No. 26-193

In the Supreme Court of the United States

BETHANY M. HALL,

Petitioner,

v.

A. SCOTT FLEMING,
Director, Virginia State Council of Higher Education,

Respondent.

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

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY AND THE NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether this Court should overrule *Locke v. Davey*, 540 U.S. 712 (2004).

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Christian Legal Society (CLS) is an association of Christian attorneys, law students, and law professors. For half a century, CLS, through its Center for Law & Religious Freedom, has advocated before this court against government discrimination, coercion, or penalizing in matters of any religious faith or none. CLS believes that a free society prospers only when the free exercise of religion of all Americans is protected.

The **National Association of Evangelicals** is the largest network of evangelical churches, denominations, colleges, and independent ministries in the U.S. It serves forty member denominations, as well as numerous evangelical associations, missions, social-service charities, refugee and humanitarian aid agencies, colleges, seminaries, and independent churches.

SUMMARY OF ARGUMENT

This Court should grant review and overrule *Locke v. Davey*, 540 U.S. 712 (2004). Every relevant *stare decisis* factor counsels in favor of laying *Locke* to rest. The decision stands as an isolated anomaly in this Court's First Amendment jurisprudence because it permits states to engage in rank discrimination against voluntarily religious choices: excluding students like Bethany Hall from generally available scholarship aid if they choose to major in theology or

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[1] All parties' counsel of record received timely notice of the intent to file this brief. This brief was prepared and funded entirely by amici and their counsel. No other person contributed financially or otherwise.

pursue a religious calling. Overruling *Locke* is necessary to end a conflict with this Court's other precedents, to honor true founding-era history, and to eliminate an unworkable standard that inflicts constitutional injury.

I. *Locke* conflicts with the overwhelming weight of this Court's decisions, which prohibit singling out religious activity for exclusion from generally available government benefits. Time and again, the Court has upheld that principle against states' efforts to evade it. Under recent decisions from *Trinity Lutheran v. Comer*, 582 U.S. 449 (2017), through *Carson v. Makin*, 596 U.S. 767 (2022), singling out religious persons and activities for exclusion from benefits constitutes "odious" discrimination, imposing an impermissible financial penalty on religious exercise. It thereby places impermissible pressure on individuals' religious choices. Nor, under *Carson*, can a state justify excluding students on the ground that they choose to "use" their funding to pursue a religious education. Finally, under *McDaniel v. Paty*, 435 U.S. 618 (1978), government cannot impose a "unique disability" on citizens who pursue religious callings. *Locke* violates this basic rule by penalizing students specifically because they choose to train for ministry.

II. *Locke* seriously erred by calling the exclusion of theology majors a "relatively minor" burden. Imposing a financial penalty on a religious calling is inherently significant. Courts may not second-guess a student's sincere belief by asserting that standalone religion classes provide an adequate substitute for a major—and in any event, standalone classes are inadequate substitutes.

III. *Locke* seriously misread founding-era history in asserting that a "historic and substantial state interest" justifies excluding theology students from generally available student aid. The Court referred to founding-era opposition to clergy assessments, but those taxes gave preferential support to clergy. They are fundamentally unlike modern, wide-ranging student aid programs that may, in some application, include students studying theology in preparation for the ministry. Excluding theology students from such programs also serves none of the historical purposes of disestablishment. Inclusion of religious majors in a general aid program neither mandates tax support for religion nor coerces choice or conscience in religious matters. Rather, exclusion imposes coercive pressure on students who choose such majors. And while disestablishment was meant to prevent government entanglement involvement with religious questions and religious institutions, it is the exclusion of theology majors—not their inclusion—that causes entanglement, by requiring administrators to examine majors to determine if they cross the line into "devotional" versus "objective" study. Thus, conflating colonial clergy taxes with neutral student aid turns disestablishment history on its head.

IV. Two other reasons support overruling *Locke*. Its rule is unworkable for the same reasons it creates impermissible entanglement: it forces state administrators to police course content to separate academic from devotional study. And *Locke* continues to inflict discrimination and coercion on students who choose religious education and a religious calling. As petitioner observes, thousands of students in multiple states are subject to the discrimination *Locke* has authorized. This Court should end it now.

