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 JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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The Jewish Coalition for Religious Liberty is a nonprofit organization–a group of lawyers, rabbis, and professionals who practice Judaism and defend religious liberty. The Coalition's members have written on the role of religion in public life. Representing members of the legal profession, and adherents of a minority religion, Amicus has a unique interest in ensuring the flourishing of diverse religious viewpoints and practices. The Coalition advocates for people of faith who practice their faith in religious services, schools, and the public square.

Amicus urges this Court to reverse the Fourth Circuit's decision and overrule *Locke v. Davey*, 540 U.S. 712 (2004). *Locke* refused to apply strict scrutiny to a law that discriminated against religion on its face, and it did so because of what it believed was the State's "antiestablishment interests." *Id.* at 722. The "antiestablishment interest" espoused by *Locke* was fictitious. History reveals no founding-era practice of singling out clergy for exclusion from generally available public-benefit programs.

Locke's green-lighting of laws that facially discriminate against religion undermined the Free Exercise Clause's guarantees. This Court should overrule *Locke* and restore consistency to its own Free-Exercise jurisprudence.

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1 No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2, and all parties consented to its filing.

SUMMARY OF ARGUMENT

In *Locke v. Davey*, 540 U.S. 712 (2004), the Court upheld a law that stripped public scholarship funds from an otherwise qualified student based solely and expressly on the religious character of his chosen course of study. Notwithstanding the law's express religious discrimination, the Court sidestepped strict scrutiny, pronouncing that the law imposed only a "mild[]" burden on students' free exercise. *Id.* at 720. In the Court's view, the law "does not require students to choose between their religious beliefs and receiving a government benefit" because it penalized only a specific religious use: the "distinct category" of religious instruction. *Id.* at 720–21. And to the extent the law did burden a student's religious free exercise, the Court held the burden was justified by the State's "antiestablishment interests" in preventing the use of "taxpayer funds to support church leaders." *Id.* at 722.

The *Locke* Court thus inserted its own assumptions about what constitutes a burden on religion, seemingly unaware that its dividing line between religious belief and vocational study is entirely non-existent for many minority religious groups. The Jewish community is one such minority. For some Jews, studying and teaching *Torah* is a vocational calling, and laws that singly exclude theological study from public-benefit programs by their nature denigrate and demean an important tenet of religious practice as well as an activity that is necessary for passing the faith on to the next generation: religious study.

This Court's subsequent decisions have shredded the slender reeds that formed *Locke*'s already-shaky foundation. In *Trinity Lutheran Church of Columbia,* *Inc. v. Comer*, 582 U.S. 449 (2017), and *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), this Court reaffirmed its long-applied rule that laws that facially discriminate against religion must survive strict scrutiny. *Trinity Lutheran*, 582 U.S. at 462–63; *Espinoza*, 591 U.S. at 473–75. Each distinguished *Locke* in part because that case purported to turn on a specific use of public funds rather than the recipient's religious beliefs. *Trinity Lutheran*, 582 U.S. at 464; *Espinoza*, 591 U.S. at 479–80.

In *Carson v. Makin*, 596 U.S. 767 (2022), however, this Court disclaimed the tenuous distinction between laws that condition funding on a recipient's religious status and those that purport to condition funding on its non-religious use. As this Court explained, a status-use distinction "lacks a meaningful application" both "in theory" and "in practice." *Id.* at 788. A use-based funding condition, just like a status-based one, discriminates on the basis of religion and is no "less offensive to the Free Exercise Clause." *Id.* at 787. Without such a distinction, this Court left *Locke* hanging by a single thread: the "'historic and substantial state interest' against using 'taxpayer funds to support church leaders.'" *Id.* at 788 (quoting *Locke*, 540 U.S. at 722).

No honest assessment of history can support *Locke*'s holding. *Locke* misunderstood and misapplied the "historic and substantial state interest" its reasoning "expressly turned on." *Id.* (cleaned up). The founding-era sources on which *Locke* relied targeted one distinct type of law: a special-purpose tax assessment for the financial maintenance of churches as such. They do not and cannot demonstrate a "historic" interest in preventing any public funding from ever reaching a clergy member. To the contrary, founding-era history reveals that clergy did receive public funds through general public-benefit programs that did not seek to support churches as such.

