No. 26-193

In the Supreme Court of the United States

BETHANY M. HALL,
PETITIONER,

v.

A. SCOTT FLEMING, *Director, Virginia State Counsel of Higher Education*,
RESPONDENT.

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

REPLY BRIEF FOR PETITIONER

STEVEN W. FITSCHEN
Counsel of Record
JAMES A. DAVIDS
CHARLES BRENT ROBBINS
THE NATIONAL LEGAL FOUNDATION
524 Johnstown Road
Chesapeake, VA 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org

MISHA TSEYTLIN
KEVIN M. LEROY
TROUTMAN PEPPER LOCKE LLP
225 W. Randolph St.,
Suite 2600
Chicago, IL 60606

Attorneys for Petitioner
(*Additional counsel listed on inside cover*)

FREDERICK W. CLAYBROOK, JR.
CLAYBROOK LLC
655 15th St., NW,
Suite 425
Washington, D.C. 20005

JOSHUA D. DAVEY
TROUTMAN PEPPER LOCKE LLP
301 S. College St.,
34th Floor
Charlotte, NC 28202

KELLY J. SHACKELFORD
JEFFREY C. MATEER
DAVID J. HACKER
JORDAN W. LORENCE
ERIN E. SMITH
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy.
Suite 1600
Plano, TX 75075

CARSON A. COX
TROUTMAN PEPPER LOCKE LLP
1001 Haxall Point,
15th Floor
Richmond, VA 23219

JAMES A. CAMPBELL
JOHN J. BURSCH
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy.
Lansdowne, VA 20176

Attorneys for Petitioner

TABLE OF CONTENTS

REPLY BRIEF 1

I. Respondent Offers No Meaningful Defense Of *Locke*'s Outlier Holding 2

II. Respondent Admits That This Case Is "On All Fours With *Locke*," And His Attempt To Manufacture A Vehicle Issue Based Upon Virginia's "Rich History" Fails 6

III. Respondent Does Not Dispute That States Across The Country Are Relying On *Locke* To Impose Religious Discrimination Against Thousands Of Students 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Carson v. Makin,
596 U.S. 767 (2022)..... 1, 5

Dobbs v. Jackson Women's Health Org.,
597 U.S. 215 (2022)..... 7

Espinoza v. Montana Department of Revenue,
591 U.S. 464 (2020).....1, 5, 10, 11, 12

Everson v. Bd. of Educ. of Ewing Twp.,
330 U.S. 1 (1947)..... 9, 10, 11

Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31,
585 U.S. 878 (2018)..... 5

Kennedy v. Bremerton Sch. Dist.,
597 U.S. 507 (2022)..... 7, 8

Locke v. Davey,
540 U.S. 712 (2004)..... 1, 3, 8, 9

N.Y. State Rifle & Pistol Ass'n v. Bruen,
597 U.S. 1 (2022)..... 7, 8

Rosenberger v. Rector & Visitors of Univ. of Va.,
515 U.S. 819 (1995)..... 9, 10

Trinity Lutheran Church of Columbia, Inc. v. Comer,
582 U.S. 449 (2017)..... 1, 4

United States v. Rahimi,
602 U.S. 680 (2024)..... 7, 8, 9

Other Authorities

Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*,
169 U. Pa. L. Rev. 111 (2020)..... 10

Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227 (2004)..... 9

REPLY BRIEF

Locke v. Davey, 540 U.S. 712 (2004), "is a stain on our Free Exercise jurisprudence," "betray[ing] the founding generation's commitment to religious liberty." App.14a, 21a (Richardson, J., concurring).

As the Petition explained, the various rationales that *Locke* offered for its anomalous holding that States could discriminate against students for seeking religious education were wrong from the outset. And as to *Locke*'s historical analysis, in particular, subsequent scholarly research has comprehensively refuted every aspect of *Locke*'s account of the Founding. The Petition also detailed that *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), and *Carson v. Makin*, 596 U.S. 767 (2022), rejected all of *Locke*'s premises. The Petition ended by explaining that this case is an ideal vehicle for reconsidering *Locke*, and that failing to overrule that decision now will continue to bless religious discrimination against thousands of students.

