

No. 26-193

In the Supreme Court of the United States

BETHANY M. HALL, PETITIONER

v.

SCOTT FLEMING, IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF THE STATE COUNCIL OF HIGHER
EDUCATION FOR VIRGINIA, RESPONDENT

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

**BRIEF OF THE HERITAGE FOUNDATION AS
AMICUS CURIAE IN SUPPORT OF THE PETITIONER**

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QUESTION PRESENTED

Whether the Court should reconsider and overrule
Locke v. Davey, 540 U.S. 712 (2024).

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INTEREST OF AMICUS CURIAE¹

The Heritage Foundation is a research and educational institution founded in 1973. For more than 50 years, Heritage has developed and promoted public policies grounded in limited government, individual liberty, free enterprise, traditional American values, and a strong national defense. Central to that mission is preserving the

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1. No counsel for a party authored this brief in whole or in part, and no person other than the amicus curiae or its counsel funded the preparation or submission of the brief. Counsel for the parties received timely notice of our intention to file this petition-stage amicus brief.

constitutional structure that protects individual freedom while confining government to its proper sphere.

Religious liberty is an essential part of that constitutional structure, as the Religion Clauses define the proper boundary between civil and religious authority. Heritage therefore has a substantial interest in ensuring that the Establishment Clause is not transformed from a limitation on the federal government’s religious power into a warrant for discrimination against religious citizens.

Virginia’s decision to withhold tuition assistance from “religious training or theological education” and the continued existence of *Locke v. Davey*, 540 U.S. 712 (2024), implicate Heritage’s interests in limited government, individual liberty, the promotion of traditional American values, and the right of Americans to pursue their chosen careers.

SUMMARY OF ARGUMENT

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

Locke began its constitutional analysis with a proposition born from the *Lemon*-era separationism: The Establishment Clause and Free Exercise Clause, it said, “are frequently in tension.” *Locke*, 540 U.S. at 718. From that supposed tension, *Locke* invoked *Walz*’s concept of “play in the joints” to permit a State to discriminate against religion in the name of avoiding governmental proximity to religion—encouraging government to suppress or disadvantage religious exercise to maintain greater symbolic separation. That premise is constitutionally indefensible.

Kennedy v. Bremerton School District, 597 U.S. 507 (2022), has already rejected this way of thinking. The

Court repudiated *Lemon*'s "ahistorical, atextual approach" to the Establishment Clause and the court-invented "endorsement" test while simultaneously rejecting the notion that Free Exercise must yield whenever the government invokes an asserted Establishment Clause concern. *See id.* at 523, 534–36. Instead, *Kennedy* holds that the Religion Clauses have "complementary" rather than "warring" purposes. *See id.* at 533. And a "phantom" Establishment Clause violation cannot justify an actual violation of the Free Exercise Clause.

This means that the Religion Clauses are not opposite ends of a single line, in which greater "separation" constricts free exercise and while free exercise risks establishment. Instead, the Religion Clauses provide two axes or dimensions of a unifying constitutional autonomy principle. The Establishment Clause limits the federal government's authority over religion, while the Free Exercise Clause limits government's authority against religion. These two protections may intersect but do not conflict. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), demonstrates the point by claiming that government selection or control of ministers would violate both Clauses: "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."

Yet *Locke* remains as a derelict precedent, and its continued existence offers a backdoor through which *Lemon*'s punitive separationism may once again authorize the religious discrimination that the Court's more recent

cases condemn. This case presents a clean vehicle to close that door.

ARGUMENT

I. LOCKE’S ASSERTED TENSION BETWEEN THE RELIGION CLAUSES IS A VESTIGE OF LEMON-ERA PUNITIVE SEPARATIONISM

The Court’s First Amendment jurisprudence has moved beyond *Locke*, which was decided in *Lemon*’s gravity and remains in *Lemon*’s orbit. Although the opinion in *Locke* does not mention *Lemon*, it proceeds from the *Lemon*-derived premise that the Religion Clauses “are frequently in tension.” *Locke v. Davey*, 540 U.S. 712, 718 (2004). That conception of the relationship between the Religion Clauses reflects a broader separationist premise that came to dominate Establishment Clause jurisprudence during the *Lemon* era. That premise has since been disavowed by this Court.