ARGUMENT

Locke v. Davey, 540 U.S. 712 (2004), should be overruled. As this Court recently emphasized, *stare decisis* is "not an inexorable command," and it is "at its weakest in constitutional cases, where only we may readily fix our own mistakes." *Trump v. Slaughter*, 146 S. Ct. 2283, 2302 (2026) (quotations omitted). The factors "relevant" to the question of overruling include "the 'quality' of the decision's reasoning, its 'consistency' with [this Court's] other cases, the 'workability' of its rule, and the interests of those who have 'relied' on it." *Id.* (cleaned up) (quoting *Knick v. Township of Scott*, 588 U.S. 180, 203 (2019)). Here, as in some other recent decisions, "every factor . . . counsels in favor of letting [*Locke*] go." *Id.*

The last factor above is easy to assess; *Locke* has engendered no reliance interests. No private party orders their primary conduct or structures long-term affairs around the premise that devotional theology majors will remain excluded from state aid. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 287 (2022). As to the "workability" factor, we briefly discuss in Part IV why *Locke*'s rule is unworkable. Our chief points in this brief are that *Locke* conflicts with myriad other decisions of the Court and that it is poorly reasoned—even "egregious[ly]" so. *Dobbs*, 597 U.S. at 268.

I. *Locke* Conflicts with the Overwhelming Weight of This Court's Decisions, Which Prohibit Singling Out Religious Activity for Exclusion from Generally Available Government Benefits.

Locke stands as an isolated anomaly in this Court's First Amendment jurisprudence. It directly conflicts with multiple decisions of the Court both pre-dating and post-dating it. Those decisions reflect four settled, overlapping constitutional principles. Government may not single out religious exercise for exclusion from generally available public benefits; it may not use financial leverage to manipulate private religious choice; it may not evade these prohibitions by drawing artificial distinctions between religious status and religious use; and it may not impose special disabilities on individuals who pursue religious vocations.

A. Under the *Trinity–Carson* Decisions, Singling Out Religious Exercise for Exclusion from Generally Available Public Benefits Is Unconstitutional Discrimination.

This Court's cases firmly establish that when the government creates a generally available public benefit program, singling out religious applicants or activities for exclusion "expressly discriminates" against religion and "triggers the most exacting scrutiny." *Trinity Lutheran Church v. Comer*, 582 U.S. 449, 462 (2017); accord *Carson v. Makin*, 596 U.S. 767, 780 (2022); *Espinoza v. Montana Dept. of Revenue*, 591 U.S. 464, 475–76 (2020); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993). Withholding a benefit from an otherwise qualified applicant solely because of religion triggers strict scrutiny because it "imposes a penalty on the free exercise of religion." *Espinoza*, 591 U.S. at 475 (quoting *Trinity Lutheran*, 582 U.S. at 462). As the Court held in *Carson*, the third of these recent decisions, the state "effectively penalizes" free exercise when institutions or individuals are "disqualified from [a] generally available benefit 'solely because of their religious character.'" *Carson*, 596 U.S. at 780 (quoting *Trinity Lutheran*, 582 U.S. at 462).

All these propositions are "'unremarkable.'" *Carson*, 596 U.S. at 780; *Espinoza*, 591 U.S. at 475 (quoting *Trinity Lutheran*, 582 U.S. at 462).

Yet *Locke v. Davey* directly conflicts with these basic propositions. *Locke* allows states to single out religious majors—theology majors—for exclusion from funding open to students pursuing the vast range of other college majors. It treated this exclusion as a mere failure to subsidize religion. *Locke*, 540 U.S. at 720 (calling the burden from exclusion "far milder" than "criminal [or] civil sanctions"). But the *Trinity–Carson* decisions make clear that when the state singles out religious recipients for exclusion from funding, although it does not ban religious exercise, the discrimination and affirmative penalty against religious exercise are "odious to our Constitution all the same." *Espinoza*, 591 U.S. at 476, 489 (quoting *Trinity Lutheran*, 582 U.S. at 467).

B. Under *Trinity–Carson*, Exclusion of Recipients Because of Their Religious Exercise Unconstitutionally Pressures Religious Choice.

Singling out students for exclusion from benefits because of their religious exercise violates another key principle under the Religion Clauses: it places unconstitutional pressure on individuals' religious choices.

