No. 26-240

IN THE
Supreme Court of the United States

CAMERON JOHNSON; LUKE THOMAS; TRACE STEVENS,
Petitioners,

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

BRIEF IN OPPOSITION

TILLMAN J. BRECKENRIDGE
Solicitor General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-1252
SolicitorGeneral@oag.state.va.us

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the Religion Clauses allow governments to exclude some religious degrees while funding similar religious degrees in educational grant programs.

2. Whether this Court should overrule *Locke*.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES..... iv

INTRODUCTION..... 1

COUNTERSTATEMENT 2

A. Virginia's Tuition Assistance Grant Program 2

B. The Department's STAP Program. 5

C. Factual background..... 5

D. Procedural background 7

E. Correction of Misstatements in the Petition..... 8

REASONS FOR DENYING THE WRIT 19

I. The Petition is premature and does not present the kind of extraordinary circumstances that could warrant certiorari before judgment..... 19

A. An immediate determination of this case is unnecessary because oral argument in the Fourth Circuit is tentatively scheduled for January 2027 19

B. This petition is particularly unsuited for certiorari before judgment given its

TABLE OF CONTENTS (CONTINUED)

undeveloped and disputed factual record 21

C. The pending petition for certiorari in *Hall* v. *Fleming* counsels against, not for, granting certiorari in this case 22

II. The district court's ruling was correct 24

III. Contrary to Petitioners' assertions, *Locke* has not been undermined by recent case law 25

A. The *Locke* decision and Washington's scholarship program 25

B. The Court's decisions in *Trinity Lutheran*, *Espinoza*, and *Carson* have consistently reaffirmed *Locke* 27

C. Petitioners' claimed circuit split is illusory 30

IV. This case is not the proper vehicle to review *Locke* for yet another reason: Virginia's rich history against funding the ministry 31

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

Cases

All Am. Check Cashing v. *CFPB*, 140 S. Ct. 646 (2019).....24

Carson v. *Makin*, 596 U.S. 767 (2022).....18, 29, 33

Coleman v. *Paccar, Inc.*, 424 U.S. 1301 (1976).....19

Colorado Christian University v. *Weaver*, 534 F.3d 1245 (10th Cir. 2008).....2, 30

Espinoza v. *Montana Department of Revenue*, 591 U.S. 464 (2020).....28, 29, 30

Everson v. *Bd. of Educ.*, 330 U.S. 1 (1947).....31, 32

Flast v. *Cohen*, 392 U.S. 83 (1968).....32

Fulton v. *City of Philadelphia*, 593 U.S. 522 (2021).....13, 17

Hall v. *Fleming*, No. 26-193 (U.S.) 1, 22, 31

Illinois v. *Gates*, 462 U.S. 213 (1983) 21

Johnson v. *Fleming*, Case No. 3:25-cv-00407 (E.D. Va.).....23

Johnson v. *Fleming*, No. 26-1437, (4th Cir.) 7, 8, 12, 17, 20, 22, 23

TABLE OF AUTHORITIES (CONTINUED)

Kennedy v. *Bremerton Sch. Dist.*, 597 U.S. 507 (2022).....33

Lee v. *Tam*, 137 S. Ct. 30 (2016).....23

Lee v. *Weisman*, 505 U.S. 577 (1992).....32

Locke v. Davey, 540 U.S. 712 (2004).....1, 2, 7–11, 17, 18, 22–25, 27–34

Lytle v. *Household Mfg., Inc.*, 494 U.S. 545 (1990).....21

Mikulski v. *Centerior Energy Corp.*, 544 U.S. 992 (2005).....24

Miller v. *Ayres*, 213 Va. 251 (1972).....9

Mount Soledad Mem'l Ass'n v. *Trunk*, 573 U.S. 954 (2014).....19

Pro-Football, Inc. v. *Blackhorse*, 137 S. Ct. 44 (2016).....23

Reynolds v. *United States*, 98 U.S. 145 (1878).....32

Town of Greece v. *Galloway*, 572 U.S. 565 (2014).....33

Trinity Lutheran Church of Columbia, Inc. v. *Comer*, 582 U.S. 449 (2017).....27, 28, 29

United States v. *Clinton*, 524 U.S. 912 (1998).....20

Va. Coll. Bldg. Auth. v. *Lynn*, 538 S.E.2d 682 (Va. 2000) 3, 9, 16

TABLE OF AUTHORITIES (CONTINUED)

Yee v. *City of Escondido*, 503 U.S. 519 (1992).....21

Statutes

Va. Code § 23.1-610.....5, 9, 16

Va. Code § 23.1-629.....3

Va. Code § 23.1-631.....3, 9

Va. Code § 57-1.....32

Va. Code § 57-2.....32

Other Authorities

1 Anson Phelps Stokes, CHURCH AND STATE IN THE UNITED STATES 366 (1950).....33

1 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA HELD IN THE CITY OF RICHMOND JUNE 12, 1902 TO JUNE 26, 1902 (1906).....9, 10

An Act for Establishing Religious Freedom, ch. 34 (Oct. 17, 1785), *reprinted in* 12 William Waller Hening, STATUTES AT LARGE 84 (1823).....8

CIP: The Classification of Institutional Programs, NAT'L CTR. FOR EDUC. STATISTICS.....4

TABLE OF AUTHORITIES (CONTINUED)

COMMAND POLICY 22-023 VIRGINIA NATIONAL GUARD STATE TUITION ASSISTANCE PROGRAM 5

Course Catalog – Biochemistry & Molecular Biology, LIBERTY UNIV. 15

Course Catalog – Mathematics, LIBERTY UNIV.....15

Course Catalog – Religious Studies Major, VA. UNION UNIV.....14

Course Catalog – Spanish, LIBERTY UNIV.....15

Detail for CIP Code 38, NCES 10, 12

Detail for CIP Code 38.0203, NCES 11

Detail for CIP Code 39, NCES 4, 10, 12, 13

Detail for CIP Code 39.0201, NCES 11

Detail for CIP Code 39.0602, NCES 11

Detail for CIP Code 39.0605, NCES 11

Detail for CIP Code 39.0699, NCES 11

Important Federal Student Loan Changes Effective July 1, 2026, LIBERTY UNIVERSITY 14

Introduction to the Classification of Instructional Program: 2020 Edition (CIP-2020) NCES.....14

LIBERTY UNIVERSITY ACADEMIC PROGRAMS.....6, 12, 14

TABLE OF AUTHORITIES (CONTINUED)

Martin E. Marty, *The Virginia Statute Two Hundred Years Later*, in THE VIRGINIA STATUTE OF RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY 1, 1 (Merrill D. Peterson & Robert C. Vaughan eds., 1988) 33

NAICS Code Description, NAICS Assoc.....16

National Guard STAP Summary.....17

REPORT OF THE COMM'N ON CONSTITUTIONAL REVISION (1969) 8, 9, 10

Search Degree Inventory, RESEARCH.SCHEV.EDU.....12, 15

State Tuition Assistance Program, VA. NAT'L GUARD 5, 17

Va. Const. art. I, § 16 32

Va. Const. art. III, § 11 (1830) 8

Va. Const. art. IV, § 16.....9, 10

Va. Const. art. IV, § 67.....9, 10

Va. Const. art. IX, § 141 (1902).....9

Va. Const. art. VIII, § 10.....9

Va. Const. art. VIII, § 11.....8, 9, 16

Va. Tuition Assistance Grant Program, STATE COUNCIL OF HIGHER EDUC. FOR VA. 13

TABLE OF AUTHORITIES (CONTINUED)