A. *Lemon*-Era Jurisprudence Regarded Government Proximity To Religion As A Constitutional Harm

Lemon “called for an examination of a law’s purpose, effects, and potential for entanglement with religion.” *Kennedy v. Bremerton School District*, 597 U.S. 507, 534 (2022) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)). This eventually led to the so-called endorsement test: whether a reasonable observer would perceive governmental endorsement of religion. *Id.*

These tests encouraged and promoted a regime of expansive separationism. *See id.* at 532–35 (the school district believed it had to suppress religious exercise to avoid the appearance of endorsement); *Good News Club v.*

Milford Cent. Sch., 533 U.S. 98, 112–19 (2001) (same). Once this Court’s Establishment Clause jurisprudence turned on whether a reasonable observer might perceive governmental “endorsement” of religion, governments sought to avoid any *appearance* of governmental proximity to religion that could trigger a lawsuit and cost taxpayers millions of dollars in attorneys’ fees. *See Kennedy*, 597 U.S. at 534–35; *County of Allegheny v. ACLU*, 492 U.S. 573, 592–94 (1989). The Court’s approach made even equal treatment of religion dangerous because governments that allowed religion to remain visible in publicly supported institutions and programs would expose governments to costly Establishment Clause lawsuits. *See Good News Club*, 533 U.S. at 114; *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 839 (1995); *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394–95 (1993). This court-imposed conception of separation created incentives for governments to exclude religious institutions from government benefits and programs as a means of avoiding potential Establishment Clause issues. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017); *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464, 484–85 (2020).

Kennedy provides an apt illustration of the problem. The school district in that case insisted that its supposed Establishment Clause obligations trumped Coach Kennedy’s Free Exercise and Free Speech rights, which had to yield to avoid perceived governmental endorsement. 597 U.S. at 532–33. But this Court correctly rejected that doctrinal framework and the supposed conflict. It held

that *Lemon* and the endorsement test had “long ago” been abandoned and that courts must instead look to historical practices and understandings. *Id.* at 534. And *Kennedy* rejected the idea that the Establishment Clause requires governments to suppress religious exercise because of a perceived conflict between the Free Exercise and Establishment Clauses. *Id.* at 542–43. “In truth,” the Court explained, “there is no conflict between the constitutional commands”—only “a false choice premised on a misconstruction of the Establishment Clause.” *Id.* at 543. *Locke* rests on that same false premise.

B. *Locke* Transformed An Antiestablishment Preference Into A License To Discriminate

Washington conceded in *Locke* that the Establishment Clause would allow state scholarship recipients to pursue theology degrees. *See Locke*, 540 U.S. at 719. And Washington had no choice but to concede this point, which had long been settled by *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). *Witters* held that the Establishment Clause did not require Washington to exclude a blind student from vocational rehabilitation assistance because he was studying at a Christian college to pursue a career in ministry. *See id.* at 483. Although the Washington Supreme Court had held that state funding of this blind student’s education would advance religion and violate the Establishment Clause, this Court unanimously rejected that theory because the assistance was available according to religion-neutral criteria and public funds reached religious education only because the individual beneficiary chose that use. *Id.* at 487–90. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), confirms

the same principle: when aid reaches religious schools through “genuine and independent private choice,” the Establishment Clause is not implicated. *Id.* at 652.

Given the previous holdings of *Witters* and *Zelman*, the Court in *Locke* should never have acknowledged or asserted a “tension” between Establishment and Free Exercise Clauses, as the Court has already established in *Witters* and *Zelman* that inclusion was constitutional. What *Locke* instead protected was Washington’s preference for *greater* separation than the Court’s Establishment Clause cases required. In this sense, *Locke* exemplified punitive separationism, as it allowed a state to invoke its separationist preference as a reason not merely to restrain its own authority but to impose disadvantages on citizens for choosing to pursue a religious education.

The recent cases of this Court reject that understanding. *Trinity Lutheran* holds that Missouri’s “policy preference for skating as far as possible from religious establishment concerns” failed to qualify as a compelling governmental interest that could justify infringing the free exercise of religion. 582 U.S. at 466. *Espinoza* likewise holds that a State’s preference for separating church and state “more fiercely” cannot justify an infringement of free exercise. 591 U.S. at 484–85. And *Carson v. Makin*, 596 U.S. 767 (2022), addresses the point directly: allowing public benefits to reach religious activity through private choice “does not offend the Establishment Clause,” and a State’s separationist interest cannot justify excluding citizens from an otherwise generally available benefit because of religious exercise. *Id.* at 781.