As noted above, *Trinity* through *Carson* hold that excluding recipients from an otherwise available benefit because of their religious character "imposes a penalty on the free exercise of religion." *Espinoza*, 591 U.S. at 475 (quoting *Trinity Lutheran*, 582 U.S. at 462); *accord Carson*, 596 U.S. at 780. Such a penalty discourages or deters individuals from pursuing a religious identity or religious activity. The state uses its financial power to exert leverage on private religious choices. Thus, in *Espinoza*, the Court emphasized that excluding religious schools from a generally available tax-credit program assisting student tuitions "burdens not only religious schools but also the families whose children attend or hope to attend them." 591 U.S. at 486. Parents' right "to direct 'the religious upbringing' of their children," including "sending their children to religious schools," is "a choice protected by the Constitution." *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)). But the state no-aid provision in *Espinoza* "penalize[d] that decision by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one." 591 U.S. at 486.

As the Court held much earlier in *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), when the state "forces [one] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to" receive benefits, "the pressure upon her to forego that practice is unmistakable." *See also Carson*, 596 U.S. at 778 (relying on the prohibition against "indirect coercion or penalties on the free exercise of religion") (quotation omitted).

In Establishment Clause decisions, this Court has upheld neutral programs of government aid where "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002); accord *Witters v. Washington Dept. of Services*, 474 U.S. 481, 488 (1986). A program whose terms are "neutral with respect to religion" creates no "financial incentive" for individuals to choose a religious education over a nonreligious one. *Zelman*, 536 U.S. at 652–53; *Witters*, 474 U.S. at 488.

The "private choice" decisions show not only why including religious choices satisfies the Establishment Clause, but also why excluding them violates the Free Exercise Clause: inclusion is consistent with individuals' choice, and exclusion penalizes that choice.

Excluding theology majors from a widely available student scholarship program, as in *Locke* and this case, penalizes religious activity in just this way. Indeed, *Witters* involved the same situation: a blind student was excluded from generally available state disability assistance because he would use it to study for the ministry. The Court ruled, 9–0, that excluding him would not serve the principle of choice in religious matters and thus was not required by the

Establishment Clause. 474 U.S. at 487–88. In such a clear case, the penalty upon religious choice not only is not required, but also is forbidden by the Free Exercise Clause.

C. Under *Carson*, the Prohibition Against Singling Out Religion Applies to Religious Use, Not Merely Religious Status.

For a brief time, the Court preserved *Locke* by saying that the exclusion it permitted was based not on recipients' religious identity ("status"), but rather on their religious "use" of funding: that is, training for the ministry. *Trinity Lutheran*, 582 U.S. at 464. But *Carson* decisively rejected the distinction between "status" and "use." The Court said that discrimination against recipients' religious uses of funding is not "any less offensive to the Free Exercise Clause" than discrimination against the recipients' religious status or affiliation. *Carson*, 596 U.S. at 787. Funding of education, *Carson* said, particularly "illustrates" the point because "the very core of the mission of a private religious school" requires "inculcating [the faith's] teachings"—that is, using the funding for religious purposes. *Id.* (quotation omitted). *Carson* thus closed this loophole that previously had been used to defend *Locke*. And *Carson* rejected state efforts to exclude uses of funds that the state deems to be "too religious." *Locke* permits that very wrong by permitting exclusions of theology or "devotional theology" majors.

D. Under ***McDaniel v. Paty***, States May Not Penalize Individuals Because They Pursue Religious Vocations.

After the *Trinity–Carson* decisions, *Locke* hangs by only a tiny thread: the assertion that there is a particular interest in singling out education for religious ministry for exclusion from broad educational benefits. *See Carson*, 596 U.S. at 788 (confining *Locke* to funding that is "intended to be used 'to prepare for the ministry'") (quotation omitted). But that distinction also contravenes a bedrock principle reflected in precedent.

Long before the *Trinity–Carson* decisions, this Court held in *McDaniel v. Paty*, 435 U.S. 618 (1978), that government cannot require an individual to abandon a religious ministry to remain eligible for a public benefit, in that case public office. *McDaniel* held that by excluding ministers from serving as constitutional convention delegates, the state had violated free exercise: "'[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties.'" *Id.* at 626 (brackets in original) (quoting *Sherbert*, 374 U.S. at 406).