Rules

Sup. Ct. R. 11.....19

Treatises

23 James Wm. Moore et al., Moore's Federal Practice – Civil (1997).....19

Regulations

8 Va. Admin. Code § 40-71-10.....3, 4, 12, 25

8 Va. Admin. Code § 40-71-50.....3

8 Va. Admin. Code § 40-71-40.....3, 4, 13

INTRODUCTION

This Court should deny review because the petition is premature and does not come close to satisfying the demands for extraordinary relief under Supreme Court Rule 11. It is unnecessary to review this case on an emergency basis when oral argument in the Fourth Circuit has already been tentatively scheduled for January 2027. But even if that were not the case, this petition is particularly unsuited for certiorari before judgment given its underdeveloped and hotly disputed factual record. For this reason, the district court declined to dismiss Petitioners' claims as to one program and urged "further development of the factual record." Worse, Petitioners take liberties with both the facts and the law dozens of times in their petition. If this Court granted certiorari, it would be required to wade into a sea of messy fact-bound inquiries.

There are also multiple other reasons to deny the petition. Until their petition for certiorari, Petitioners never once called for the overruling of Locke v. Davey in either of the courts below. Instead, they have consistently argued that *Locke* does *not* apply to the facts of their case, and they continue to argue that in their petition. Yet they also now call for the explicit overruling of *Locke*. Petitioners attempt to have it both ways, but those two arguments cannot be reconciled. A petition that adopts contradictory positions on the core issue makes for an exceedingly poor vehicle for this Court to decide that issue.

Moreover, contrary to Petitioners' suggestion, the pending petition for certiorari in *Hall* v. *Fleming* counsels against, not for, granting certiorari here. If this Court decides to grant certiorari in *Hall*, there is

no good reason to do the same with this case given its undeveloped record and the fact that the Fourth Circuit has not weighed in yet. And there are two fundamental differences between *Hall* and this case that would complicate any effort to decide them together. This case involves an additional—and different—program (STAP) that was not at issue in *Hall*. More importantly, the petition in *Hall* and the petition here differ on whether *Locke* even applies to the facts of their respective cases.

Finally, the district court was correct in its ruling denying a preliminary injunction and partially dismissing the claims. It applied the appropriate precedents, including *Locke*, in concluding that Petitioners did not establish that they were likely to succeed on the merits of their constitutional claims. *Locke* has not been undermined by recent case law, and this Court has consistently reaffirmed *Locke*'s narrow holding. Petitioners' attempt to manufacture a circuit split with the nearly two-decade old *Colorado Christian Univ.* v. *Weaver* case falls flat given the obvious significant differences between that case and *Locke*. In any event, this case is not the proper vehicle to address whether to overrule *Locke* for yet another reason—because of Virginia's long historical tradition against funding the clergy.

This Court should deny the petition.

COUNTERSTATEMENT

A. Virginia's Tuition Assistance Grant Program

In 1972, the Viriginia General Assembly passed the Tuition Assistance Grant Act. Va. Code §§ 23.1-628 to -635. The Act provides financial assistance to

Virginia residents who choose to attend accredited, private, nonprofit colleges and universities in Virginia. Pet. App. 4a. The State Counsel of Higher Education for Virginia ("SCHEV") is responsible for administering the Virginia Tuition Assistance Grant Program ("TAG"), and it has promulgated regulations governing the program. Va. Code § 23.1-629; 8 Va. Admin. Code §§ 40-71-10 to -70.

For Virginia undergraduate students to be eligible for a grant under TAG, they must be "obligated to pay tuition as full-time. . . students at an eligible institution." Va. Code § 23.1-631(a). Students can use grant funds to pay for tuition, fees, room, board, books, supplies, and other education-related expenses. 8 Va. Admin. Code § 40-71-10 (defining "Cost of Attendance"); 8 Va. Admin. Code § 40-71-50(B). Grants for undergraduate students are limited to four academic years, may be used only toward associate or baccalaureate degrees, and may be used only for educational programs that do not constitute "religious training or theological education." Va. Code § 23.1-631(B)-(C); 8 Va. Admin. Code § 40-71-10 (defining "Eligible Program"); 8 Va. Admin. Code § 40-71-40(D)(2); Pet. App. 4a.

The terms "religious training" and "theological education" are derived from Article VIII, Section 11 of the Constitution of Virginia. *Va. Coll. Bldg. Auth.* v. *Lynn*, 538 S.E.2d 682, 689–90 (Va. 2000). The Supreme Court of Virginia has construed "theological education" as being "applicable to a seminary or other institution whose purpose is to prepare students for vocations associated with ordination, such as rabbi, minister, or priest." *Id.* at 690. The phrase "religious training" is "applicable to institutions or departments

within institutions whose purpose is preparation of students for religious vocations other than those associated with ordination." *Id.* TAG's limited prohibition on grant funding for degrees preparing students to minister is what Petitioners now characterize as "religious discrimination." Pet. at 6.

Under SCHEV's regulations for TAG, students enrolled in undergraduate programs "that provide religious training or theological education, classified as [National Center for Education Statistics' Classification of Instructional Programs ("CIP")] Code 39-series programs, are not eligible" for grants. 8 Va. Admin. Code §§ 40-71-10, 40-71-40. The U.S. Department of Education's National Center for Education Statistics developed CIP Codes to support "the accurate tracking and reporting of fields of study and program completions activity." *CIP: The Classification of Institutional Programs*, NCES, perma.cc/3XLX-NTAF. CIP Code 39-series programs "prepare individuals for the professional practice of religious vocations." *Detail for CIP Code 39*, NCES, perma.cc/V7MY-9545. A student who declares a double major that includes an eligible major and an ineligible CIP Code 39 major is still eligible to receive a grant, so long as she does not take more classes in the ineligible major than those taken for the eligible major during any given semester. 8 Va. Admin. Code § 40-71-10.

Students enrolled at religious colleges and universities in Virginia, including Liberty University, are eligible to participate in TAG if they meet the relevant qualifications. Pet. App. 5a.

B. The Department's STAP Program.

The Virginia National Guard State Tuition Assistance Program ("STAP") allows grants to members of the Virginia National Guard who are "enrolled in any course or program at any public institution of higher education or accredited nonprofit private institution of higher education whose primary purpose is to provide collegiate or graduate education" and satisfy other eligibility criteria. Va. Code § 23.1-610(A). The Department of Military Affairs administers the program, *id.* § 23.1-610, and the Adjutant General has issued a command policy to "implement[]" it and provide "procedural guidance," COMMAND POLICY 22-023 VIRGINIA NATIONAL GUARD STATE TUITION ASSISTANCE PROGRAM ¶ 2 (Sept. 15, 2022) [hereafter COMMAND POLICY], perma.cc/NT5N-G43Z.

