Nos. 26-193 & 26-240

In the Supreme Court of the United States

BETHANY M. HALL,

Petitioner,

v.

A. SCOTT FLEMING, DIRECTOR, VIRGINIA STATE COUNCIL OF HIGHER EDUCATION,

Respondent.

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

(For Continuation of Caption, See Inside Cover)

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional provisions, statutes, and rules

Other authorities

INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Locke v. Davey*, 540 U.S. 712 (2004), or amicus, *e.g.*, *Carson v. Makin*, 596 U.S. 767 (2022). The ACLJ is dedicated, *inter alia*, to religious liberty and freedom of speech. ACLJ attorneys represented Joshua Davey from the trial court through the Supreme Court in the *Locke v. Davey* case.

SUMMARY OF ARGUMENT

In the distribution of religion-neutral benefits (here, tuition assistance), the government may not disfavor otherwise eligible recipients solely on the basis of their religious choices. The lower courts' rejection of that norm in these two cases cannot stand and warrants this Court's review. Importantly, the decision in *Locke v. Davey*, 540 U.S. 712 (2004), does not require a contrary result. The fact that lower courts continue to invoke *Locke* for the opposite proposition, as in the cases below, demonstrates the need for this Court to limit or overturn *Locke*.

ARGUMENT

Governments often employ incentives (grants, credits, and deductions) to pursue desired social goods, such as the fostering of charitable works and the education of

[1] Counsel of record for the parties received timely notice of the intent to file this brief, S. Ct. R. 37.2. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

children. That the incentivized activities may involve religious entities or the pursuit of religious goals is not a constitutional problem. *Walz v. Tax Comm'n of NY*, 397 U.S. 664 (1970) (tax exemption included properties dedicated to religious purposes); *Mueller v. Allen*, 463 U.S. 388 (1983) (deduction for education expenses included expenses at private religious schools). What the government may *not* do is discriminatorily exclude otherwise qualified, eligible recipients solely because of their religious choices. This norm follows from much of this Court's jurisprudence.

Two Virginia educational assistance programs are at issue here. The Virginia Tuition Assistance Grant (VTAG) program provides grants to eligible students, *except when those students pursue certain religious degrees*. Meanwhile, the Virginia National Guard State Tuition Assistance Program (VANGSTAP) offers grants to eligible Virginia National Guard members, *except when pursuing degrees in religious training or theological education*. These two programs thus extend benefits to college students for *all* studies *except* when pursuing certain forbidden religious majors.

The lower courts upheld these discriminatory exclusions, declaring themselves bound by this Court's decision in *Locke v. Davey*. This Court should grant review and overrule, or at least limit, the *Locke* decision.

I. IT IS UNCONSTITUTIONAL INVIDIOUSLY TO DISQUALIFY AN OTHERWISE ELIGIBLE RECIPIENT IN A SECULAR BENEFITS PROGRAM SOLELY BECAUSE OF THE RECIPIENT'S RELIGIOUS CHOICES.

Express governmental discrimination, in a secular benefits program, against an otherwise qualified recipient, solely because of that recipient's religious identity, choices, or activities, is presumptively unconstitutional. Yet the courts below approved precisely such discrimination.

The Constitution "forbids hostility" toward "all religions," *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). "State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). The Establishment Clause "commands that . . . [a state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Id.* at 16.

This Court has therefore held that it violates the First Amendment (specifically, the Free Exercise Clause) to target clergy for special political disabilities. *McDaniel v. Paty*, 435 U.S. 618 (1978). This Court has likewise held, in the context of a speech forum, that it violates the First Amendment to exclude an entity because of its religious message, *e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), including when a funding program is at issue, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Similarly, the exclusion of an otherwise eligible recipient from a government grant program, solely because that entity is religious in nature, violates the Free Exercise Clause. *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 582 U.S. 449 (2017). In *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), this Court held that a ban on aid only to "sectarian" schools "turns expressly on religious status and not religious use," *id.* at 477, and thus violates the nondiscrimination norm articulated in *Trinity Lutheran* and "the decades of precedents on which it relied," *Espinoza*, 591 U.S. at 484. And in *Carson v.*

Makin, 596 U.S. 767 (2022), this Court noted that "we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Id.* at 778.