Justice Brennan's influential concurring opinion in *McDaniel* added that the state had violated the core of free exercise by "impos[ing] a unique disability upon those who exhibit a defined level of intensity of involvement in protected religious activity": pursuing the ministry. *Id.* at 632 (Brennan, J.). As that opinion emphasized, the right of exercising religion "include[s] doing so to earn a livelihood. 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.* at 631.

Locke contravenes *McDaniel* by allowing states to impose a "unique disability" on those whose religious "sincerity" and "intensity" impels them "to join the ministry" and to major in devotional theology in preparation. *McDaniel*, 435 U.S. at 631–32. *Locke* empowered Virginia to impose that unique disability on Bethany Hall because she "'heard God's call to ministry and changed her major'" to one that the state excluded. App. 4a (quotation omitted).

This case and *Locke* involve funding, while *McDaniel* involved service in public office (and *Locke* gestured at that distinction, *see* 540 U.S. at 720). But it is a distinction without a difference, and in other decisions this Court has rejected it. *Trinity Lutheran* held that the state exclusion from funding there was "[l]ike the disqualification statute in *McDaniel*" in that both put the religious claimant "to a choice: It may participate in an otherwise available benefit program or remain a religious institution [or in *McDaniel*, a minister]." *Trinity Lutheran*, 582 U.S. at 462. "[W]hen the State conditions a benefit in this way"—whether the benefit is funding or political office—"*McDaniel* says plainly that the State has punished the free exercise of religion." *Id.* And in *McDaniel*, both the majority and the key concurrence quoted and relied on *Sherbert*, a case about financial assistance, to conclude that the state had "penalize[d]" a minister's religious exercise by "condition[ing] the availability of benefits" upon "surrendering his religiously impelled ministry." 435 U.S. at 626; see *id.* at 633 (Brennan, J., concurring) (the argument that disqualification "does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment" is "squarely rejected by precedent," that is, *Sherbert*).

II. *Locke* Seriously Erred by Calling the Exclusion of Theology Majors a "Minor" Burden on Religious Exercise.

Locke upheld the exclusion of theology students partly based on its argument that such an exclusion imposed only a "relatively minor" burden on students receiving scholarships. 540 U.S. at 720, 725. The burden was "minor," *Locke* said, in part because the scholarship program allowed recipients to take religiously oriented courses: eligible schools could include religious teaching in their classes, and non-theology majors could still take devotional theology classes. *Id.* at 724–25; see also *id.* at 724 (arguing that the program went "a long way toward including religion in its benefits"). The court of appeals here followed *Locke* because Virginia's provisions were materially the same. App. 7a.

But this dismissal of the exclusion's harm is seriously mistaken, for two reasons.

1. First, as already discussed (*supra* pp. 10–12), the imposition of a "unique disability" on the pursuit of a religious calling is, by itself, constitutionally significant. *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring); *see also Locke*, 540 U.S. at 726 (Scalia, J., dissenting). It singles out religious exercise for discriminatory treatment: that is, "special disabilities." *Emp't Div. v. Smith*, 494 U.S. 872, 877, 888 (1990). And it places pressure on religious choice, forcing students like Bethany Hall to seek other majors that do not reflect their sense of religious calling. Such a "unique disability" was impermissible even under pre-*Locke* decisions and is even more clearly impermissible after *Trinity–Carson*.

2. Moreover, the penalty and burden from excluding theology majors does not become "minor" simply because scholarship students can still take religiously oriented courses. *Locke* seriously erred on that count as well.

For one thing, if students sincerely believe they are called to pursue a religious vocation by concentrating on it in a degree program, courts may not second-guess that belief and conclude that individual religion classes provide an adequate alternative. If a student sincerely believes in a call to focus on religious ministry, "it is not for [a court] to say that the line he drew was an unreasonable one." *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981). *See also Holt v. Hobbs*, 574 U.S. 352, 361–62 (2015) (holding that, under the "substantial burden" inquiry of RLUIPA, the court "asks whether the government has substantially burdened religious exercise . . . not whether the [religious] claimant is able to engage in other forms of religious exercise").