Servicemembers submit their applications to the Department, which makes eligibility and award determinations. Va. Code § 23.1-610(B); COMMAND POLICY, *supra*, ¶ 9(a)(1), (c); *State Tuition Assistance Program*, VA. NAT'L GUARD, perma.cc/6ZP3-FELP. As part of this application process, the servicemember must sign a promissory note stating that he "understand[s] and agree[s] to" terms including that grant awards "cannot be used to fund degrees in religious training or theological education." JA120. The command policy references "seminary school" as an example of an ineligible "theological degree[]." COMMAND POLICY, *supra*, ¶ 7(a)(6)(c).

C. Factual background

Petitioners' desired programs in religious training or theological education are ineligible for grants through the TAG and STAP Programs, respectively.

Johnson is majoring in Pastoral Leadership. JA216. Liberty University offers this program through its school of divinity and classifies it in the CIP Code 39-series. LIBERTY UNIVERSITY ACADEMIC PROGRAMS at 11, perma.cc/VV67-EY3U. It is ineligible for a grant through the TAG Program. JA216.

Thomas wants to major in Music and Worship, JA339–340, which Liberty University classifies as a CIP Code 39-series program. LIBERTY UNIVERSITY ACADEMIC PROGRAMS, *supra*, at 10. It is ineligible for a TAG Program grant. JA221.

Stevens is a member of the Virginia Army National Guard and wishes to pursue a Master of Divinity degree at Liberty. JA337. Liberty offers this program through its school of divinity, and it is an ineligible program under the STAP Program, JA337. While the Department's decisions do not depend on CIP Code classifications, Liberty University classifies the Master of Divinity in the CIP Code-39 series. LIBERTY UNIVERSITY ACADEMIC PROGRAMS, *supra*, at 11.

Stevens earlier obtained a Bachelor of Science in Religion, JA336, which is also offered through Liberty's school of divinity. Although Liberty University classifies this major as a CIP Code-38 series program, LIBERTY UNIVERSITY ACADEMIC PROGRAMS, *supra*, at 9, the Department found it to be ineligible based on publicly-available information from Liberty University's website (including that it is offered through the School of Divinity) and Stevens's decision to strike through the "religious training or theological education" condition in his promissory note, JA150–152, JA156.

Petitioners are interested in using their religious training or theological education for religious vocations, but they also say that they are open to secular career options. JA44–45, JA047, JA51, JA53.

D. Procedural background

Petitioners filed this litigation, contending that their ineligibility for the respective TAG and STAG Programs violated:

- the Free Exercise Clause (Count I);
- the Free Exercise and Establishment Clauses in combination (Count II); and
- the Equal Protection Clause (Count III).

JA62–68. They moved for a preliminary injunction, which the district court denied. JA19–20, JA158–160. The district court also dismissed Johnson's and Thomas's claims against the SCHEV defendants, as foreclosed by *Locke*. JA9–17. While the district court found Stevens's claims against the Department defendants "unlikely to succeed" under the preliminary injunction standard, JA20, and "suspect[ed] that" *Locke* "dooms" them, JA9, it let them go forward, JA17–18. The district court wanted to rule with the benefit of "additional information" on the Department's implementation of the STAG Program. JA18.

Petitioners noticed their appeal and moved the district court for an injunction pending appeal, which was denied. JA30–31, JA342–344. Petitioners then moved for an injunction pending appeal in the Fourth Circuit, Emergency Motion for Injunctive Relief Pending Appeal, *Johnson* v. *Fleming*, No. 26-1437, Doc. 14 (4th Cir. April 17, 2026), which was also

denied, Order, *Johnson*, No. 26-1437, Doc. 23 (4th Cir. May 18, 2026).

E. Correction of Misstatements in the Petition

Pursuant to their Rule 15.2 obligation, Respondents have identified multiple misstatements of fact and law in the petition. These include misstatements about Virginia law, the TAG and STAP Programs' operation, and *Locke*.

1. Misstatements of Virginia law

The petition misstates Virginia law restricting public funding for programs in religious training or theological education.

First, the petition misstates that there is "a direct connection" between Article VIII, § 11 and the "Blaine Amendment" that was proposed to the U.S. Constitution in 1875. Pet. at 21, 25–26. Nothing connects the two at all.

Second, the petition also misstates that Article VIII, § 11 lacks a "historic and substantial" basis. Pet at 4. Virginia's Founding-era experience provided "[p]erhaps the most famous example" supporting the historic State interest against funding religious vocational training. *Locke*, 540 U.S. at 722 n.6. Article VIII, § 11 traces to that Founding-era experience. REPORT OF THE COMM'N ON CONSTITUTIONAL REVISION 274 (1969); *see also* Va. Const. art. III, § 11 (1830); An Act for Establishing Religious Freedom, ch. 34 (Oct. 17, 1785), *reprinted in* 12 William Waller Hening, STATUTES AT LARGE 84 (1823).

Third, the petition, throughout, mischaracterizes Virginia's funding restriction as a form of religious discrimination or a religiosity standard. *E.g.*, Pet. at 1, 3–6, 13, 16–18, 27–28, 36. Instead, the relevant Virginia constitutional and statutory

provisions restrict funding for "religious training or theological education." Va. Const. art. VIII, § 11; Va. Code §§ 23.1-610(A), -628(A), -631(C). The Supreme Court of Virginia has authoritatively defined this as a restriction on public funding to "educat[e] students for religious vocations." *Lynn*, 260 Va. at 624–25. This tracks "the historic and substantial state interest" in "the denial of funding for vocational religious instruction." *Locke*, 540 U.S. at 725. The petition's statements to the contrary are inaccurate.

Fourth, the petition misstates that Article VIII, § 11's "drafters meant" for it to "avoid 'weakening the wall of separation between church and state . . . erected in'" only two constitutional provisions adopted in 1902—and no others. Pet. at 25–26 (omission in original) (quoting REPORT OF THE COMM'N ON CONSTITUTIONAL REVISION, *supra*, at 274). Insofar as either of those provisions would have restricted public funding for grants used at religiously-affiliated institutions of higher education, *cf.* Va. Const. art. IV, § 67 & art. IX, § 141 (1902); Va. Const. art. IV, § 16 & art. VIII, § 10. Article VIII, § 11 displaced "restrictions which might otherwise apply because of" those provisions and made them "inapposite," *Miller* v. *Ayres*, 213 Va. 251, 261 (1972).

Fifth, the petition misstates that Article IV, § 16—a provision that is inapposite to this case—is "root[ed] in Blaine's anti-Catholic bigotry." Pet at 25. While "two Catholic charities" were mentioned in the 1901 debates on the proposed limitation on public appropriations, Pet. at 25, so were "various institutions that [were] organized by the Protestant denominations," 1 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA HELD IN THE CITY OF RICHMOND JUNE 12, 1902 TO JUNE 26, 1902, at 794–96, 804–05

(1906) [hereafter DEBATES]. The provision's "main advocate" was not targeting Catholic institutions, *cf.* Pet. at 25, and "den[ied] it emphatically," DEBATES, *supra*, at 805. The provision was meant to address "all of the denominations," DEBATES, *supra*, at 805, as its adopted text reflects, Va. Const. art. IV, § 67 (1902); Va. Const. art. IV, § 16.

2. Misstatements related to the TAG Program

The petition also misstates fact and law pertaining to SCHEV's administration of the TAG Program.