Locke's errors did not end with its reliance on a historically misinformed "antiestablishment interest." *Locke* also failed to appreciate the numerous ways its holding conflicted with the Free Exercise Clause. Contrary to the *Locke* Court's view, facially discriminatory laws *do* impose burdens on religious exercise. Moreover, because the Court declined to apply any kind of scrutiny to the law before it, *Locke* failed to recognize that laws prohibiting the use of scholarship funds to study theology are hopelessly overbroad and could never be appropriately and narrowly tailored even if a relevant governmental interest existed, which it does not.

Stare decisis cannot save *Locke*. "[P]roper application of *stare decisis* require[s] an assessment of the strength of the grounds on which [precedent] is based." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 234 (2022). *Locke*'s reasoning and outcome "expressly turned on" its view of history. *Carson*, 596 U.S. at 788. But *Locke*'s historical rationale "either ignored or misstated" crucial aspects of founding-era law and practice, aspects that should have directly informed the contours of the purported "antiestablishment interest" at stake. *Dobbs*, 597 U.S. at 241. Moreover, *Locke*'s short shrift of the free-exercise interests at stake undermine its precedential weight. *Locke* "failed to appreciate the conceptual difficulty" of applying a clergy-focused "antiestablishment interest" to the educational context and failed to "foresee the practical problems" that arise from the principled application of such a rule. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 920 (2018) (internal citation omitted).

Locke was wrong the day it was decided. It was "irreconcilable" with the decisions that preceded it and has been eroded by those that have followed. *Locke*, 540 U.S. at 726 (Scalia, J., dissenting). And as Justice Scalia foretold, *Locke* has provided fodder for states to broadly rationalize the attempted deprivation of sundry public benefits from the religious. *See, e.g.*, *Trinity Lutheran*, 582 U.S. at 454–56 (playground resurfacing); *Espinoza*, 591 U.S. at 468–70 and *Carson*, 596 U.S. at 773–75 (school vouchers). Having pruned back the branches of these encroachments on religious liberty, this Court should dig up the invasive root.

This Court should overrule *Locke*.

ARGUMENT

I. *Locke* Relied on an Ahistorical Antiestablishment Interest.

A. Historical Precedent Must Closely Fit the Modern Analogue.

This Court has consistently looked to history and tradition to discern the scope of the First Amendment's guarantees. Where a specific expression of religion has deep historical roots, this Court has upheld the practice against Establishment Clause challenges. *See Marsh v. Chambers*, 463 U.S. 783, 787–92 (1983) (chaplain's prayers in state assemblies); *Van Orden v. Perry*, 545 U.S. 677, 686–92 (2005) (monument with inscription of Ten

Commandments). And this Court has rejected Free Exercise challenges to laws that were in place at the founding. *See Reynolds v. United States*, 98 U.S. 145, 165 (1878) (criminalization of bigamy).

History, however, must be applied carefully. With enough time and creativity, a zealous advocate can see historical precedent behind even the most novel species of law. Just last term, this Court confronted such a maneuver when the Government attempted to defend a broad disarmament statute as a modern extension of vagrancy laws. *See United States v. Hemani*, 146 S. Ct. 1677, 1686–87 (2026). This Court rejected the Government's over-extension and distilled general principles that should govern any analysis of a regulation's historicity.

For a historical practice or regulation to bear on a modern law's constitutionality, the laws must be "relevantly similar" in both "purpose and operation." *Id.* at 1686 (cleaned up). Where a historical practice or regulation "targeted different kinds of people, did so for different purposes, and operated in different ways" to a modern analogue, the old cannot demonstrate the constitutionality of the new. *Id.*

B. *Locke*'s "Historic and Substantial Interest" Is Dissimilar to Discriminatory Scholarship Criteria.

Locke's invocation of history flunks the purpose-and-operation test. In *Locke*, the Court relied on founding-era "popular uprisings against procuring taxpayer funds to support church leaders." 540 U.S. at 722. The Court then pointed to two historical examples of that popular movement: (i) a proposed tax assessment in Virginia to fund clergy which was defeated after James Madison penned his Memorial and Remonstrance, and (ii) state constitutional provisions that generally prohibited the forced attendance or financial support of churches. *Id.* at 722–23.