Respondent disputes little of this, including offering no meaningful defense of *Locke*. Instead, he argues that *Trinity Lutheran*, *Espinoza*, and *Carson* did not actually overrule *Locke*. But that is what *this* Petition seeks: having "rejected or ignored every premise of *Locke*" in those cases, App.17a (Richardson, J., concurring), this Court should now formally overrule *Locke*. Respondent also concedes that this case is on all fours with *Locke* but then

conjures up a vehicle objection by claiming that Virginia has engaged in such religious discrimination for a long time. But this just repeats the errors about Virginia history that *Locke* relied upon. And Respondent does not dispute that unless this Court overrules *Locke* now, that decision will continue to authorize religious discrimination across the country.

This Court should grant the Petition and overrule *Locke*.

I. Respondent Offers No Meaningful Defense Of *Locke*'s Outlier Holding

This Court's *stare decisis* factors weigh heavily in favor of overruling *Locke*. Pet.9–29. *Locke* was poorly reasoned when it was decided. Pet.10–20. It declined to apply strict scrutiny both because it wrongly believed that denying a scholarship to a student because he wanted to pursue a religious degree was only "mild" discrimination, Pet.12–13, and because such a denial targeted religious use rather than status, which was never a constitutionally relevant distinction, Pet.13–14; *see also* States.Am.6–8. *Locke* also relied upon a "play in the joints" theory based on claimed antiestablishment concerns, but this Court's pre-*Locke* cases held that neutral aid programs that benefit religion do not violate the Establishment Clause. Pet.14–16; *see also* States.Am.7–8. *Locke* also relied on Founding-era history of allegedly similar religious discrimination, but it got that history wrong. Pet.16–20; *see also* States.Am.11–14; Jewish.Coalition.Am.5–14. This Court's post-*Locke* decisions in *Trinity Lutheran*, *Espinoza*, and *Carson*

further refuted *Locke*'s rationales. Pet.20–24. Finally, *Locke* put forward no workable rule, Pet.24–27, and has not generated any legitimate reliance interests, Pet.27–28.

Respondent simply ignores most of Petitioner's arguments for why this Court should overrule *Locke*. Instead, Respondent asserts that *Locke*'s analysis is "valid," while offering no meaningful defense of retaining this decision under this Court's *stare decisis* factors. *See* BIO.7–9. Respondent does not claim that *Locke* rightly authorized States to engage in "mild[ ]" religious discrimination. 540 U.S. at 720. Nor does he defend *Locke*'s use-based rationale, even as he appears to rely on that rationale to distinguish post-*Locke* cases. *See infra* pp.4–5. While *Locke* hinged in large part on the discredited "play in the joints" theory, 540 U.S. at 718–19, Respondent never mentions this justification. And as to Petitioner's criticisms of *Locke*'s historical analysis, Respondent fails to respond to many of them, except for making a few (incorrect) points about Virginia history as part of his misguided vehicle discussion. BIO.13–17; *see infra* Part II. Nor does Respondent attempt to argue that *Locke* created any legitimate reliance interests.

Respondent argues that *Trinity Lutheran*, *Espinoza*, and *Carson* did not formally overrule *Locke*, *see* BIO.9–12, but that misses the point. As Judge Richardson explained, while these post-*Locke* decisions "rejected or ignored every premise of *Locke* except its flawed historical analysis," App.17a, "lower-court judges must keep applying it" until this

Court "formally buries" it, App.21a. The Petition asks this Court to do that now.

Respondent says that *Trinity Lutheran*, *Espinoza*, and *Carson* correctly "reaffirmed" *Locke*'s holding that States may decline to provide scholarship aid to students who plan to pursue faith-based majors, on the premise that such denial is based on religious "use," not "religious status." *See* BIO.9–10 (discussing *Trinity Lutheran*); *see also* BIO.10–11 (same discussion as to *Espinoza*); BIO.11–12 (same discussion as to *Carson*). This argument finds no support in what *Trinity Lutheran*, *Espinoza*, and *Carson* actually said. Rather, those decisions either cabined or contradicted *Locke*'s status-use rationale.

