary school,” “religious degrees,” and “religious study,” Va. Code § 23.1-610(A); C.A.J.A.99, 120, 154, though it may pay for the odd “religious ‘required’ course for another type of degree.” C.A.J.A.110.

Both programs also require the Commonwealth to engage in the type of religious inquiries the First Amendment prohibits. Under VTAG, the Commonwealth somehow concluded that a “Christian Studies” major (CIP Code 38) doesn’t constitute “religious training or theological education,” but a “Biblical Studies” major (CIP Code 39) does. *Browse CIP Codes*, NCES, <https://nces.ed.gov/ipeds/cipcode/browse.aspx?y=56> (accessed Sept. 9, 2026). The reasoning behind this theological wrangling eludes even the most advanced theologian. Perhaps that is why the First Amendment forbade civil entities from embarking on such endeavors.

Under VANGSTAP, Virginia claims to allow some religious degrees, though it has identified none and any such decision would be subject to a government

review to determine whether it in fact is excluded under the statute. C.A.Resp.Br. 35, 40. This inquiry would require the Commonwealth to delve into whether a program accurately teaches a particular religion's doctrines, such that it actually provides "religious training," what is required to prepare to enter ministry, and similar theological questions that are outside the State's purview.

The Commonwealth's attempt to single out "religious training" degrees in the name of "antiestablishment" raises further line-drawing questions. Education degrees might be used in a religious context—to teach at sectarian schools or to otherwise prepare one to be an effective religious teacher in various contexts. Might those degrees constitute religious training? Why is a general music degree acceptable even though the student wishes to enter music ministry, but a "music and worship" degree for the same purpose isn't? Does one somehow not implicate the State's alleged antiestablishment interest? Are certain philosophical or scientific degrees that prepare one to promote atheism or other less-structured religions acceptable? Why?

Attempting to answer these questions leads to the unavoidable conclusion: Virginia's scholarship programs run afoul of the First Amendment's protections.

II. *LOCKE V. DAVEY* CANNOT SUPPORT A DIFFERENT OUTCOME.

Locke v. Davey cannot rescue Virginia's scholarship programs. Its flawed reasoning necessitates its overruling.

A. “Play in the joints” is an outcome, not a legal rule, and does not allow courts to make an end-run around the Constitution’s free exercise guarantee.

The *Locke* Court began its analysis where it wanted to end—by assuming that the case “involves that ‘play in the joints’” where “some state actions [are] permitted by the Establishment Clause but not required by the Free Exercise Clause.” *Locke*, 540 U.S. at 719 (citation omitted). That is not how a Free Exercise analysis begins under this Court’s precedents.

The Court recognized in *Widmar v. Vincent*, 454 U.S. 263 (1981), and again in *Trinity Lutheran* that “the state interest asserted here—in achieving greater separation of church and State that is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause.” *Trinity Lutheran*, 582 U.S. at 466 (quoting *Widmar*, 454 U.S. at 276).

The Free Exercise Clause’s text has no caveats. “Congress shall make no law ... prohibiting the free exercise [of religion].” U.S. Const., amend. I. It doesn’t state, “Congress shall make no law prohibiting the free exercise of religion unless it really wants one” or “except to avoid even the appearance of a religious establishment.” The state cannot infringe upon free exercise whatsoever.

The Court’s earlier observation in *Walz v. Tax Commissioner of City of New York*, 397 U.S. 664, 669 (1970), that “play in the joints” might exist between the Religion Clauses merely described a practical

possibility. It is hypothetically possible that a state action might neither constitute an establishment of religion nor infringe upon free exercise. But the hypothetical existence of “play in the joints” doesn’t mean such play exists in any particular case.

Rather, courts must apply the correct level of scrutiny. If a court completes this analysis correctly and still finds the program permissible under the Free Exercise Clause, then “play in the joints” exists to that extent. But that is an end-stage description only. One could omit it and the legal analysis would look identical. It isn’t a reason for concluding that no free exercise violation exists.

But the *Locke* Court improperly short-circuited its Free Exercise analysis. It attempted to distinguish *Locke*’s “disfavor of religion” as a “far milder kind” than that in other Free Exercise cases. *Locke*, 540 U.S. at 720. But it did not explain how that was permissible under its precedents. It did not dispute that the State’s discrimination burdened religious free exercise. *Id.* at 721. Nor did it dispute that a scholarship program that excludes certain religious majors is neither neutral toward religion nor generally applicable. *Id.* But it still refused to apply the strict scrutiny required of *any* statute that is not neutral toward religion or generally applicable. *Lukumi*, 508 U.S. at 531–32 (citing generally *Emp. Div.*, 494 U.S. 872); *Locke*, 540 U.S. at 720. Instead, it concluded, “If any room exists between the two Religion Clauses, it must be here,” because state “antiestablishment interests” somehow excused blatant religious discrimination. *Locke*, 540 U.S. at 722–25. This was error.

B. *Locke*'s "historic and substantial state interest" in religious "antiestablishment" was a red herring.

The "historic and substantial state interest" in religious "antiestablishment" that *Locke* relied on so heavily was a red herring.

Locke's historical citations are out of context. Justice Scalia pointed this out in his dissent, without meaningful rebuttal from the majority. For example, the *Locke* Court's concerns about "historical 'popular uprisings against procuring taxpayer funds to support church leaders,'" were entirely "misplaced." *Id.* at 727 (Scalia, J., dissenting) (citing majority opinion at 1313). As Scalia explained, "[t]hat history 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.* Scalia also specifically corrected the Court's reliance on James Madison's Remonstrance, which objected to a targeted Virginia bill levying property taxes *solely* "for the support of Christian teachers." *Id.* (quoting A Bill Establishing a Provision for Teachers of the Christian Religion (1784), reprinted in *Everson*, 330 U.S. at 72, and citing S. Cobb, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 131, 169, 270, 295, 304, 386 (1902)).

At most, Scalia noted, any hostility from the Framers was directed at "funding the clergy specifically." *Locke*, 540 U.S. at 727. But there is no evidence the Framers thought "clergy had to be excluded from benefits the State made available to all." *Id.*

And even if the Founders were concerned about programs that provided targeted funding for religious training, *Witters* shows that a general scholarship program where the beneficiary chooses the course of study does not trigger any religious establishment concerns.

Witters highlights multiple characteristics that assuage any Establishment Clause concerns. First, as Section I discussed, any aid that “ultimately flows to religious institutions” or religious training “does so only as a result of the genuinely independent and private choices of aid recipients.” 474 U.S. at 488. Second, the scholarships are “made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.” *Id.* Third, it did not “provide greater or broader benefits for recipients who apply their aid to religious education” or study at sectarian institutions, so this was not a backdoor attempt to provide targeted funding for religious training specifically. *Id.*

In short, “the mere circumstance that [a student] has chosen to use neutrally available state aid to help pay for his religious education” does not “confer any message of state endorsement of religion.” *Id.* at 488–89 (citation omitted). *See also Mueller*, 463 U.S. at 398–99; *Witters*, 474 U.S. at 490–91 (Powell, J., concurring) (“[S]tate programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not” have “the principal or primary effect of advancing religion” “because any aid to religion results from the private choices of individual beneficiaries.”).

Therefore, there was and is no “historic and substantial state interest” against funding religious training as part of a generally available public benefits program, when such training is pursued entirely at the option of the beneficiary. And there cannot be a valid state “antiestablishment interest” when the program in question does not trigger any Establishment Clause concerns.

CONCLUSION

This Court should grant both petitions for writs of certiorari.

Respectfully submitted,

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