But founding-era history shows that the "antiestablishment interests" invoked by *Locke* was quite narrow. 540 U.S. at 722. States sought to prevent special-purpose tax assessments for church support *as such*. And they accomplished their goal with precision. They enshrined in their constitutions anti-contribution provisions that prevented the state from forcing any individual to contribute to a church. But the anti-contribution provisions forbade only the church-support laws they were designed to prevent. They did not prohibit the payment of any public funds to clergy as a categorical matter. To the contrary, as shown below, where public funds were appropriated for a distinct state purpose apart from church support, clergy were often the recipients.

Neither example *Locke* cited bears any resemblance, either in purpose or operation, to the discriminatory scholarship criteria the Court held furthered Washington's "antiestablishment interests." *Id.*

1. History clearly records the purposes motivating both Virginia's proposed tax assessment in 1785 and Madison's opposition to it. The tax assessment bill's preamble stated that a "competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens," was necessary to "the general diffusion of Christian knowledge," and that such knowledge "hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society." A Bill Establishing a Provision for Teachers of the Christian Religion, reprinted in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 72 (1947) (appendix to dissent of Rutledge, J.). To make such "competent provision" for the "support of Christian teachers," the bill proposed a universal tax assessment, the proceeds of which would be dispensed by the Sheriff to the "society of Christians" the taxpayer desired. *Id.* at 72–73. In other words, the bill proposed a special tax, imposed on all, and payable to Christian churches and societies, precisely because such Christian churches and societies promoted the "general diffusion of Christian knowledge." *Id.* The object of the legislation was the financial support of Christian churches to make society more Christian.

It was precisely this purpose that so enflamed Madison's opposition to the tax. In his Memorial and Remonstrance, Madison wrote that the tax was not necessary for the "support of the Christian Religion," which he recognized as its primary purpose. J. Madison, Memorial and Remonstrance Against Religious Assessments, reprinted in *Everson*, 330 U.S. at 67 (appendix to dissent of Rutledge, J.). Rather, Madison argued, the bill's assessment of levies to financially maintain Christian churches would "weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author [God]" because it would demonstrate a failure to rely on the "ordinary care of Providence." *Id.*

The state constitutional provisions invoked by *Locke* reacted to similar special-purpose taxes. Although described by the majority as "formal prohibitions against using tax funds to support the ministry," *Locke*, 540 U.S. at 723, the founding-era state constitutions sought to prevent laws, like Virginia's proposed law, that levied personal tax assessments for the specific purpose of directly funding Christian churches. *Id.* at 727 (Scalia, J., dissenting).

To be sure, the *Locke* majority disagreed with that historical understanding of the founding-era state constitutional provisions. The Court believed that "[t]he plain text of these constitutional provisions prohibited *any* tax dollars from supporting the clergy" and that the provisions discriminated on their face by "explicitly excluding *only* the ministry from receiving state dollars." *Id.* at 723. But *Locke*'s reading viewed those state constitutional provisions shorn of their own historical context.

In the founding era, the notion that any interaction between government, the public fisc, and religion somehow created "establishment" concerns was unheard of. Religious "establishment," as the founding generation understood it, bore several hallmarks, including government control of doctrine and church personnel, government mandated church attendance, government persecution of minority religious groups, government restriction of political participation for minority religious groups, and financial maintenance of the established church. *See Shurtleff v. City of Boston*, 596 U.S. 243, 286 (2022) (Gorsuch, J., concurring) (citing Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131–2181 (2003)).

The state constitutions cited by *Locke* were ratified against that context. They were among the first charters that defined the governmental structure of the States in the newly-formed United States of America. Having just declared their independence from England, with its state-sponsored church, the choice before the States was whether to establish their own church, or instead to chart a new course. Almost all chose the latter,[2] providing in their constitutions varied protections against the specific features of state-established churches described above. *Id.*; Vincent Phillip Muñoz, Church and State in the Founding-Era State Constitutions, 4 AM. POL. THOUGHT 1, 17–27 (2015). The anti-contribution provisions, considered against their historical backdrop, were aimed at the practice that preceded them: special-purpose tax assessments for the support of state-sponsored churches. Put simply, "preferential funding was the *only* issue in the founding era." 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, 244 (2004) (cleaned up).