A brief review of the Court's decisions in those three cases shows that they undermined the status-use rationale in *Locke*, with *Carson* entirely refuting it. In *Trinity Lutheran*, this Court undercut *Locke*'s status-use rationale, holding that Missouri cannot invoke *Locke* to exclude religious institutions from a generally available playground-resurfacing grant program. *See* 582 U.S. at 461, 465 & n.3; Pet.22. The Free Exercise Clause condemns state laws that "regulate or outlaw *conduct* because it is religiously motivated" or that "discriminat[e] in the distribution of public benefits based upon religious *status*." *Trinity Lutheran*, 582 U.S. at 461 (emphases added) (citations omitted). *Espinoza* further undermined *Locke*'s status-use rationale when striking down Montana's exclusion of religious schools from a program that provided tuition assistance to parents

sending their children to private schools. *See* 591 U.S. at 467–68, 478–79; Pet.22. "Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid *to religious uses*." *Espinoza*, 591 U.S. at 478 (emphasis added). And *Carson* put the nail in the coffin of *Locke*'s status-use rationale. *See* 596 U.S. at 778, 787–89; Pet.23. There, this Court held that Maine's exclusion of religious schools from a tuition-assistance program violated the Free Exercise Clause, noting that "any status-use distinction lacks a meaningful application not only in theory, but in practice as well." *Carson*, 596 U.S. at 788.

Trinity Lutheran, *Espinoza*, and *Carson* "eroded" each of *Locke*'s flawed "underpinnings," *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 924 (2018) (citation omitted), "reject[ing] or ignor[ing] every premise of *Locke*," App.17a (Richardson, J., concurring); Pet.9, 24. *Locke* now applies *only* to discriminatory laws like Virginia's VTAG Program and others like it that force religious students to choose whether to pursue only government-preferred degrees or forfeit their participation in generally available scholarship programs. Pet.30–31 (collecting examples); Council.Christian.Am.5–7 & App. (same); Notre.Dame.Educ.Am.16–24 (same). Yet, after this trilogy of cases from this Court, there is no principled reason to uphold these laws either.

II. Respondent Admits That This Case Is "On All Fours With *Locke*," And His Attempt To Manufacture A Vehicle Issue Based Upon Virginia's "Rich History" Fails

This case is an ideal vehicle for overruling *Locke*. The courts below and the parties all agree that this case is "on all fours" with, and "directly analogous to," *Locke*. App.7a (citation omitted); Pet.28–29 (quoting App.7a); BIO.12–13 (quoting App.7a); *see* App.28a–30a. Virginia makes Petitioner ineligible for VTAG funding because she chose a faith-based major, just as Washington made the student-plaintiff in *Locke* ineligible to receive funding from a similar program because he chose a faith-based major. Pet.28–29. Distinguishing *Locke* is not an option here; this Court would need to decide whether to overrule *Locke*.

Respondent says that Virginia's program is "more inclusive of religion than" Washington's program in *Locke* because Virginia may provide funding to a student who pursues both a faith-based major and a non-faith-based major. BIO.12–13 (emphasis omitted). That distinction does not make the cases constitutionally different because Virginia engages in the same kind of religious discrimination as Washington did. Virginia has refused to provide Petitioner with generally available scholarship assistance *solely* because she chose to pursue a faith-based major—just as Washington did to the identically situated student-plaintiff in *Locke*. Pet.6–7; BIO.4–5; App.3a–4a, 7a–8a & n.6.

Respondent also says that this case is "not the proper vehicle to overrule *Locke* given Virginia's rich history against funding the ministry." BIO.13 (formatting altered); *see* BIO.13–17. This just repeats *Locke*'s discredited historical account. This case is an ideal vehicle to reassess *Locke* and its claimed historical underpinnings, including using the methods that this Court has developed for assessing "'historical practices and understandings'" since *Locke* was decided. BIO.15 (quoting *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022)); *accord Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 270 (2022) (a precedent that rests on "an erroneous historical narrative" warrants reconsideration).

Under those methods, a "modern regulation" denying a benefit on the basis of religion may be consistent with the First Amendment if it is "distinctly similar" to "historical regulation[s] addressing" the same "general societal problem." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 26–27 (2022). "[I]f earlier generations addressed the societal problem" at issue "through materially different means," that "modern regulation" may be "unconstitutional." *Id.* So, when assessing historical arguments, the "court must ascertain whether the new law is relevantly similar to the laws that our tradition is understood to permit," and "[w]hy and how the regulation burdens the right are central to this inquiry." *United States v. Rahimi*, 602 U.S.

680, 692 (2024) (citations omitted); *accord Kennedy*, 597 U.S. at 535–36.

