

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

**BRIEF FOR THE BUCKEYE INSTITUTE
AS AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether this Court should overrule *Locke*.

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INTEREST OF AMICUS CURIAE¹

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. Related to this case, The Buckeye Institute has filed briefs with this Court discussing protections for the free exercise of religion. See Brief of Amicus Curiae The Buckeye Institute in Support of Petitioners, *Carson as next friend of O. C. v. Makin*, 596 U.S. 767 (2022) (No. 20-1088); Brief of Amicus Curiae The Buckeye Institute in Support of Petitioner, *Ricks v. Idaho Contractors Bd.*, 141 S. Ct. 2850 (2021) (No. 19-66). The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

¹ As required by Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

SUMMARY OF THE ARGUMENT

Forty years ago, then-Justice Rehnquist remarked that “[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history.” *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting). At that time, the Establishment Clause had already been “expressly freighted” for nearly forty years with the misleading metaphor “a wall of separation between church and State.” *Id.* at 91–92 (Rehnquist, J., dissenting) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)). The reasoning in *Locke v. Davey*, 540 U.S. 712 (2004), suffers from an infirmity derived from a mistaken understanding of constitutional history. The historical context in which *Locke* views the Establishment Clause assumes the Constitution creates a barrier between church and state that the drafters of the document never intended to erect—a wall that allegedly permits States to deny publicly available scholarship funds to college students seeking to obtain degrees related to religion. Not even a strict construction of the Establishment Clause requires that result, and a clear-eyed look at *Locke*’s own historical sources makes that conclusion even clearer.

In the founding era, the drafters of the U.S. Constitution and many state constitutions sought to address concerns about discrimination against religious minorities and the Federal Government’s potential imposition of a national religion. Paltry historical evidence exists, however, that the Framers sought to ban legislation benefiting religion or even laws serving a religious purpose, and religious

minorities did not even petition for such an extreme solution.

Even so, the *Locke* majority effectively endorses a novel suspicion of religious ministry in public life, declaring without a hint of irony that the State of Washington’s scholarship program “deal[ing] differently with religious education for the ministry than with education for other callings is . . . *not* evidence of hostility toward religion.” *Locke*, 540 U.S. at 721 (emphasis added). In other words, *Locke* uses a historically blinkered reading of the Establishment Clause to justify denying citizens public education funds simply because they plan on using them for classes related to religion. Even this Court’s ruling in *Everson v. Board of Education of Ewing*, in which the Court delivered its notorious assertion that the wall between church and state “must be kept high and impregnable,” does not necessitate this result. See *Everson v. Board of Ed. of Ewing*, 330 U.S. 18 (1947).

The Court has rightly noted of late that history and tradition should play a role in determining the outcomes of future Establishment Clause cases. See, e.g., *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 60 (2019). That is why it is important for the Court to clarify that *Locke* is based on badly doctored history and should not be viewed as authoritative. The Court should grant the petition to continue laying a solid historical foundation for the Establishment Clause.

ARGUMENT

I. The “wall of separation between church and state” is not the embodiment of the First Amendment’s religion clauses.

For decades, Thomas Jefferson’s “wall of separation” metaphor nearly replaced the First Amendment’s Establishment Clause in the minds of many. Then-Justice Rehnquist lamented that Jefferson’s “short note of courtesy” to the Danbury Baptist Association, written 14 years after the Bill of Rights was passed by Congress, had been improperly overlaid on the First Amendment. *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting). But Jefferson was not giving a legal exposition to a court or legal audience. Nor was he attempting to persuade the Congress or the public to adopt the First Amendment—that had already happened. Rather, the letter was “a political statement written to reassure Jefferson’s Baptist constituents in New England of his continuing commitment to their religious rights, and to strike back at the Federalist-Congregationalist establishment in Connecticut for shamelessly vilifying him as an ‘infidel’ and an ‘atheist’ in the rancorous presidential campaign.” Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation between Church and State* 29 (2002).