2. The founding-era provisions' operation confirmed this narrow purpose. Contrary to the *Locke* majority's assertion that the founding-era state constitutions prohibited "*any* tax dollars" from going to clergy, even as part of a program that "equally support[s] other professions," 540 U.S. at 723, these

[2] South Carolina, for its part, initially *did* establish a formal state church in its 1778 constitution. It also adopted articles of faith by legislation. Vincent Phillip Muñoz, Church and State in the Founding-Era State Constitutions, 4 AM. POL. THOUGHT 1, 24–26 (2015).

provisions did permit public funds to flow indirectly to clergy, as demonstrated by contemporaneous public-benefit laws. The New York state constitution, for example, declared that any "statutes and acts" which "establish or maintain any particular denomination of Christians or their ministers" were "repugnant to [the] constitution." Muñoz, *supra*, at 22 (quoting New York Constitution of 1777). But in 1795, after New York appropriated 20,000 pounds to support schools in New York City, the funds were distributed to *churches directly* "for the education of poor children." Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111, 158 (2020). Likewise in Pennsylvania, the State's constitution provided that "No man . . . can be compelled to . . . erect or support any place of worship or maintain any ministry." Muñoz, *supra*, at 22 (quoting Pennsylvania Constitution of 1776). And yet, in 1802, Pennsylvania appropriated funds towards "the country's first school voucher program," which included church-run schools. Storslee, *supra*, at 162. These states were not outliers. In the late 18th century, every state with an anti-contribution provision (and others still) provided funding for religious schools. *Id.* at 163. And in many of these first schools, clergy themselves were the teachers. McConnell, *supra*, at 2172. That the States uniformly directed public funds to churches and clergy as part of public-benefit programs even with anti-contribution provisions in their constitutions belies *Locke*'s reading of those provisions as prohibiting "*any*" funding of clergy. 540 U.S. at 723.

State practice accorded with how the Framers viewed the federal constitution's counterpart.

Notwithstanding the First Amendment's prohibition of any "law respecting an establishment of religion," early Presidents (including Thomas Jefferson, one of the Framers most famous for his staunch antiestablishment views) directly funded clergy with public tax dollars to act as missionaries to various Indian tribes. Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 NOTRE DAME L. REV. 677, 688–701 (2020). The practice, which George Washington described as useful for "promoting civilization among the friendly tribes," *id.* at 696, eventually ripened into a formal federal program authorizing the President to "employ capable persons of good moral character, to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic, and performing such other duties as may be enjoined," *id.* at 704. That clergy received public funds was unremarkable—no one doubted the program's constitutionality. *Id.* at 701.

Public funding of clergy, pursuant to public-benefit programs that did not resemble religious tax assessments, was the norm in the founding era. States did so, and the federal government (despite its very limited tax authority and revenue at the time) did so.

3. Properly understood, *Locke*'s anti-contribution provisions bear no resemblance to the scholarship laws at issue in *Locke* and in this case, either in purpose or in operation. In *Locke*, the Promise Scholarship Program was created to "assist academically gifted students with postsecondary education expenses." 540 U.S. at 715. In this case, the VTAG Program was created to "provide financial assistance to Virginia residents who choose to attend credited, private, nonprofit colleges and universities in Virginia." *Hall v. Fleming*, 175 F.4th 510, 511 (4th Cir. 2026). Both scholarship programs created a religiously neutral public benefit designed to assist all qualified students, religious or not. Neither purported to directly fund religious institutions as such.

Accordingly, whatever Washington's or Virginia's purpose for their discriminatory scholarship criteria,[3] it logically *cannot* have been the prevention of a special-purpose tax assessment for church support— the true "antiestablishment interests" at issue in *Locke*. 540 U.S. at 722. Indeed, it is difficult to conceive how any "antiestablishment interest" could come into play when prior Supreme Court precedent held and the *Locke* Court *admitted* that inclusion of theological study in a generally available state-aid program posed no Establishment Clause problem. *See Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488–89 (1986); *Locke*, 540 U.S. at 719.

Washington and Virginia's scholarship laws also operate entirely differently. Starting from a neutral

[3] Justice Scalia's description of the State's purported interest as a mere "philosophical preference" has explanatory value. *Locke*, 540 U.S. at 730 (Scalia, J., dissenting). Without a constitutional rule requiring the exclusion of religious recipients from public benefits, the State's criteria can be rightly described as a rule granting taxpayers a kind of heckler's veto. Those taxpayers that disagree with the myriad *secular* uses to which private recipients put public funds must be tolerant, but those offended by any private recipient's *religious* use of public funds are spared the displeasure of having their tax dollars put to an unwanted use.

baseline that granted equal treatment to all scholarship recipients, these scholarship laws imposed extra criteria that facially discriminated against theological study because the student who chooses to study theology may enter the ministry. Washington's and Virginia's laws sweep far wider than the anti-contribution provisions to which *Locke* analogized. As shown above, those provisions permitted public funds to flow, not just to students who *may* become clergy, but to clergy *themselves*, provided the funds were not appropriated as part of a special-purpose tax assessment.