This Court has also held that the Equal Protection Clause commands that "all persons similarly situated should be treated alike," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), and that discrimination triggered by the exercise of a fundamental right – here, religious educational choices – triggers strict scrutiny under the Equal Protection Clause. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications affecting fundamental rights trigger strict scrutiny). *A fortiori*, restrictions that rest on no more than "a bare desire to harm" – or exclude – those who make religious choices are unconstitutional. *Cleburne*, 473 U.S. at 446-47 (citing *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

Thus, a government's posting of a "no religious choices allowed" sign, whether literal or figurative, runs afoul of both the Equal Protection Clause and the religion and speech[2] clauses of the First Amendment. *See also Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (upholding parental right to choose religious schools for their children).

It follows that the selective exclusions challenged here cannot stand. Virginia's selective bans on tuition assistance apply expressly to a student's choice of *religious* or *theological* studies. *Johnson* Pet. at 7, 11-12 (No. 26-240). "A law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (quoted in *Carson*, 596 U.S. at

[2] The standards governing discrimination against religious speech are the same under the Free Speech and the Equal Protection Clauses. *E.g.*, *Carey v. Brown*, 447 U.S. 455, 463 (1980); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 n.4 (1992).

780-81). And here, Virginia's desire to achieve greater separation of church and state does not satisfy strict scrutiny. "[A]n interest in separating church and state more fiercely than the Federal Constitution cannot qualify as compelling in the face of the infringement of free exercise." *Carson*, 596 U.S. at 781 (internal quotation marks, ellipsis, and citations omitted).

A contrary rule would authorize gratuitous hostility against otherwise eligible applicants who make choices guided by their religious beliefs. A state or federal government could expressly disallow charitable contributions deduction for religious organizations. Use of public parks could be free except for religious events. Tours of museums and state capitols could be at discounted rates for all student groups except those attending religious schools. A government transportation agency could allow free (and thus subsidized) use of express lanes by HOV vehicles except for buses carrying children to or from religious schools or churches. Such discrimination, in a land settled by believers seeking religious freedom, would be ahistorical, ironic, and "odious," *Trinity Lutheran*, 582 U.S. at 467.

The lower courts' rulings in these cases *allowed* precisely what the Constitution *forbids*. Accordingly, this Court should grant review and reverse. And as explained below, this Court's *Locke v. Davey* decision ought not to stand as an obstacle to the protection of religious freedom here.

II. *LOCKE v. DAVEY* PROVIDES NO VALID BASIS FOR A CONTRARY RESULT.

The courts below invoked this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), as supporting the supposed constitutionality of a no-choice-of-religious-majors rule. *Hall* Pet. App. 13a (No. 26-193) ("in the absence of any statement from the Supreme Court questioning or rejecting *Locke*'s holding, it is still the law. We must therefore faithfully apply it"); *Johnson* Pet. App. 11a (No. 26-240) ("The Court agrees that, so long as *Locke* remains good law, Plaintiffs' claims against the . . . VTAG Program[] must fail. The Court suspects that *Locke* also dooms Plaintiffs' claims against [VANG]STAP").

But *Locke* does not categorically approve the discriminatory exclusion of religious choices, as the post-*Locke* decisions in *Trinity Lutheran*, *Espinoza*, and *Carson* amply demonstrate. In any event, *Locke* at best provides very unsteady footing for *any* rule that would justify targeted religious discrimination.

Locke worked no revolution in constitutional jurisprudence. *Locke* did not purport to overturn any of this Court's prior precedents, discussed *supra* §I. Nor did *Locke* challenge the notion that discrimination against religion as such would violate the Constitution. *See* 540 U.S. at 724 (distinguishing government action "evincing hostility toward religion"). To the contrary, *Locke* expressly distinguished a situation like the one here, where someone had "to choose between their religious beliefs and receiving a government benefit." *Id*. at 720-21.

Moreover, the *Locke* decision represents an especially ill-suited candidate for the construction of a religion-antagonistic body of law. The fact that *Locke* continues to generate erroneous lower court decisions as in *Trinity Lutheran*, *Espinoza*, *Carson*, and the cases at bar shows the need for this Court definitively to repudiate *Locke v. Davey*.