These holdings restore the Establishment Clause to its proper function: the federal government may not establish or control religion, but neither may governments invoke a phantom Establishment Clause violation to justify discrimination against religious believers. *See Kennedy*, 597 U.S. at 543 (holding that “phantom constitutional violations” cannot justify infringing rights under the Free Exercise or Free Speech Clauses).

II. THE RELIGION CLAUSES ARE DIFFERENT AXES OF A SINGLE CONSTITUTIONAL STRUCTURE

Kennedy rejects *Locke*’s conceptual error, which treated the Religion Clauses as occupying opposite ends of a line and acts as though the protection of free exercise comes with a corresponding move toward establishment. *Kennedy* instead holds that the “natural reading” of the Religion Clauses suggests “complementary” purposes, “not warring ones where one Clause is always sure to prevail over the others.” *See Kennedy*, 597 U.S. at 533.

The Clauses’ histories demonstrate their complementary purposes. The defining characteristics of establishments were governmental power over church doctrine and ecclesiastical leadership. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131–33, 2207–08 (2003). Disestablishment deprived civil government of religious jurisdiction. Free exercise protected the corresponding liberty of religious individuals and communities to govern religious affairs according to conscience.

The church-autonomy doctrine illustrates the structure. In *Hosanna-Tabor*, this Court held that both Religion Clauses prevent government from interfering with the choice of a minister. *See Hosanna-Tabor*, 565 U.S. at 181–89. The Establishment Clause addresses the problem from the perspective of the federal government’s authority: the federal government cannot appoint ministers or exercise ecclesiastical power. The Free Exercise Clause addresses the same problem from the perspective of the religious organization: it must remain free to select those who embody and teach its faith. *Id.* at 184. This is not “tension”; it is reinforcement. The Establishment and Free Exercise Clauses together mark a jurisdictional boundary between religious and civil authority. Non-establishment does not mean hostility toward religion; it protects religious freedom by denying the federal government the power to govern religion.

III. “PLAY IN THE JOINTS” ORIGINALLY DESCRIBED PERMISSIBLE ACCOMMODATION, NOT PERMISSIBLE DISCRIMINATION

Understanding the Religion Clauses in this manner clarifies the meaning of “play in the joints.”

This phrase first appeared in *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), which rejected an Establishment Clause challenge to property-tax exemptions for religious organizations. *Walz* explains that absolute separation between church and state is neither possible nor desirable. Instead, *Walz* acknowledges room for “play in the joints,” producing a “benevolent neutrality” in which the government accommodates religious exercise without interfering with it. *Walz*, 397 U.S. at 669.

Later cases understand *Walz* the same way. *Amos* allowed Congress to exempt religious organizations from Title VII's prohibition on religious discrimination. *See Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329–30, 338–39 (1987). The Court explained that permissible governmental accommodation extends beyond the minimum accommodations commanded by the Free Exercise Clause. *See id.* at 334–35 (citing *Walz*, 397 U.S. at 673).

All of this shows that “play in the joints” allows government to lift burdens on religious exercise even when the Free Exercise Clause does not require it to do so. But the Clauses do not war with one another; government is simply permitted to give religious exercise breathing room within both constitutional limits. As the United States argued in *Locke*, the logic of benevolent neutrality cannot justify governmental discrimination against religion. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 29 n.7, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315).

But *Locke* turned that principle of accommodation upside down, allowing Washington to exclude devotional theology from its scholarship program even though the Establishment Clause did not require this exclusion. *See Locke*, 540 U.S. at 718–25. But the principle that government may sometimes *accommodate* religion beyond the constitutional minimum, as discussed in *Walz*, does not imply that government may *penalize* religion beyond the requirements of the Establishment Clause. The former practice enlarges private religious liberty; the latter

punishes or discriminates against private religious exercise on account of its religious nature.