Indeed, Jefferson’s Danbury letter, written in 1802, languished in near obscurity until the decision in *Reynolds v. United States*, 98 U.S. 145 (1878). The Court’s next mention was 69 years later, when *Everson* made Jefferson’s wall “high and impregnable.” *Everson*, 330 U.S. at 18.

But is that even what Jefferson meant at all? Justice Frankfurter—assuming that the “wall” should have any jurisprudential value at all—explained that

agreement, in the abstract, that the First Amendment was designed to erect a ‘wall of separation between Church and State,’ does not preclude a clash of views as to what the wall separates. . . . We cannot illuminatingly apply the ‘wall-of-separation’ metaphor until we have considered the relevant history of religious education in America.

People of State of Ill. ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., Ill., 333 U.S. 203, 213 (1948). True, walls separate, but what is on either side of a wall depends on where the wall is built. Careful historical analysis suggests that Jefferson’s metaphorical wall “was between the federal government on one side and church authorities and state governments on the other.” Dreisbach, *supra*, at 68.

“Throughout his lifetime, Jefferson repeatedly stated his federalist views of the Establishment Clause . . . Jefferson wrote that the federal government had ‘no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution . . . [A]ll lawful powers respecting the same did of

right remain, and were reserved to the states, or to the people”

David E. Steinberg, *The Myth of Church-State Separation*, 59 Clev. St. L. Rev. 623, 634 (2011) (quoting Kentucky Resolutions of 1798 and 1799, reprinted in 5 *The Founders’ Constitution* 131, 132 (Philip B. Kurland & Ralph Lerner eds., 1987)).

Jefferson’s views on government support of religion are better understood by examining his actions as Rector of the University of Virginia, a state university. Jefferson was one of the founders of the University of Virginia, a school that, from its establishment in 1819, has been wholly governed, managed, and controlled by the State of Virginia. In 1822, the university faced the same problem that was before the Court in *McColum* and again before the Court today: “The question of the constitutional limitation upon religious education in public schools.” *McColum*, 333 U.S. at 245 (Reed, J., dissenting).

In his 1822 annual report as Rector, Jefferson expounded on his views on government involvement in religion, at least in the context of a government university. Jefferson’s report, approved by the Board of Visitors of the University, of which Madison was one, *id.* at 245 (Reed, J., dissenting), affirmed that “the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation.” Report from Virginia Board of Visitors to Directors of the Literary Fund of the University of Virginia, in 19 *The Writings of Thomas Jefferson* 414 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904). To

remedy the “chasm” in the “general instruction of the useful sciences,” in which he included the instruction of religious faith, Jefferson concurred that the university should provide for the instruction of religion on campus. *Id.* at 415. Jefferson agreed with the suggestion to establish

religious schools on the confines of the University, so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for the religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University.

Id.

In 1824, the university adopted the following regulation:

‘Should the religious sects of this State, or any of them, according to the invitation held out to them, *establish within . . . the precincts of the University*, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning,

and in time to meet their school in the University at its stated hour.

McCullum, 333 U.S. at 246 (Reed, J., dissenting) (quoting *The Writings of Thomas Jefferson*, *supra*, at 449).

Jefferson's recommendation gives strong evidence that his "wall of separation between church and State" did not exclude religious education within the very university that Jefferson co-founded. Commenting on Jefferson's wall metaphor, Justice Reed observed that "[t]he difference between the generality of Jefferson's statements on the separation of church and state and the specificity of his conclusions on education are considerable. *A rule of law should not be drawn from a figure of speech.*" *Id.* at 247 (Reed, J., dissenting) (emphasis added). "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.). Even so, the evolution of the Court's religious jurisprudence looks nothing like a "high and impregnable wall." *Everson*, 330 U.S. at 18. Rather, the Court's metaphorical wall has become "as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded." *McCullum*, 333 U.S. at 238 (Jackson, J., concurring).