In any event, there are strong reasons why penalizing a choice of theology major is a significant burden and taking individual theology courses is no substitute. An academic major, unlike selected individual courses, provides a coherent plan and sequence of topics and study. "Courses within [various] majors possess an inherent coherence generated by the knowledge structures and paradigms of that single discipline or field." "The Academic Major," in 1 *Encyclopedia of Education* 19, 21 (James W. Guthrie ed., 2d ed. 2006); accord Dartmouth College Undergraduate Admissions, *Custom Majors* (last visited Sept. 10, 2026), https://admissions.dartmouth.edu/majors-minors/custom-majors ("The purpose of a major is to provide a coherent program of study in a discipline or area of knowledge."). Not surprisingly, "[r]esearch affirms that the academic major is the strongest and clearest curricular link to gains in student learning." "The Academic Major," *supra*, at 20.

College majors in ministry or theology, specifically, are often designed to provide knowledge not only of religious concepts, but also of "leadership and management" as preparation for pastoral or leadership positions in religious organizations. *Guide to Bachelor of Ministry Programs*, TheologyDegree.org (last visited Sept. 10, 2026), https://www.theologydegree.org/programs/ministry-degrees/. These majors "may also ask for an internship or a capstone project to complete" the structured experience. *Id.* (giving examples).

In all these ways, majors in theology are important to those students whose religious beliefs "impel [them] to join the ministry." *McDaniel*, 435 U.S. at 631 (Brennan, J., concurring). Accordingly, *Locke* seriously erred in asserting that taking individual courses can make up for the state's penalties on pursuing a theology major.

III. *Locke* Seriously Misread the Founding-Era History of Opposition to Clergy Taxes.

Locke also seriously misread founding-era history. *Locke* attempted to justify excluding devotional majors from general tuition aid based on the "historical and substantial state interest" against "procuring taxpayer funds to support church leaders." 540 U.S. at 722, 725. But the founding-era tax assessments for ministers bear no meaningful resemblance to the inclusion of ministry majors in modern, wide-ranging student aid. And excluding such majors furthers none of the historical purposes of disestablishment.

A. Founding-Era Taxes Aimed at Supporting Ministers Are Fundamentally Unlike Modern, Wide-Ranging Student Aid.

Locke wrongly conflated (1) 18th-century taxes earmarked for ministers with (2) modern benefits programs that neutrally benefit a wide range of students seeking education, where some of those students may be preparing for ministry. This case provides an important opportunity for the Court to make the distinction between ministers receiving preferential aid and students, including students preparing for ministry, receiving equal access to neutral state aid.

In its misreading of history, *Locke* relied first on the successful opposition to clergy taxes in Virginia in the mid-1780s. *See* 540 U.S. at 722–23 & n.6. Patrick Henry proposed his "Bill Establishing a Provision for Teachers of the Christian Religion"; James Madison and others opposed Henry's proposed tax; and the state legislature eventually rejected the proposal and adopted Thomas Jefferson's "Bill for Establishing Religious Freedom." *See Everson v. Bd. of Ed.*, 330 U.S. 1, 72–74 (1947) (Supp. App. to the opinion of Rutledge, J., dissenting).

The general assessment bill had multiple features of historic establishments. It was not neutral between religion and nonreligion: as its title indicated, it would have worked "a massive discrimination in favor of religious viewpoints. In a time of minimal government, Christian clergy and Christian places of worship were to be singled out for special subsidy." 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). The proposed support for ministers was in no way part of a general aid program supporting a function, such as education, performed by both religious and non-religious entities. Finally, "[t]he argument for the general assessment was the familiar argument for other forms of establishment—that the state would benefit from having a more Christian population." *Id.* at 243. Its rationale was that "'[t]he general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be affected without a competent provision for learned teachers.'" *Everson*, 330 U.S. at 72 (Supp. App. to the opinion of Rutledge, J., dissenting).

In this context—a coerced tithe—Madison articulated his objections in his "Memorial and Remonstrance Against Religious Assessments." There he argued that the tax would violate "equality," not "because it allowed religious groups to participate in a generally available government program, but because [it] singled out religious entities for special benefits." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 854–55 (1995) (Thomas, J., concurring). Neither Madison nor other Framers argued that religious individuals or institutions should be excluded from receiving standard, non-discriminatory government services funded by general revenues. Rather, the funds demanded in the General Assessments were an offering to God that the government had no right to compel.