First, the petition misstates that CIP Code 38-series and 39-series programs are "materially indistinguishable" and "inherently" and "equally religious." Pet. at 8–10, 19. The petition selectively quotes from the definitions of CIP Code 38-series programs and 39-series programs. Pet. at 8. The full definition of CIP Code-38 series programs is "[i]nstructional programs that focus on the logical inquiry, philosophical analysis, and the academic study of organized systems of belief and religious practices." *Detail for CIP Code 38*, NCES, perma.cc/ESD9-LZTZ. The full definition of CIP Code-39 series programs is "[i]instructional programs that focus on the intramural study of theology and that prepare individuals for the professional practice of religious vocations." *Detail for CIP Code 39*, NCES, *supra.* Petitioners conveniently ignored that CIP Code-39 series majors expressly prepare students "for the professional practice of religious vocations." *Ibid.* That is a material distinction that tracks "the denial of funding for vocational religious instruction." *Locke*, 540 U.S. at 725.

Second, the petition omits significant portions of the descriptions of certain majors in an attempt to show that 38-series major and 39-series majors are "indistinguishable." Pet. at 9. For instance, it gives a truncated description of a TAG-eligible Code 38.0203 program titled Christian Studies, Pet. at 9, when the actual definition is significantly broader. *Detail for CIP Code 38.0203*, NCES, perma.cc/K4V9-MWZ9.

The same is true when the petition selectively quotes the definition of the TAG-ineligible Code 39.0201 program titled Bible/Biblical Studies. That program also focuses on the "Jewish Bible" in addition to the Christian Bible and states that it "[m]ay include preparation for applying these studies in various religious vocations." *Detail for CIP Code 39.0201*, NCES, perma.cc/89Z9-V3VC. No reasonable observer would believe that these two programs are "materially indistinguishable."

One CIP Code 39-series that aptly demonstrates the differences between the programs eligible and ineligible for TAG is the Divinity/Ministry program designated as CIP Code 39.0602. The definition of that program is "[a] program that prepares individuals for ordination as ministers or priests in any of the Christian religious traditions." *Detail for CIP Code 39.0602*, NCES, perma.cc/TP85-XYUZ. There is a similar program for Rabbinical Studies, as well as one for "preparation for religious vocations in faiths other than Christianity and Judaism." *Detail for CIP Code 39.0605*, NCES, perma.cc/KS9S-L8UU; *Detail for CIP Code 39.0699*, NCES, perma.cc/87BT-4ZYA.

Third, the petition also misstates that the TAG program's reference to CIP Codes amounts to "government-imposed religious criteria." Pet. at 19,

28. These are not religious criteria, *Locke*, 540 U.S. at 725, and the institutions themselves assign the CIP Codes to their programs, *e.g.*, LIBERTY UNIVERSITY ACADEMIC PROGRAMS 9, *supra*.

Fourth, the petition misstates that funding for CIP Code 38-series programs, but not CIP Code 39-series programs, favors "mainline denominations" over "evangelical" ones. Pet. at 28. CIP Code distinctions are not made with any favor or disfavor toward any program or institution based on "mainline" or "evangelical" status. *Detail for CIP Code 38*, NCES, *supra*; *Detail for CIP Code 39*, NCES, *supra*. Moreover, CIP Code 38-series and 39-series programs are offered at "mainline," "evangelical," and other institutions. *Search Degree Inventory*, RESEARCH.SCHEV.EDU, (subheading "CIP Search," entering "38" in the field for "Search by CIP Code" and clicking "Generate"), tinyurl.com/y2nvyh48; *Search Degree Inventory*, RESEARCH.SCHEV.EDU, *supra* (subheading "CIP Search," entering "39" in the field for "Search by CIP Code" and clicking "Generate").

Fifth, as to the allowance for funding of a double major in one eligible and one ineligible program in a semester where the student must take more credits in the ineligible major due to "circumstances beyond the control of the student," Va. Admin. Code § 40-71-10, the petition misstates that "[n]o one knows when this exception applies[,]" Pet. at 26. The exception applies "when it is impossible to select the appropriate proportion of courses as a result of the alignment of the institution's course offerings, or the available times for the courses offered, in that particular semester." Resp. Br. 54–55, *Johnson v. Fleming*, No. 26-1437, Doc. 45 (4th Cir. July 10, 2026), And this non-substantive, per-semester accommodation does not "invite[s] the government to decide

which reasons for [funding religious study] are worthy of solicitude." Pet. at 26 (second alteration in original) (quoting *Fulton v. City of Philadelphia*, 593 U.S. 522, 537 (2021)).

Sixth, the petition misstates that "[m]ost undergraduates receive $5,250 annually." Pet. at 6. Nothing in the record supports that. While $5,250 is the maximum semester award, "actual awards will be based on available funding and projected number of recipients." Va. Tuition Assistance Grant Program, STATE COUNCIL OF HIGHER EDUC. FOR VA., perma.cc/PN4N-VM45 (VTAG Summary).

Seventh, the petition also is incorrect when it states that "[t]o access the funding, students must satisfy two primary requirements." Pet. at 7. There are actually five requirements, including being a domiciliary resident of Virginia, compliance with the federal selective service registration requirement, and "not participating in the Virginia Women's Institute for Leadership in Mary Baldwin College." 8 VAC § 40-71-40(C)(1)–(5).

Eighth, the petition notes that CIP Code 39-series majors that are not funded include "Bible/Biblical Studies, Religious Education, Religious/Sacred Music, and Pastoral Studies/Counseling." Pet. at 7. But that partial list omits others, including "Rabbinical Studies," "Talmudic Studies," "Youth Ministry," and "Divinity/Ministry (BD, M.Div.)." *Detail for CIP Code* 39, NCES, *supra*.

Ninth, the petition further states that "NCES never intended the CIP Code to be 'a regulatory device' or to serve as 'a prescriptive list of officially recognized . . . programs.'" Pet. at 8. But Petitioners neglect to explain that "[t]he CIP is the accepted federal government standard on instructional program classifications and is used in a variety of

education information surveys and databases." *Introduction to the Classification of Instructional Program: 2020 Edition (CIP-2020)* at 1, NCES, perma.cc.549R-8G2C. In addition, "[t]he CIP is used by state agencies, national associations, academic institutions, and employment counseling services for collecting, reporting, and analyzing instructional program data." *Ibid.* Indeed, Liberty University uses the CIP Code to categorize its Academic Programs. LIBERTY UNIVERSITY ACADEMIC PROGRAMS, *supra*. Moreover, Liberty University explains that "CIP codes are used by the U.S. Department of Education to identify and standardize academic programs." *Important Federal Student Loan Changes Effective July 1, 2026*, LIBERTY UNIVERSITY, perma.cc/7S23-VNPL.

Tenth, the petition discusses a Code 38-series Religious Studies program at Virginia Union University, Pet. at 8, but the information Petitioners rely on is from an outdated catalog (2022-2024), and they omit words that change the meaning. Pet. at 8. The full mission statement for this program states that "[t]he mission of Religious Studies is to prepare persons *for graduate work* in the discipline of religion and ministerial studies as well as those who seek to pursue religious vocations (i.e. youth ministers, pastoral assistants, associate ministers, etc.)." *Course Catalog – Religious Studies Major* at 49, VA. UNION UNIV., perma.cc/PNM2-3YYA (emphasis added). In any event, this description no longer exists in the 2026-2027 VUU Catalog. *Course Catalog – Religious Studies Major* at 159, VA. UNION UNIV., perma.cc/HGM7-PE2Q. Instead, it states that the mission of the program is to prepare students "to take their place in the global society as scholars, leaders, and builders of the future in religious institutions, the

academy or whatever other area of society within which they choose to function." *Ibid.* It is unclear why Petitioner chose to rely on an outdated description when more recent ones are available.