A. The *Locke* Decision Is Itself Questionable.

At issue in *Locke* was a state's decision to deny a scholarship to an incoming college student who had announced his intention to pursue a major in devotional theology. 540 U.S. at 716-17. The majority ruled that this denial reflected a historically based refusal to use tax money to fund the training and maintenance of clergy. *Id.* at 722-23 & n.6. To be sure, that "historic and substantial" concern, *id.* at 725, was real. However, that concern addressed a *special privilege* being afforded to clergy, not a *common benefit* being denied to clergy. In other words, the state's boot in *Locke* far exceeded the historical footprint.

There is a huge difference *in kind*, not just in degree, between doling out a special benefit to a select profession (i.e., clergy) and singularly denying an otherwise generally available benefit (i.e., scholarships, access to public parks, use of public libraries) only to the select group. The first is a privilege; the second is blatant discrimination. *See id.* at 727 (Scalia, J., dissenting) ("Davey is not asking for a special benefit to which others are not entitled. . . . He seeks only equal treatment").

The *Locke* majority sought to counter this disconnect between the state interest and the challenged restriction by asserting that "training for religious professions and training for secular professions are not fungible," and that "[t]raining someone to lead a congregation is an essentially religious endeavor." *Id.* at 721. There is some truth to this. But the *Locke* majority's rejoinder proves far too much. The same could be said of countless other acts: carrying a religious icon in procession vs. carrying a political banner; wearing a yarmulke vs. wearing a pullover cap; growing a long beard for religious reasons vs. growing a beard for health or style. In each such case, to single out the religious act for restraint, when the comparable (and, in secular terms, indistinguishable) act is not so restrained, is antireligious discrimination.

Moreover, the "essential" difference between religious and secular professions is *only visible to the theological eye*. That is, the nonbeliever considers religious acts to be meaningless rituals of no greater significance than a Zumba exercise. Only to the eyes of faith is the religious act "essentially" different. Yet the federal and state courts are not equipped or even permitted to render such inherently religious assessments. While disallowing a *special privileged* assessment for ministers did not require courts to determine whether Ethical Culture or Veganism counts as a religion – *nobody* got special tax money for their profession – a *targeted exclusion* of what is "essentially religious" from an otherwise general benefits program necessarily thrusts courts into the theological thicket. That is, government bodies would have to decide what is "religious," or "too religious," triggering disqualification. The present cases well illustrate the thorniness of that problem. *See Johnson* Pet. at 7-13 (No. 26-240) (recounting seemingly arbitrary distinctions).

Recognizing the line between special *privileges* and unique *disabilities* has growing importance in a time of expanding government. The more benefits and services the state undertakes to fund, deliver, control, or manage, the more important it becomes to resist discriminatory disqualifications. When the state undertakes, for example, to foot the bill for healthcare for the populace or a segment thereof, it would be plainly discriminatory to disqualify otherwise eligible ministers, and only ministers, for this tax-funded benefit.

In short, the rationale of *Locke* rests upon a basic category error, conflating privileged subsidies and generally available benefits. Disavowing that error leaves *Locke* without its asserted historical foundation. But even on its own terms, as discussed below, the *Locke decision* does not follow from *Locke*'s *facts*, rendering it a shaky precedent indeed.

B. The Decision in *Locke* Was Unnecessary.

Compounding the weakness of the rationale in *Locke* is the fact that resolution of the opinion's central issue was completely unnecessary to decide the case. In actuality, the restriction at issue in *Locke* was so poorly tailored to the state's proffered rationale as to be irrational, having no real effect except to penalize those students who were guileless enough to declare a major in devotional theology before they were required to do so.