IV. HALL DEMONSTRATES WHY LOCKE'S PUNITIVE-SEPARATION MODEL CANNOT BE RECONCILED WITH MODERN FIRST AMENDMENT JURISPRUDENCE

This case illustrates the anomaly that *Locke* created. Virginia established the Tuition Assistance Grant to assist Virginia residents attending eligible private colleges and universities. But the program excludes educational programs constituting “religious training or theological education,” which Virginia implements through the classification of specified religious programs under CIP Code 39. Pet. App. 3a–4a, 23a–24a. Hall remained eligible while pursuing Music Education: Choral. She became ineligible after choosing Youth Ministries and later Music & Worship. Pet. App. 4a, 24a–25a. Nothing relevant to Virginia’s general provision of higher-education assistance changed. Hall remained the same student at the same institution. The only thing that changed was Virginia’s characterization of the religious nature of her chosen vocation.

A. Virginia’s Exclusion Embodies A Religious Value Judgment That The Free Exercise Clause Forbids

Ordinarily, government has substantial latitude to decide what it public funds will support. It may establish programs for engineers, teachers, nurses, farmers, or any other legitimate category. It may decide to support all degrees. But the First Amendment does not allow the government to explicitly disfavor religion when deciding the activities it will fund. *See* Brief of the United States,

supra, at 25–26. That principle anticipated this Court’s modern Free Exercise jurisprudence. A law “target[ing] religious conduct for distinctive treatment” is not neutral and must satisfy the most rigorous scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). A State cannot exclude an otherwise eligible participant from a generally available benefit because of religion. See *Trinity Lutheran*, 582 U.S. at 458–66. And it cannot evade that rule by converting discrimination based on religious identity into discrimination based on religious use. See *Carson*, 596 U.S. at 786–88.

That disposes of *Locke*’s distinction between who the beneficiary is and what the beneficiary intends to do. *Carson* holds that religious-use discrimination is no less offensive to the Free Exercise Clause. *Id.* at 787. Hall is being excluded precisely because of what she proposes to do: devote her education to ministry and worship.

Nor may Virginia insulate that exclusion by defining the aim of the Tuition Assistance Grant as supporting only the education Virginia has decided to make eligible. As *Carson* recognizes, “the definition of a particular program can always be manipulated to subsume the challenged condition.” *Id.* at 784 (quoting *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 215 (2013)). Otherwise, the State could defeat Free Exercise scrutiny by defining a program’s purpose to incorporate the very discrimination being challenged.

Virginia has made tuition assistance broadly available and has made religious vocational study an express ground of exclusion. That is religious discrimination.

Under the Free Exercise Clause, it is subject to strict scrutiny.

B. Punitive Separationism Also Creates The Religious Line-Drawing Authentic Disestablishment Seeks To Prevent

One of the more peculiar ironies of *Locke* is that it makes a doctrine ostensibly designed to keep government out of religion into a regime that requires governments to determine what is sufficiently religious to exclude.

Virginia’s statute and regulations make legal consequences turn on whether education constitutes “religious training or theological education.” Pet. App. 3a–4a, 23a–24a. The State presently uses CIP classifications to administer that distinction. Pet. App. 3a–4a, 23a–24a. But an administrative classification does not eliminate the constitutional problem: government has made the religious character of a student’s educational undertaking legally dispositive.

This Court recognized this problem in *Carson*. Efforts to distinguish permissible from impermissible “religious uses” by scrutinizing how a religious school carries out its educational mission raise “serious concerns about state entanglement with religion and denominational favoritism.” *Carson*, 596 U.S. at 787.

The lower courts have dealt with the same problem. *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), for example, disapproved a scholarship scheme requiring Colorado to decide which religious institutions were too “sectarian” to participate. *See id.* at 1250, 1261–66. It held that the government cannot, consistent with this Court’s Establishment Clause doctrine,

condition educational benefits upon official judgments about the degree or character of religious teaching.

That principle flows from the church-autonomy doctrine. Authentic disestablishment prevents civil government from becoming an arbiter of religious doctrine and religious identity. It does not invite government to make these determinations for the purpose of withholding otherwise available benefits.

In this sense, *Locke* becomes self-defeating. It purports to allow government to discriminate against religion in the name of separating church and state, but in doing so it allows states to establish regimes that require scrutiny of religious education to determine when it becomes too religious to fund.

* * *

Locke mischaracterized extra-constitutional, punitive separationism as neutrality. The Court's subsequent decisions have undermined nearly every premise that undergirds that misguided holding. What remains of *Locke* is a narrow exception to the prohibition on religious discrimination embodied in the rest of this Court's Free Exercise jurisprudence. This case provides the Court with an opportunity to remove that anomaly.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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