Eleventh, the petition references a Music program at Bluefield University, and states that it is a Code 38-series program. Pet. at 8–9. This is incorrect; instead, this program is a 50-series program. *Search Degree Inventory*, RESEARCH. SCHEV.EDU (subheading "Institution," entering "Bluefield University" in the field for "Select an institution" and clicking "Generate"), tinyurl.com/y2nvyh48.

Twelfth, the petition also misstates the extent to which the course requirements for Code 38-series majors and Code 39-series majors overlap. Pet. at 9–10. It claims that the Biblical Studies major and the Applied Ministry Major both require the same five courses. But the petition fails to mention that all of these courses are part of the General Education/Foundation Skills Requirements and are not requirements for the Majors. In fact, virtually all undergraduate majors at Liberty, including mathematics, Spanish, and biochemistry and molecular biology, *require these same five courses.* Course Catalog – Mathematics, LIBERTY UNIV., perma.cc/5C4C-GPCR; Course Catalog – Spanish, LIBERTY UNIV., perma.cc/7N8G-7GQ9; Course Catalog – Biochemistry & Molecular Biology, LIBERTY UNIV., perma.cc/8PMX-M6R3. Thus, the overlap identified by the petition does not support Petitioners' argument.

Thirteenth, the petition claims that the data shows that most Liberty graduates with a Code-39 series major designation of "Theology and Religious Vocations" reported secular rather than religious

employment a year later. Pet. at 10. Setting aside the fact that the link to the data provided by the petition does not work, the petition omits an important qualification: there is not a separate industry code that covers all entities operated by religious organizations. NAICS Code Description, NAICS Assoc., https://perma.cc/K449-4LVY. Instead, for instance, "[e]stablishments operated by religious organizations primarily engaged in health and social assistance for individuals are classified in Section 62, Health Care and Social Assistance." *Ibid*. And "[s]chools, colleges, or universities operated by religious organizations are classified in Sector 61, Educational Services." *Ibid*.

3. Misstatements related to the STAP program

In addition, the petition misstates facts and law pertaining to administration of the STAP program.

First, the petition, puzzlingly, makes several inconsistent misstatements as to the standards governing the STAP program. At one point, it misstates that "all religious majors are forbidden" funding through the STAP program. Pet. at 12. At others, it misstates that the program's restriction depends on whether the degree is "secular enough," "uses less religious terminology," or "place[s] less emphasis on evangelization." Pet. at 26–28. And still elsewhere, the petition misstates that the STAP program is a "standardless regime" that "turns on officials' ad hoc decisions" or their "unbridled discretion." Pet. at 12–13, 20, 27–28.

Each of these misstatements ignores that the STAP program is subject to constitutional and statutory restrictions on funding for programs in "religious training or theological education." Va.

Const. art. VIII, § 11; Va. Code § 23.1-610(A); *Lynn*, 260 Va. at 624–25. Shorthand variants of that formulation in a command policy, an ineligibility letter, or an email do not alter the "plain import of" Virginia law. Pet. at 12. Nor does the denial decision for a single applicant who refused to acknowledge that funding could not be used for degrees in "religious training or theological education." JA150–151, *Johnson*, No. 26-1437, Doc. 34.

Second, the petition misstates that "Virginia disclosed two factors below" for the STAP program's funding restriction but "backtracked from the first." Pet. at 12. This is a misstatement of Respondents' briefing, which explained the relevant constitutional and statutory restrictions and Supreme Court of Virginia authority, "consistent with *[Locke]*'s recognition that States may deny grant funding for religious vocational training programs." Resp. Br. 8, 34–35, *Johnson*, No. 26-1437, Doc. 45.

Third, compounding these misstatements, the petition further misstates that the STAP program "invite[s] the government to decide which reasons for [funding religious study] are worthy of solicitude," Pet. at 26–27 (second alteration in original) (quoting *Fulton*, 593 U.S. at 537), and excessively entangles itself with religion, Pet. at 28.

Fourth, the petition incorrectly states that STAP "provides Guard members between $4,500 and $10,000 a semester, depending on participation and funding." Pet. at 11. But the source that Petitioners rely on for this statement provides different information: the "funding cap for Spring 2026 is set at up to $4,500, reduced from the previous semester's $10,000 cap due to a surge in the program's enrollment." Pet. at 11. And the "Fall 26 Semester Cap Amount Per Student Has Been Set at $5000.00."

National Guard STAP Summary, https://perma.cc/2MT5-UC6J (all caps omitted).

4. Misstatements related to *Locke*

The petition also misstates facts and law pertaining to this Court's decision in *Locke*.

First, the petition misstates that Washington's eligibility distinctions differed materially from those in the TAG and STAP programs. Pet. at 3–5, 18–19. In *Locke*, this Court upheld Washington's distinctions between ineligible degrees "training for religious professions" and eligible degrees—including those in the secular study of religion—"training for secular professions." *Locke*, 540 U.S. at 721–22, 725; *cf.* Davey's Br. *17–18, *35, *75–76, *in Locke* v. *Davey*, No. 20-1315 (U.S.), *available at* 2003 U.S. S. Ct. Briefs LEXIS 757. That is the same distinction that Virginia's programs draw.

Second, the petition misstates that *Locke*'s rationale only concerned public funding for "the clergy." Pet. at 20–21 (quoting 540 U.S. at 723). *Locke*'s "focus" was "on vocational religious degrees." *Carson* v. *Makin*, 596 U.S. 767, 788–89 (2022); *Locke*, 540 U.S. at 725.

Third, the petition misstates that *Locke*'s rationale was based on Davey's unequivocal plans to use his scholarship-ineligible degree to become a "church pastor." Pet, at 20–21 (quoting 540 U.S. at 723). Washington's ineligibility determinations were not based on the student's "plans" but, instead, on the "type of instruction" that the student would receive. Wash.'s Br. *41 n.7, *in Davey*, No. 02-1315, *available at* 2003 U.S. S. Ct. Briefs LEXIS 613. The "focus" was "on vocational religious degrees." *Carson*, 596 U.S. at 788–89; *Locke*, 540 U.S. at 725.

REASONS FOR DENYING THE WRIT

I. The Petition is premature and does not present the kind of extraordinary circumstances that could warrant certiorari before judgment.

The petition should be denied because Petitioners have failed to show the exigent circumstances that warrant the extraordinary relief of certiorari before judgment. A grant of certiorari before judgment is an "extremely rare occurrence." *Coleman* v. *Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). Such a grant is appropriate "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination" in the Supreme Court. Sup. Ct. R. 11. Petitioners' burden is "heavier than if petitioner[s] were seeking review after the court of appeals had issued a judgment." 23 James Wm. Moore et al., Moore's Federal Practice – Civil § 511.02 (1997). Petitioners have not satisfied this "very demanding standard" for at least three reasons. *Mount Soledad Mem'l Ass'n* v. *Trunk*, 573 U.S. 954 (2014) (Alito, J., statement respecting the denial or certiorari before judgment).