The scholarship at issue in *Locke*, the Promise Scholarship, was available to graduating high school students for use *only in the first two years of college* study. Wash. Admin. Code §§ 250-80-010, 250-80-070(1), (4); *Locke*, 540 U.S. at 715-16. It could be used for any college "education-related expense, including room and board," 540 U.S. at 716. Students who did not declare any major during their first two years of college, or who declared a major other than devotional theology, could receive the Promise Scholarship. Brief for Respondent at 10 & n.4, *Locke v. Davey*, No. 02-1315 (U.S. Sept. 8, 2003) (citing record and noting that the state relied, in its answer, upon the ability of students to decline to announce a major and retain their eligibility for the scholarship). But any student who declared a major in devotional theology – i.e., theology taught from a believing perspective – was penalized with the loss of scholarship eligibility. 540 U.S. at 716. Thus, the scholarship program in *Locke*:

- Did not bar the use of tax funds for the study of devotional theology or ministerial training, even if the student fully intended to become a minister, so long as the student *did not declare a major, id.* at 725 & n.9;
- Did not bar the use of tax funds for the study of devotional theology or ministerial training as an elective or even a required course, even if the student

fully intended to become a minister, so long as the student *declared a different major, id.*;

- Did not bar the use of tax funds for the study of theology, even by an actual minister or minister in training, so long as the theology was taught from a nonbelieving perspective, *id.* at 716.

However, the restrictions at issue *did* disqualify a student with a declared major in devotional theology:

- Even if the student took no more courses in devotional theology during the covered freshman and sophomore years than were required of all other students at the same school, *id.* at 725 & n.9;
- Even if the student changed his major after sophomore year or, like Joshua Davey himself, changed his career plans and did not become clergy after all. (Davey attended Harvard Law School, *see* Joshua Davey, "The Real Losers of Locke v. Davey," *Ichthus* (Apr. 1, 2004), and is now a partner at a law firm, www.troutman.com/professionals/joshua-d-davey/. (Davey is co-counsel for petitioner in *Hall v. Fleming*, No. 26-193.)

Thus, the restriction at issue in *Locke*, which supposedly furthered the goal of avoiding tax funding "for vocational religious instruction," 540 U.S. at 725, was almost completely ineffectual. The state "allowed scholarships to be used at 'pervasively religious schools' that incorporated religious instruction throughout their classes," *Espinoza*, 591 U.S. at 480. And as noted above, scholarship recipients, including clergy in training, could specifically use scholarship funds for devotional theology study so long as they either had declared a different major or were savvy enough not to declare any major during the first two years of college. Meanwhile, students like Joshua Davey were penalized for their voluntary declaration of a major that they were not required to make and not required subsequently to pursue. Ultimately, the haphazardly tailored restriction in *Locke* was no more than a penalty for a college freshman's forthrightness regarding his expected major, or a punishment for his mistaken predictions about his future study plans.

The *Locke* Court should have struck down the restrictions at issue as an irrational penalty on free speech (declaring a major) and religious exercise (declaring one's intent to pursue a religious vocation) that fails even minimal scrutiny. That case should certainly not be rewritten to be the basis for a broad mandate to treat religious choices as constitutional pariahs when neutral, generally available benefits are at stake.

C. This Court Should Definitively Inter the *Locke* Decision.

As in *Trinity Lutheran*, *Espinoza*, and *Carson*, this Court can reach the right result here without overruling *Locke*. However, it would be *better for the law* to repudiate *Locke* so that it does not continue to generate errors in the lower courts.

In *Trinity Lutheran*, the court of appeals relied upon *Locke*. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 785 (8th Cir. 2015). In *Espinoza*, the state supreme court likewise relied upon *Locke*, despite this Court's intervening decision in *Trinity Lutheran*. *Espinoza v. Montana Dep't of Revenue*, 2018 MT 306, ¶15, ¶16, 393 Mont. 446, 459, 435 P.3d 603, 608-09 (2018). In *Carson*, the lower court relied upon *Locke*, despite *Trinity Lutheran* and *Espinoza*. *Carson v. Makin*, 979 F.3d 21 (1st Cir. 2020). And in the present cases, the courts below felt bound by *Locke* for their holdings, *supra* pp. 5-6, despite this Court's rulings in *Trinity Lutheran*, *Espinoza*, and *Carson*.

Confining *Locke* to its facts evidently will not do. Moreover, *Locke*, as explained *supra* §II(B), is actually irrational on its own facts. What is needed to restore coherence and integrity to the law is this Court's recognition that *Locke* was a mistake, ill-conceived on both its facts and its reasoning, a decision that merits explicit renunciation. The sooner this Court takes that step, the better.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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