C. Without a Real Antiestablishment Interest, *Locke* Cannot Be Reconciled with This Court's Subsequent Decisions.

The "antiestablishment interest" on which *Locke* relied was narrower than the Court described. Properly understood, the anti-contribution provisions cited by *Locke* targeted only a traditional hallmark of an established church. They did not, as *Locke* claimed, demand exclusion of clergy or would-be clergy from generally available public benefits. In holding otherwise, *Locke* not only misread history but relied on two legally dubious premises.

1. First, *Locke* relied on a "play in the joints" theory that, in its most abstract form, affirms the unremarkable maxim that there are categories of laws "permitted by the Establishment Clause but not required by the Free Exercise Clause." 540 U.S. at 719. That much is uncontroversial. The animating force behind the play-in-the-joints theory, however, is not that a law can technically comply with both Clauses, but rather the flawed premise that the Establishment Clause and the Free Exercise Clause are "frequently in tension." *Id.* at 718. And to avoid that perceived tension, a state may burden free exercise, even in the absence of a proven Establishment Clause violation. Indeed, *Locke* stated as much, admitting that removal of the discriminatory scholarship criteria posed no Establishment Clause problem. *Id.* at 719 (citing *Witters*, 474 U.S. at 489, which expressly held that student's use of funding from neutral public-benefit program to study theology to prepare for ministry did not violate the Establishment Clause). In so doing, *Locke* upheld a facially discriminatory law merely because the state wished to steer miles away from the possibility of an Establishment Clause violation.

This Court has since rejected the prophylactic rationale on which *Locke* relied. In *Trinity Lutheran*, the Court held that Missouri's "policy preference for skating as far as possible from religious establishment concerns . . . cannot qualify as compelling." 582 U.S. at 466. In *Espinoza* and in *Carson*, this Court reaffirmed *Trinity Lutheran*'s rule. *Espinoza*, 591 U.S. at 484–85 (separating church and state "more fiercely" than required by Establishment Clause is not a compelling interest); *Carson*, 596 U.S. at 781 (same). In each case, the state pointed to an "antiestablishment interest" divorced from an actual Establishment Clause violation and in each case this Court denied that such an interest could justify a facially discriminatory law that burdens free exercise.

But beyond the prophylactic-interest problem, *Locke*'s play-in-the-joints theory faces a more fundamental flaw: the assumption that the Religion Clauses are in tension. When confronted with the same argument in *Kennedy v. Bremerton School*

District, this Court rhetorically asked, "But how could that be? . . . the three Clauses appear in the same sentence of the same Amendment . . . A natural reading of that sentence would seem to suggest the Clauses have complementary purposes, not warring ones." 597 U.S. 507, 532–33 (2022) (cleaned up). *Locke* illustrates the troubling implications of reading the Religion Clauses in tension with one another. *Locke* believed that a state's interest in avoiding the formal establishment of religion somehow justified treating religious people and institutions as if they are toxic or unfit to participate in public benefits on equal footing with their neighbors. How a unitary constitutional amendment, an amendment prohibiting any law abridging the "free exercise" of religion, permits such a law is beyond explanation.

2. Second, even assuming the vitality of *Locke*'s prophylactic theory, the rule it espoused cannot qualify as prophylactic. Prophylactic rules sweep broadly to "safeguard" the rights they protect. *Vega v. Tekoh*, 597 U.S. 134, 142 (2022). Logically, a prophylactic rule must prevent an underlying constitutional violation in at least *some* circumstances. Without any risk of jeopardy to the underlying right, no rule can claim to be a "safeguard" to such right. But in *Locke*, the absence of an Establishment Clause violation did not turn on specific circumstances that may change from case to case. It was not as if a change in curriculum or school choice would have changed the Establishment Clause calculus, such that Washington needed to sweep widely to avoid a line-drawing problem. The Establishment Clause question was not close. As this Court held in *Zelman v. Simmons-Harris*, "a government aid program [that] is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice" does not violate the Establishment Clause. 536 U.S. 639, 652 (2002). A public-benefit program that turns on a funding recipient's "genuine and independent choice" nullifies any possible Establishment Clause problem, even if, as a factual matter, virtually all funding ends up being put to a religious use. *See id.* at 658 (that 96% of scholarship recipients enrolled in religious schools was "irrelevant").