A. An immediate determination of this case is unnecessary because oral argument in the Fourth Circuit is tentatively scheduled for January 2027

Petitioners must demonstrate that the question presented in their petition "require[s] immediate determination." Pet. 37–38. Rule 11 typically requires a matter of exceptional urgency. Petitioners fail to

articulate why this case must be heard on an emergency basis.

Petitioners' only attempt to address that issue is arguing that granting certiorari before judgment is appropriate here because "the Fourth Circuit has not heeded [their] pleas for relief" by denying their motion for an injunction pending appeal and deferring their motion to accelerate the appeal. Pet. at 38. The implication is that the Fourth Circuit is not proceeding quickly enough for Petitioners' liking.

But the Fourth Circuit is in fact "proceed[ing] expeditiously [with] decid[ing] this case." *United States* v. *Clinton*, 524 U.S. 912 (1998). Oral argument is tentatively calendared in the Fourth Circuit on January 26–27, 2027. *Johnson* v. *Fleming*, No. 26-1437, Doc. 73 (4th Cir. Oct. 26, 2026). In fact, the Fourth Circuit originally sought to schedule oral argument in December 2026, *Johnson*, No. 26-1437, Doc. 48 (4th Cir. Sept. 8, 2026), but deferred until January, possibly because counsel for Petitioners was only available for one of the four potential oral arguments dates. *Johnson*, No. 26-1437, Doc. 57 (4th Cir. Sept. 15, 2026). Regardless, Petitioners would likely be able to seek Supreme Court review next Term, if necessary. Petitioners fail to explain why that timeline will not suffice.

This case fails to qualify as an emergency. It plainly does not involve a time-sensitive matter any more so than the many other petitions for certiorari this Court considers. To the contrary, it challenges a precedent that has been on the books for over two decades. Accordingly, Petitioners fail to meet the Rule 11 requirement that an immediate determination is

necessary. This deficiency alone counsels for denial of their petition.

B. This petition is particularly unsuited for certiorari before judgment given its undeveloped and disputed factual record

Rule 11's strict standard permits the Court to have the "benefit of developed arguments on both sides and lower court opinions squarely addressing the question" at issue. *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992). Departure from normal procedure risks considering cases without the full record, which can lead to "untoward practical ramifications not foreseen at the time of the decision," such as "framing broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances." *Illinois* v. *Gates*, 462 U.S. 213, 224 (1983). *See also Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 552, n.3 (1990) ("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion.").

This case runs afoul of the Court's preference for a developed record. In denying the motion for preliminary injunction, the district court emphasized that it was ruling based on a limited evidentiary record. That record was necessarily sparse; it was developed in a few short weeks without the benefit of discovery. Indeed, the district court remarked on the factual record on at least four instances in its Memorandum Opinion, calling it "limited," Appx. 11a, "underdeveloped," *id.* at 23a, and referencing "the more limited factual depiction of STAP presently available," *id.* at 24a, while urging "further

development of the factual record," *id.* at 26a. The district court even refused to grant Defendants' motion to dismiss as to the STAP claim "absent additional information." *Id.* at 24a.

Moreover, the petition is premised on numerous misstatements regarding the trial record, which is reason enough to deny review. These misstatements are catalogued in the Counterstatement, Section E, *supra*. These hotly contested factual disputes date to the beginning of the case and have been showcased in the Fourth Circuit briefing, which may have led to that court declining to decide the case on the briefs. Respondents below described Petitioners' repeated mischaracterizations: "Virginia admits things it doesn't admit," Virginia concedes things it doesn't concede," and "Virginia doesn't dispute things it does dispute." *Johnson*, No. 26-1437, Doc. 32 (4th Cir. May 29, 2026). Simply put, the record here is far too messy for this case to be a suitable vehicle to re-examine *Locke*.

C. The pending petition for certiorari in *Hall* v. *Fleming* counsels against, not for, granting certiorari in this case

Petitioners also suggest that because there is a petition pending in a similar case (*Hall* v. *Fleming*, No. 26-193), that supports granting certiorari before judgment. Pet. at 37. But the opposite is true for at least two reasons.

First, all things being equal, this Court rightly prefers a case with a developed factual record that has already been adjudicated in a court of appeals rather than one that has not. For instance, this Court denied certiorari before judgment when—as here—another

case presented the same questions in the context of an ordinary post-judgment petition for writ of certiorari. *See Pro-Football, Inc.* v. *Blackhorse*, 137 S. Ct. 44 (2016) (denying certiorari before judgment); *Lee* v. *Tam*, 137 S. Ct. 30 (2016) (granting certiorari).

Second, this case differs from *Hall* in at least two important ways. This case involves an additional—and different—program that is not at issue in *Hall*: STAP. And the district court described the claims regarding STAP as factually limited and denied Respondents' motion to dismiss pending further factual development. Pet. App. 24a. Combining the two cases risks confounding the issues. Even Petitioners consistently argued below in both courts that *Hall* is "materially different" from this case and "doesn't control." Appellants' Opening Brief, *Johnson*, No. 26-1437, Doc. 33 at 40 (4th Cir. June 1, 2026). The Fourth Circuit is best positioned to first weigh the fact-intensive issues.

In addition, the petitioners here and the petitioners in *Hall* disagree fundamentally on the core issue in both petitions—whether *Locke* applies to their particular facts. *Hall* says yes, but Petitioners here say no. Pet. at 18–22; Pet. for Cert. at 9–28, *Hall*, No. 26-193. In fact, Petitioners have consistently and extensively argued in both the district court and the Fourth Circuit that *Locke* does not control and is distinguishable. *See* Appellants' Opening Brief, *Johnson*, No. 26-1437, Doc. 33 at 30–40 (4th Cir. June 1, 2026); Plaintiffs' Brief in Support of Motion for Preliminary Injunction, *Johnson*, Case No. 3:25-cv-00407, Doc. 23 at 15 (E.D. Va. June 27, 2025). And despite never having called for *Locke* to be overruled below, Petitioners inexplicably do so in their petition

for the first time. But they make no effort at all to show why this case should be vehicle for overruling *Locke*.

This case is not a companion case to *Hall* simply because it may implicate a related legal question. This Court has rejected similar requests to bypass the ordinary appellate process on such bare grounds. *See*, *e.g.*, *All Am. Check Cashing* v. *CFPB*, 140 S. Ct. 646 (2019) (rejecting petition for writ of certiorari before judgment despite petitioner's claim that the case overlapped with the questions presented by another case pending before the Supreme Court); *Mikulski* v. *Centerior Energy Corp.*, 544 U.S. 992 (2005) (rejecting petition for writ of certiorari before judgment as a companion case to another then-pending case, despite the cases originating in the same circuit).