Turning to the Virginia history that Respondent discusses, he follows *Locke*'s lead, 540 U.S. at 722–25 & n.6, by citing James Madison's *Memorial and Remonstrance* (addressed to the Virginia General Assembly in 1785) and Thomas Jefferson's "Bill for Establishing Religious Freedom" (passed by the Virginia General Assembly in 1786) to argue that Virginia has a "longstanding tradition" supporting laws like its VTAG Program, *see* BIO.13–17. But these two sources are part of a Founding-era tradition against only "laws that singled [religious ministers] out for financial aid," *Locke*, 540 U.S. at 727 (Scalia, J., dissenting), as Justice Scalia explained in *Locke*, App.14a–15a (Richardson, J., concurring), and as subsequent scholarship confirms, Pet.16–20. So, both Respondent and *Locke* are wrong to rely upon these sources as support for laws that exclude students from a generally available program based on religion.

Madison's *Memorial and Remonstrance* is "materially different," *Bruen*, 597 U.S. at 26, than discriminatory laws like Virginia's VTAG Program. Madison wrote to oppose a tax-assessment bill proposed by the Virginia General Assembly that would have imposed a tax for the "direct[ ] support [of] Christian teachers and ministers." Pet.16–17 (quoting App.15a n.2 (Richardson, J., concurring)). That bill "'discriminat[ed] in favor of religious *viewpoints*'"—it was "not a neutral program that only

incidentally benefitted religion." App.15a n.2 (emphasis added) (quoting Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 Tulsa L. Rev. 227, 242 (2004)); *see Locke*, 540 U.S. at 727–28 (Scalia, J., dissenting); *see also* Christian.Legal.Am.15–18. "Madison's objection to the assessment bill did not rest on the premise that religious entities may never participate on equal terms in neutral government programs." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 854 (1995) (Thomas, J., concurring). Rather, Madison believed that the "assessment violated the 'equality' principle . . . because the bill singled out religious entities for special benefits" while "subjecting some to peculiar burdens." *Id.* (citations omitted); *see also Locke*, 540 U.S. at 727–28 (Scalia, J., dissenting); Christian.Legal.Am.15–18. That equality principle supports Petitioner here because she is subject to the type of "peculiar burden[ ]" to which Madison objected. *Rosenberger*, 515 U.S. at 854 (Thomas, J., concurring) (citations omitted).

Jefferson's "Bill for Establishing Religious Freedom"—which the Virginia General Assembly passed instead of the tax-assessment bill opposed by Madison, *see Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 12 (1947)—is not even remotely "similar" to Virginia's VTAG Program either, *Rahimi*, 602 U.S. at 692 (citations omitted). The Bill's preamble stated that, among other things, "to compel a man to furnish

contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Everson*, 330 U.S. at 12–13 (citations omitted). The associated statute then provided "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . nor shall otherwise suffer on account of his religious opinions or belief." *Id.* at 13 (citations omitted). That language prohibits special taxes targeted to aid religion; it does not bar religious entities from receiving state aid from a general state program on equal footing with others. *See id.*; *see also* States.Am.12–13; Ass'n.Christian.Schools.Am.10–11. And it prohibits Virginia from punishing an individual "on account of [her] religious opinions or belief," *Everson*, 330 U.S. at 13 (citations omitted), which is what Virginia is doing here to Petitioner.

Respondent's contrary interpretation would have surprised Jefferson, given that he "advocated the use of public funds in Virginia for a department of theology in conjunction with other professional schools." *Rosenberger*, 515 U.S. at 859 n.4 (Thomas, J., concurring); *see also* States.Am.13. It also would have surprised Virginia's founding generation more broadly because Virginia continued to fund religious schools even as it forbade compelled assessments for religion. *See* Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. Pa. L. Rev. 111, 130–35 (2020); *accord Espinoza*, 591 U.S. at 481 (recognizing that "States with bans on government-supported

clergy . . . provided various forms of aid to religious schools") (citations omitted).*

But even indulging the ahistorical assumption that Virginia had an "extensive" history of religiously discriminatory laws like its VTAG Program, *see* BIO.16; *but see supra* pp.8–10, that still would not create any vehicle problem. Such discrimination would run counter to the prevailing Founding-era practice that informs the meaning of the First Amendment. Petitioner provided numerous Founding-era examples of government aid or benefit to religion—both to religion specifically and on equal terms with secular comparators, Pet.17–19—and there are many more such examples, Jewish.Coalition.Am.10–12; *supra* pp.8–10. Respondent disputes none of that history.