Accordingly, Washington needed no prophylactic rule to avoid an Establishment Clause problem. Under any factual circumstance, as long as the Promise Scholarship program employed religiously neutral criteria and allowed recipients to choose their course of study, the program would not violate the Establishment Clause as to any student. Washington needed no "play in the joints." It faced one constitutional problem alone: abridging the free exercise of religion.

II. *Locke* Failed to Appreciate the Free Exercise Issues at Stake.

A. Singling Out Theological Study for Exclusion Burdens Certain Religious Minorities and the Devoutly Religious.

In addition to its flawed reliance on history to bolster the State's purported interest in its discriminatory scholarship law, the *Locke* Court skirted the Free Exercise problem before it. Rather than focusing on whether Washington's law had the effect of burdening Davey's free exercise, the Court seemed inordinately focused on whether, in its view, the *State* seemed hostile towards religion generally. *See* 540 U.S. at 720–21, 724 & n.8 (concluding that Washington did not "evinc[e]" any "hostility toward religion" but instead was "solicitous in ensuring that its constitution is *not* hostile towards religion" (emphasis added)); *see also id.* at 732 (Scalia, J., dissenting) ("The Court does not explain why the legislature's motive matters, and I fail to see why it should."). And when the Court did address the burden inflicted on Davey, it dismissed the issue out of hand in a footnote. *Id.* at 720–21 & n.4 (stating that Washington's law did not "require students to choose between their religious beliefs and receiving a government benefit" because "Promise Scholars may still use their scholarship to pursue a *secular degree*." (emphasis added)).

But as Justice Scalia persuasively argued in dissent, Washington's law (and all others like it) *do* inflict an onerous burden. Such laws "single[] out for disfavor . . . those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry." *Id.* at 733. They condition civic benefits to those with "only a tepid, civic version of faith." *Id.* In favor of modern culture's "trendy disdain for deep religious conviction," Washington's law overtly discriminated "against a religious minority." *Id.*

The Jewish community is one such minority. Jewish teaching places great importance on the study and teaching of the *Torah*. The Torah commands, "you shall set these words of Mine upon your heart . . . [a]nd . . . teach them to your children." Deuteronomy 11:18-19; *id.* 5:1 ("Hear, O Israel, the statutes and laws that I speak in your ears today, and you shall study them and keep them to do them"); *id.* 6:7 ("[Y]ou shall teach them diligently to your children, and speak of them when you sit in your house, when you walk on the way, when you lie down, and when you rise up.") *See also*, *e.g.,* Maimonides, *Mishneh Torah*, Laws of Torah Study, 1:3. Accordingly, "every Jewish man is obligated to study *Torah*, whether he is poor or rich." *Id.* at 1:8. Theological study and teaching is integral to Orthodox Judaism. And for some Orthodox Jews, *Torah* study is a vocational calling. The study of Torah and Halacha (Jewish law) is essential in order to have a functioning Jewish community and also to educate and pass on the faith to the next generation.

Laws that singly exclude theological study from public-benefit programs are not "solicitous" of religion. *Locke*, 540 U.S. at 724 n.8. They denigrate the very identity of many religious groups and make it more difficult to pass the faith onto the next generation. And for devout Jews who are called to study and teach *Torah*, the conditioning of scholarship funds on non-theological study imposes the cruel choice that *Locke* denied existed: it "require[s] students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720–21.

B. Discriminatory Scholarship Laws Are Neither Narrowly Tailored Nor Workable.

Washington's law burdened religious exercise and discriminated against religion on its face. The *Locke* Court should have, then, as Justice Scalia argued in dissent, applied strict scrutiny. 540 U.S. at 726. Because it did not, the Court failed to appreciate just how overbroad and unworkable its ruling was. Strict scrutiny, of course, requires a law both serve a "compelling interest" and be "narrowly tailored to that end." *Kennedy*, 597 U.S. at 532. The "antiestablishment interest" cited by *Locke* was not compelling, for the reasons explained above. But even assuming that a State maintains a compelling interest in preventing clergy from receiving funds from a religiously neutral public benefit program, laws excluding theological study from scholarship programs are not narrowly tailored to that interest.