II. The district court's ruling was correct

The district court correctly denied Petitioners' motion for a preliminary injunction. Its reliance on *Locke* was justified. Like the plaintiff in *Locke*, Petitioners here are undergraduate students at a private Christian college who chose a major associated with a possible career in the ministry. *Id.* Like Washington's statute, the two Virginia programs at issue here allow students to attend religious institutions and take religious courses, so long as the funding does not go toward an ineligible major—a major that prepares an individual for a career in ministry. *Id.*

In fact, the Virginia programs are *more* inclusive of religion than the scholarship program in *Locke*, because students may pursue a double major that includes an otherwise ineligible CIP Code 39 major, so

long as the student does not take more classes in the ineligible major than those taken for the eligible major during any given semester. 8 Va. Admin. Code § 40-71-10 (defining "Eligible Program"). Both Petitioners and the *Locke* plaintiff chose majors that rendered them ineligible to receive a tuition grant. Pet. App. 4a–11a. And both Petitioners and the *Locke* plaintiff challenged their respective state statutes that prohibited the use of tuition assistance grants toward religious vocational degrees as violating the Free Exercise Clause. *Ibid*.

In *Locke*, this Court concluded that such programs do not violate the Free Exercise Clause. *Supra* at 725. And unremarkably, the district court reached the same conclusion. Pet. App. 18a. Virginia has chosen to not fund a category of instruction. And this Court has acknowledged that Virginia has a historic and substantial state interest in not funding the clergy.

III. Contrary to Petitioners' assertions, *Locke* has not been undermined by recent case law

Locke v. *Davey* is still good law—its justifications remain valid, and it has not been undermined by this Court's recent Free Exercise cases.

A. The *Locke* decision and Washington's scholarship program

In *Locke*, the State of Washington established a scholarship program to help gifted students with postsecondary education expenses. 540 U.S. at 715. Students could use the scholarship at private religious institutions, but not to pursue a devotional-theology degree. *Id.* at 716. Davey sought to use the scholarship for a devotional-theology degree excluded

under the scholarship program and filed suit when that request was denied. *Id.* at 717.

This Court held that the scholarship program did not violate the Free Exercise Clause of the First Amendment. *Id.* at 715. The law did not seek to suppress or sanction religious practices, nor deny ministers the right to participate in the political community. *Id.* at 720. The scholarship program did not force students to choose between their religious beliefs and receiving a government benefit. *Id.* at 720. Indeed, the program was inclusive, rather than hostile, to religion because students were permitted to use the funds at religious institutions and take devotional theology courses. *Id.* at 724–25.

Instead, the State "merely chose[] not to fund a distinct category of instruction." *Id.* at 721. The Court emphasized that "[t]raining someone to lead a congregation is an essentially religious endeavor." *Id.* at 721.

The Court observed that there was a deep historical tradition against funding the clergy. At the time of the founding, many State constitutions prohibited "using tax funds to support the ministry." *Id.* at 723. Indeed, some of the most prominent public outcry against taxpayer support for the ministry occurred in Virginia. *Id.* at 722 & n.6; *infra* at 31–34. "That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforce[d] [the Court's] conclusion that religious instruction is of a different ilk." *Id.* at 723 (emphasis in original).

In light of the "historic and substantial state interest" against funding the ministry, the Court

concluded that Washington's "denial of funding for vocational religious instruction" is not "inherently constitutionally suspect." *Id.* at 725.

B. The Court's decisions in *Trinity Lutheran*, *Espinoza*, and *Carson* have consistently reaffirmed *Locke*

This Court's recent Free Exercise Clause decisions have not undermined *Locke*. To the contrary, the Court has consistently offered two principal justifications for *Locke*: (1) States can choose not to fund a category of instruction, and (2) opposition to funding the ministry lays at the historical core of the Religion Clauses. These justifications remain valid today.

In *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017), the Court considered a Free Exercise challenge to Missouri Department of Natural Resource's competitive grant program for schools to purchase recycled rubber playground surfaces. 582 U.S. at 453–54. Because the Department had an express policy to deny grants to applicants owned or controlled by religious entities, based on the State's constitution, the Department denied Trinity Lutheran's grant application. *Id.* at 455–56. The Court concluded that the grant program violated the Free Exercise Clause because it denied a public benefit based solely on the religious status of the recipient. *Id.* at 462–63.

The Court distinguished the grant program at issue from scholarship program in *Locke*. First, the Court emphasized that, in *Locke*, "the State had 'merely chosen not to fund a distinct category of instruction.'" *Id.* at 464 (quoting *Locke*, 540 U.S. at

721). There, the plaintiff was denied funds because he planned to use them "to prepare for the ministry." *Id.* In contrast, Trinity Lutheran was denied funds solely based on its religious status. *Id.* Second, while opposition to funding the ministry "lay at the historic core of the Religion Clauses, there was no similar history for a grant program for recycled rubber playground surfaces. *Id.* at 465. Additionally, the scholarship program in *Locke* "went 'a long way toward including religion in its benefits'" because students could use the funds at religious schools and take devotional theology courses, whereas the program at issue in *Trinity Lutheran* categorically excluded religious schools. *Id.* (quoting *Locke*, 540 U.S. at 724).

In *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020), the Court considered a Free Exercise challenge to Montana's program that granted tax credits to taxpayers who donate to organizations that award scholarships for private school tuition. 591 U.S. at 468–69. The Montana Department of Revenue promulgated "Rule 1," which prohibited the use of scholarships at religious schools, consistent with the no-aid provision of the Montana Constitution. *Id.* at 470. The Court concluded that the scholarship program violated the Free Exercise Clause because it barred religious schools from receiving a public benefit based solely on their religious status. *Id.* at 476.

The Court again distinguished *Locke*, based on the same justifications advanced in *Trinity Lutheran*. First, in *Locke*, the State chose "not to fund a distinct category of instruction"—training ministers to lead a congregation. *Id.* at 479 (internal quotation marks

omitted). Aside from that "narrow restriction," students could use the scholarship funds at religious schools. *Id.* at 480. In contrast, the Montana no-aid provision barred all funding to religious schools based solely on religious status, making schools and parents choose between receiving a public benefit and their religious beliefs. *Id.* "Second, *Locke* invoked a 'historic and substantial' state interest in not funding the training of clergy," *id.* (quoting 540 U.S. at 725), which "was a central subject of founding-era debates," *id.* No similar "historic and substantial" tradition justified Montana's disqualification of religious schools from receiving government aid. *Id.*

Most recently, in *Carson* v. *Makin*, 596 U.S. 767 (2022), the Court considered a Free Exercise challenge to Maine's tuition assistance program for parents of students in school districts that do not operate a secondary school. 596 U.S. at 771–72. Under the program, the school district would transmit the tuition assistance payment to the public or private school of the parent's choice. *Id.* at 773. But by statute, only nonsectarian schools could receive payments. *Id.* at 774–75. Based on the "unremarkable principles" advanced in *Trinity Lutheran* and *Espinoza*, the Court concluded that the program violated the Free Exercise Clause because it denied religious schools from receiving a public benefit based solely on their religious status. *Id.* at 780.

Once again, the Court distinguished *Locke* based on the same justifications articulated in *Trinity Lutheran* and *Espinoza*. First, the program in *Locke* declined to fund a particular category of instruction—"the essentially religious endeavor" of training ministers. *Id.* at 788. Second, *Locke* turned on a

"historic and substantial state interest" against using taxpayer monies to fund the clergy. *Id.* And as explained in *Espinoza*, there is no comparable "historic and substantial tradition" against providing aid to religious schools. *Id.*

The Court emphasized *Locke*'s "narrow focus": it authorizes States to exclude funding for "vocational religious degrees." *Id.* at 789. That is precisely what Virginia has done with the programs at issue.