Locke also relied on founding-era state constitutional provisions "against using tax funds to support the ministry," and it argued that these provisions were not limited to preferential funding for the ministry. 540 U.S. at 723. But preferential funding was the source of controversy in the founding era. States did not have programs then that funded education of ministers as simply one application of a broad category of subjects matters or occupations, religious and non-religious. The language in state constitutions cannot be fairly read to "address such possibilities, which were almost literally unimaginable under the limited governments of the time." Berg and Laycock, *supra*, at 244.

Modern programs of aid to students, including those in *Locke* and this case, share none of the unconstitutional features of 18th-century clergy assessments. Modern programs support overall access to education, not simply religious ministers; the grants rest on secular, academic, and residency qualifications. As already discussed, funds flow to an institution or major because of "the genuine and independent private choice[s]" of individuals."

Zelman, 536 U.S. at 652; accord *Witters*, 474 U.S. at 488.

It is true that the training of religious leaders is a core religious activity. But that fact does not matter in cases like *Locke* and this one where the students training for ministry are simply a subset of the much larger group of students receiving scholarships for the full range of majors and courses of study. Cases like this are still "unlike the general assessment":

> The training of clergy is clearly an incidental application of a vastly broader program; the training of clergy also serves the state's goal of educating its citizenry; and the decision to direct the money to religious uses is made by private citizens with no encouragement from the state.

Berg and Laycock, *supra*, at 243.

Conflating colonial clergy assessments with equal access to public benefits turns founding-era history on its head. The Founders sought to prevent government sponsorship and coercion, not to impose a state-mandated disability on students who choose a religious vocation. This Court should grant review to repudiate *Locke*'s flawed history and prevent such impositions.

B. Excluding Theology Majors from a General Aid Program Serves None of the Historical Purposes of Disestablishment.

The sharp distinction between historical clergy taxes and the programs here and in *Locke* is confirmed by an examination of the historical purposes of disestablishment. Those purposes were to eliminate specific structural government harms: compulsory financial support for state churches, official coercion of conscience, and governmental involvement in religious questions and in the oversight of churches. Permitting an undergraduate student to apply a neutral, generally available tuition grant toward a major in devotional theology or ministry triggers none of these harms.

1. Including Religious Majors in a General Aid Program Neither Mandates Tax Support for Religion nor Coerces Choice or Conscience in Religious Matters.

As just discussed, disestablishment ended the practice of forcing citizens to pay taxes aimed at funding the clergy and churches. But a neutral benefit program does not constitute state funding of religion, because public money flows to religious training only through "the genuine and independent private choice[s]" of individuals. *Zelman*, 536 U.S. at 652; *accord Mueller v. Allen*, 463 U.S. 388, 399 (1983); *Witters*, 474 U.S. at 488. As the Court said in *Witters*—which unanimously upheld the inclusion of a ministry student in such a wide-ranging general aid program—"the decision to support religious education is made by the individual, not by the State." *Id.* ("it does not seem appropriate to view any aid ultimately flowing to the [school for ministry] as resulting from a *state* action sponsoring or subsidizing religion") (emphasis in original).

Instead, it is the *exclusion* of devotional majors that imposes on religious conscience, for reasons set forth above. *Supra* pp. 7–9. The financial penalty from exclusion exerts coercive pressure against students who choose religious vocations. It forces students like

Bethany Hall in this case, and Joshua Davey in *Locke*, either to forfeit significant, potentially vital, educational assistance or to forfeit the degree program that fits their religious calling.

2. It is Exclusion from a General Aid Program, Rather than Inclusion in It, that Creates Impermissible Government Entanglement in Religious Matters.

Disestablishment was also designed to shield church autonomy by barring state officials from judging, monitoring, or managing religious doctrine. For example, disestablishment (as well as free exercise) was meant to prevent government control over the selection of ministers *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184–85 (2012). The doctrine against entanglement in religious questions also "protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits . . . or as a basis for regulation or exclusion from benefits." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (McConnell, J.) (citing Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 397 (1984)). "[I]t is well established, in numerous . . . contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion).