1. As a threshold matter, the very question of who qualifies as "clergy" complicates any narrow tailoring analysis. The category of "minister" or "clergy" can cover many roles. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 756–57 (2020) (school teachers). Moreover, even for those who plan to fill a more commonly understood clergy role (such as pastor or priest or rabbi), they may choose an ostensibly "secular" course of study to prepare for that role. A student may study history to better understand the context of his religion's teachings, or he might study linguistics to better understand sacred texts in their original language. Possibilities abound. And yet for all of them, the student may receive public funds, even if his degree will "prepare [him] for the ministry." *Locke*, 540 U.S. at 719. That a state exempts some students preparing for the ministry from its discriminatory scholarship law but refuses to allow students obtaining a theological degree the same benefit undercuts any claim that the law is narrowly tailored to a compelling governmental interest. *Fulton v. City of Philadelphia*, 593 U.S. 522, 542 (2021) (inconsistent application of law "undermines the [State's] contention that its . . . policies can brook no departures").

2. The variety of possible motivations for theological study also demonstrates a lack of narrow tailoring. To be sure, in *Locke* itself, the student, Joshua Davey, unequivocally expressed a desire to study theology because he wanted to enter the ministry, "specifically as a church pastor." 540 U.S. at 717. And this Court's subsequent decisions have highlighted that fact. *Trinity Lutheran*, 582 U.S. at 464; *Espinoza*, 591 U.S. at 479–80; *Carson*, 596 U.S. at 788–89. But that the student in *Locke* expressed a desire to become clergy does not mean that all who study theology share that desire. As Justice Thomas stated in dissent, a student may choose to study theology for a variety of reasons, even if he has no desire to become clergy. *See Locke*, 540 U.S. at 734–35 (Thomas, J., dissenting). For many religious students, theological study brings religious nourishment and fulfillment. As explained above, Jews believe that all Jewish people have a religious duty to study biblical teaching.

Laws like Washington's and Virginia's however, do not differentiate between students who plan to become clergy and students who do not. They broadly prohibit the use of scholarship funds for *any* student pursuing a degree in theology—even when a student, with no desire to become clergy, nevertheless chooses to pursue theological study for religious reasons. *Locke*'s anti-clergy rationale, however, cannot possibly extend to such applications. To argue otherwise would require broadening *Locke*'s interest to cover funding for all religious instruction, regardless of the student's vocational plans, an argument this Court has twice rejected. *See Espinoza*, 591 U.S. at 479–81; *Carson*, 596 U.S. at 788–89.

But if *Locke*'s interest justifies withholding funding from would-be clergy alone, and the State otherwise lacks a compelling interest in enforcing its discriminatory scholarship criteria against other "particular religious claimants," its criteria are not narrowly tailored. *Fulton*, 593 U.S. at 541 (internal citation omitted). And if not narrowly tailored, such law "cannot survive strict scrutiny[] and violates the First Amendment." *Id.* at 542.

3. *Locke*'s free-exercise issues run even deeper, however. Even assuming a state could narrowly tailor its discriminatory scholarship criteria to just those students with plans to enter the ministry,[4] the law would still violate the Free Exercise Clause. For many, choosing to become clergy is an essentially religious calling. *Locke* recognized as much. 540 U.S. at 720–21. A state policy's special exclusion of those who desire to become clergy from scholarship eligibility, then, does more than merely disfavor one vocation relative to another. It penalizes *religious beliefs*. By distinguishing among students engaged in identical conduct (enrollment in a course of theological study) merely because one student believes God has called him to the ministry, the law conditions benefits based on the student's "religious *beliefs* as such." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990) (internal

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[4] This also assumes that the student's plans are constant, which of course is another complicating factor. What of students who change their vocational plans mid-study? Or what if a student's plans are tentative?

citation omitted). Such law is repugnant to the First Amendment.

*   *   *

Locke marked a departure from this Court's precedents and has proven since to be an aberration. By relying on a historically inaccurate conception of antiestablishment interests, *Locke* permitted laws singling out a student's exercise of religion for disfavor. Such laws are "odious to our Constitution . . . and cannot stand." *Trinity Lutheran*, 582 U.S. at 467. *Locke* called that which is odious constitutional. To safeguard the Constitution's guarantees, this Court should overrule *Locke*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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