C. Petitioners' claimed circuit split is illusory

Petitioners attempt to manufacture a circuit split in invoking the Tenth Circuit's decision in *Colorado Christian University* v. *Weaver*, 534 F.3d 1245 (10th Cir. 2008). The petition mischaracterizes *Colorado Christian* as "similar" to this one and speculates that the Tenth Circuit "would not apply *Locke*" if the TAG and STAP programs were before it. Pet. at 22–23. But the facts and the law at issue in *Colorado Christian* are materially different from those here.

Under the challenged Colorado program, scholarships could not be used at any "pervasively sectarian" institution of higher education. 534 F.3d at 1250 (quoting Colo. Rev. Stat. §§ 23-3.5-102(3)(b), -3.3-101(3)(d), -3.7-102(3)(f), -18-102(9)). The focus was on the institution, not the degree. And the "pervasive[ness]" of the institution's "sectarian[ism]" was determined from an "intrusive" six-factor inquiry into the affiliations, beliefs, practices, activities, and funding of the institution, its leadership, its faculty, and its students. *Id.* at 1250–51, 1256. There is nothing like that in the TAG and STAP programs, in which religious vocational training programs are

ineligible consistent with *Locke*. Thus, the petition's assertion that there is a "divide" between the district court's decision and the Tenth Circuit's is incorrect. Pet. at 23.

Curiously, Petitioners fail to mention that the petition for certiorari in *Hall* v. *Fleming* does not even mention *Colorado Christian*, let alone frame it as a circuit split. Pet. for Cert., *Hall*, No. 26-193 (Aug. 11, 2026). If *Colorado Christian* was truly in conflict with the district court's decision here or the Fourth Circuit's decision in *Hall*, then the petitioners in *Hall* would have certainly said so. The fact that they did not do so undercuts Petitioners' claim here.

IV. This case is not the proper vehicle to review *Locke* for yet another reason: Virginia's rich history against funding the ministry

This Court has repeatedly recognized Virginia's longstanding tradition against funding the ministry. *See, e.g., Locke*, 540 U.S. at 722 & n.6; *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 11–13 (1947). In *Everson*, this Court noted that "Virginia's resistance to taxation for church support was crystallized in the famous 'Parsons' Cause' argued by Patrick Henry in 1763." *Id*. at 11 n.10. Indeed, in *Locke*, the Court noted that "the most famous example of public backlash" against using taxpayer funds to support the clergy occurred in Virginia. 540 U.S. at 722 & n.6. In 1785, the Virginia General Assembly debated "A Bill Establishing a Provision for Teachers of the Christian Religion," which would have required citizens to pay a tax, the proceeds of which would be used to direct payments to Christian churches and give undirected monies to the public treasury for seminaries of learning. *Locke*, 540

U.S. at 722 n.6. James Madison penned his famous Memorial and Remonstrance, fiercely arguing against the bill. In it, he emphasized that "no person, either believer or non-believer, should be taxed to support a religious institution of any kind." *Everson*, 330 U.S. at 12. The importance and influence of Madison's Remonstrance have not gone unnoticed by this Court. *See Lee* v. *Weisman*, 505 U.S. 577, 589–90 (1992); *Flast* v. *Cohen*, 392 U.S. 83, 103–04 (1968). Madison was not the sole opponent. Several other groups, including religious groups, spoke out against it. *See Everson,* 330 U.S. at 12 n.12. After significant public outcry, the bill was defeated.

Instead, in 1786, the General Assembly passed Thomas Jefferson's "Bill for Establishing Religious Freedom," which prohibited religious assessments. *Locke*, 540 U.S. at 722 n.6. It provided that "no man shall be compelled to . . . support *any* religious worship, place, or ministry *whatsoever*." *Id*. (emphasis added). The Act served as the model for Virginia's own Constitution, which prohibits assessments "for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please." Va. Const. art. I, § 16. As this Court has previously said, the Act laid the foundation for the First Amendment's protections against governmental intrusion on religious liberty. *Everson*, 330 U.S. at 13; *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878). Jefferson's Act remains codified today, and the rights asserted therein remain the policy of Virginia. Va. Code §§ 57-1, 57-2. Historians have described Jefferson's Act as having "influenced the American theories of Church-State separation and religious freedom more than any other historical factor." 1

Anson Phelps Stokes, CHURCH AND STATE IN THE UNITED STATES 366 (1950); *see also* Martin E. Marty, *The Virginia Statute Two Hundred Years Later*, in THE VIRGINIA STATUTE OF RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY 1, 1 (Merrill D. Peterson & Robert C. Vaughan eds., 1988) (describing Jefferson's Act as "the most decisive element in an epochal shift in the Western world's approach to relations between civil and religious spheres of life").

When interpreting the First Amendment's Religion Clauses, this Court looks to "historical practices and understandings." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022). "[T]he line that courts and governments must draw between the permissible and the impermissible" must "accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers." *Town of Greece* v. *Galloway*, 572 U.S. 565, 577 (2014) (internal quotation marks omitted). This was no less true in *Locke*, where the Court examined "the historic and substantial state interest at issue" and concluded there was nothing in Washington's own history that "suggests animus towards religion." 540 U.S. at 725. And more recently, *Carson* v. *Makin*, 596 U.S. 767 (2022), reaffirmed that "*Locke*'s reasoning expressly turned on what is identified as the historic and substantial state interest" against using "taxpayer funds to support church leaders." *Id.* at 788 (internal quotation marks omitted).

The state interest that *Locke* relied on to uphold Washington's law is not only more robust in Virginia; it originated in substantial part in Virginia. Virginia's state interest as explained *supra* is

extensive and predates the federal Constitution in sharp contrast to Washington's state interest in *Locke*. And there can be no serious argument that Virginia's historic tradition is animated by religious hostility given that the entire purpose of Madison's Remonstrance and Jefferson's Act was to *protect* religion. Thus, this case presents a stronger historical justification for the rule enunciated in *Locke* than even *Locke* did.

That alone would be reason alone to deny the petition. Overruling a decision that has withstood multiple assaults over the last twenty years is fraught enough as it is. But doing so on facts—and history—that differ from those that led to the original decision would require significantly more than simply declaring *Locke* as overruled. It would require grappling with the extensive Virginia-specific anti-establishment history and determining whether that history, rather than the more meager history in *Locke*, justifies the continuation of the *Locke* rule.

And even if the Court were inclined to do so, Virginia's history presents another challenge. It is the direct lineal precursor for the Religion Clauses in the First Amendment, and thus is deeply intertwined with the history from which the Religion Clauses emerged. Untangling such doctrinal strands does not make for a clean vehicle to overrule *Locke*. Indeed, it risks unnecessarily muddling the evolving jurisprudence in this area.

Given Virginia's "historic and substantial" state interest against funding the ministry, this case is not the appropriate vehicle for deciding the question presented.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

TILLMAN J. BRECKENRIDGE
Solicitor General
Counsel of Record
OFFICE OF THE ATTORNEY
GENERAL OF VIRGINIA
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-1252
SolicitorGeneral@oag.state.va.us