Accordingly, state aid might raise concerns under the Religion Clauses if it came with conditions on the religious autonomy of participating schools, or if it required courts to decide questions about religious meaning.

But programs like those here and in *Locke* raise no such concerns. Neither case presented any assertion that there were conditions on student aid that might restrict participating schools' autonomy. "The only significant condition was the very one at issue [in *Locke*]—the exclusion of theology majors taught from a religious perspective." Berg and Laycock, *supra*, at 242.

It is the exclusion of religious majors that creates impermissible government involvement in deciding religious questions. *Locke* allowed exclusion of "devotional" theology majors, those "designed to induce religious faith," 540 U.S. at 716, but presumably not those that studied religion from a more "objective" perspective. Drawing that line is a deeply entangling inquiry given that many colleges, even in their examination of theology, try to maintain "an often 'precarious balance' [of] giving weight to both the teachings of their church and the standards of the secular academy." Berg and Laycock, *supra*, at 241 (quoting Stephen L. Carter, *The Constitution and the Religious University*, 47 DePaul L. Rev. 479, 485–86 (1998)). To draw the unclear line where a major becomes too "devotional," state administrators may well have to evaluate theological intensity and conduct invasive inquiries into the precise nature of coursework. That means "trolling through" and "second-guessing" the religious content of the major. *Mitchell*, 530 U.S. at 828; *Colorado Christian*, 534 F.3d at 1261.

This situation is like that in *Widmar v. Vincent*, 454 U.S. 263 (1981), where this Court ruled that enforcing a public university rule excluding "religious worship" or "religious speech" by student groups "would risk greater entanglement" with religion than simply allowing such activity on an equal basis. *Id.* at 272 n.11. Here too, ending the exclusion of majors that are "too religious" will reduce entanglement.

* * *

Because the disestablishment interests in denying aid here and in *Locke* are weak, as this section shows, there is accordingly no argument that denial falls within some legitimate "play in the joints" between the Religion Clauses. "Even if 'play in the joints' were a valid legal principle, surely it would apply only when it was a close call whether complying with one of the Religion Clauses would violate the other"—and here "[t]he establishment question would not even be close, as is evident from the fact that this Court's decision in *Witters* . . . was unanimous." *Locke*, 540 U.S. at 728–29 (Scalia, J, dissenting) (emphasis removed). As decision after decision of this Court has made clear, an "interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise." *Carson*, 596 U.S. at 781 (ellipsis in original) (quoting *Espinoza*, 591 U.S. at 484–85; *Trinity Lutheran*, 582 U.S. at 466; *Widmar*, 454 U.S. at 276).

IV. *Locke* is Unworkable and Continues to Harm Students Who Choose an Education Reflecting Their Religious Calling.

Locke should be overruled for two other reasons.

1. *Locke* is unworkable for reasons just discussed concerning entanglement (*supra* pp. 20–22). Under *Locke*, states may exclude students majoring in "devotional" theology while presumably including students majoring in the study of religion from a more "objective" perspective. 540 U.S. at 717. The entanglement in religious questions that this creates also makes the rule unworkable. *Id*. In *Widmar*, for example, this Court found that rules excluding "religious worship" or "religious speech" by student groups both risked "greater entanglement" with religion and were "judicially unmanageable" and "impossible." 454 U.S. at 271–72 nn. 11, 9.

2. Although *Locke*'s reach has been confined, it is not a dead letter, as this case shows. Virginia and eleven other states continue to rely on *Locke* to disqualify students from neutral, broadly available financial aid programs based solely on their choice to follow their religious calling. *See* Pet. 31–32.

The "thousands" of students potentially subject to these exclusions should not have to face the predicament that Bethany Hall faced. *Id*. They should not be forced, as the price of retaining potentially vital educational aid, to consider abandoning their vocation of religious ministry or searching for other majors that might fit the state's notion of what is acceptable.

This Court should put an end now to the discrimination against religion, and the pressure on religious choices and callings, that *Locke* has authorized.

CONCLUSION

The Court should grant the petition and overrule *Locke*.

Respectfully submitted.

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September 14, 2026