Indeed, the only historical grounding that Virginia could claim for its VTAG Program is state-level "Blaine Amendments[,] adopted more than 100 years after the founding" and "rooted in anti-Catholic animus." States.Am.15–16 (citations omitted); *see Espinoza*, 591 U.S. at 482–83. As *Espinoza* explains, the "shameful pedigree" of state-level Blaine

---

* Respondent also briefly references the 1763 "Parsons' Cause" from colonial Virginia. *See* BIO.13. *Everson* rightly identified this as an example of "Virginia's resistance to taxation for church support." 330 U.S. at 11 n.10. So, it too provides no historical support for religiously discriminatory laws like Virginia's VTAG Program.

Amendments "hardly evince[s] a tradition that should inform our understanding of the Free Exercise Clause." 591 U.S. at 482 (citations omitted). And while Respondent notes that Virginia enacted the VTAG Program only in 1972, BIO.2, "the original motivation for [such] laws matter[s]," *Espinoza*, 591 U.S. at 497 (Alito, J., concurring).

III. Respondent Does Not Dispute That States Across The Country Are Relying On *Locke* To Impose Religious Discrimination Against Thousands Of Students

It is imperative for this Court to overrule *Locke* now because the religious discrimination that *Locke* authorizes is all too common across our Nation. Pet.29–33. In addition to Virginia and Washington, at least ten other States have laws locking students out of educational-grant programs if they enroll in certain religious majors. Pet.30–31 (collecting state laws); *see also* States.Am.3 (22 States asking for *Locke* to be overruled). *Amici* identified additional *Locke* laws and regulations. *See* Council.Christian.Am.5–7 & App.; Notre.Dame.Educ.Am.16–24. As thousands of students across our Nation continue to feel called to pursue religious-vocation majors each year, these discriminatory laws harm significant numbers of students who have chosen to act upon that spiritual calling. *See* Pet.31–32; *see also* Notre.Dame.Educ.Am.6–7; Council.Christian.Am.7–9. This unequal treatment that *Locke* condones sends the message that religious vocations are second class

and that the States may constitutionally discriminate against them. Pet.32; Council.Christian.Am.2, 8–9.

Respondent questions none of this. He does not contest that many States have laws excluding students who pursue religious studies from generally available scholarship programs. *Compare* Pet.30–31, *with* BIO.7–17. He does not address Petitioner's point that because thousands of students enroll in faith-based studies each year, *Locke* continues to harm a significant number of students. *Compare* Pet.31–32, *with* BIO.7–17. Nor does he dispute Petitioner's point that these discriminatory laws marginalize people of faith. *Compare* Pet.32–33, *with* BIO.7–17.

In all, it is long past time for this Court to stop *Locke*'s perpetuation of religious discrimination. This Court should overrule that fatally flawed decision.

CONCLUSION

This Court should grant this Petition.

Respectfully submitted this 26th day of October, 2026,

STEVEN W. FITSCHEN
Counsel of Record
JAMES A. DAVIDS
CHARLES BRENT ROBBINS
THE NATIONAL LEGAL FOUNDATION
524 Johnstown Road
Chesapeake, VA 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org

FREDERICK W. CLAYBROOK, JR.
CLAYBROOK LLC
655 15th St., NW,
Suite 425
Washington, D.C. 20005

KELLY J. SHACKELFORD
JEFFREY C. MATEER
DAVID J. HACKER
JORDAN W. LORENCE
ERIN E. SMITH
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy.
Suite 1600
Plano, TX 75075

MISHA TSEYTLIN
KEVIN M. LEROY
TROUTMAN PEPPER LOCKE LLP
225 W. Randolph St.,
Suite 2600
Chicago, IL 60606

JOSHUA D. DAVEY
TROUTMAN PEPPER LOCKE LLP
301 S. College St.,
34th Floor
Charlotte, NC 28202

CARSON A. COX
TROUTMAN PEPPER LOCKE LLP
1001 Haxall Point,
15th Floor
Richmond, VA 23219

JAMES A. CAMPBELL
JOHN J. BURSCH
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy.
Lansdowne, VA 20176

Attorneys for Petitioner