Further, contrary to *Everson's* assertion, Jefferson, while instrumental in the founding of the country, had little to do with the drafting or passage of the First Amendment. At the time that the Establishment Clause was being debated and drafted, Jefferson was across the Atlantic in Paris. Edward S. Corwin, *The Supreme Court as National School Board*, 14 L. &

Contemp. Probs. 3, 13 (1949). However one wishes to interpret Jefferson's Letter to the Danbury Baptists, one must accept that it was authored and sent well over a decade after the Clause it discusses was set in stone. It would then be "an astonishing act of political prophesy for the members of the First Congress . . . to have foretold Jefferson's remarks . . . and incorporate them into the Establishment Clause." Mark J. Chadsey, *Thomas Jefferson and the Establishment Clause*, 40 Akron L. Rev. 623, 638–39 (2007). While Jefferson pressed James Madison and a few others to support a Bill of Rights generally, there is little (if any) historical evidence that his views shaped the drafting or passage of specific clauses. *Id.* at 634–37. A similar lack of evidence exists that Jefferson had any influence on the state legislatures that ratified the Establishment Clause. *Id.* at 636.

As such, his passing phrase in a post-passage letter for political purposes should not be the source of our religious liberty jurisprudence. In addressing *Locke*, the Court should look to historical evidence, not metaphorical flourish from a gifted presidential candidate seeking political support to get reelected.

II. The Court has used history and tradition to create rules for other Establishment Clause questions.

This Court has looked to America's history, and especially the writings and practices of the Framers, to inform its Establishment Clause precedent. Continuing to do so is important because any competent legal test should account for the Nation's traditions. Other approaches have led to inconsistent

or unworkable results. See *Am. Legion*, 588 U.S. at 68–69 (Kavanaugh, J., concurring).

While it is intellectually appealing to attempt a “grand unified theory” of the Establishment Clause (such as the “*Lemon* test”), such theories do not fully account for America’s history and tradition of religious practice. The most obvious examples are the long-held practices of legislative prayer and public observances of religious holidays. *Id.* at 60. See also *Van Orden v. Perry*, 545 U.S. 677, 699–700 (2005) (Breyer, J., concurring) (explaining, regarding legislative prayer and other practices, that “the Court has found no single mechanical formula that can accurately draw the constitutional line in every case”).

Justice Breyer’s astute observation in his *Van Orden* concurrence is echoed by Justice Kavanaugh in his *American Legion* concurrence: “[E]ach category of Establishment Clause cases has *its own principles based on history, tradition, and precedent*.” *Am. Legion*, 588 U.S. at 71 (Kavanaugh, J., concurring) (emphasis added). One such category that Justice Kavanaugh discusses is cases involving “government benefits and tax exemptions that go to religious organizations.” *Id.* at 70 (Kavanaugh, J., concurring). He notes that the Court has upheld such benefits even when “those policies have the effect of advancing or endorsing religion,” a result unexplainable by the *Lemon* test. *Id.*

In short, any cogent theory of the Establishment Clause should be able to draw reasonable lines as to proscribed conduct, while considering the specific issues at bar and historical understandings of what the Clause means. The majority in *American Legion*

appeared to endorse such an idea by holding that the Court's recent trend has been to avoid "grand unified theor[ies]" and "take[] a more modest approach that focuses on the particular issue at hand and looks to *history* for guidance." *Id.* at 60 (emphasis added). That modest approach is undermined by *Locke*, which espouses a flawed view of history to come to an absurd result.

III. The modern conception of "separation of church and state" that informed *Locke* is ahistorical.

The *Locke* decision noted that key framers and many early Americans opposed the compelled support of state-favored clergy members or church leaders. That historical factoid seems thin gruel for a foundation of constitutional jurisprudence justifying allowing a state to deny scholarship funds to a college undergraduate seeking to earn a devotional theology degree. See *Locke*, 540 U.S. at 717, 722–23. There is little, if any, relationship between the principles espoused by the Framers on one hand and Washington's attack on religious liberty on the other. The chasm results from a fundamentally flawed view of "separation of church and state."

A. State involvement with religious organizations before the First Amendment undermines the church-state wall thesis.

The *Locke* majority makes much of the fact that "[s]ince the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders." *Locke*, 540 U.S. at 722. While this is not incorrect, it ignores the deeper and longer-

held American tradition of bringing religious concerns directly into public life.

State constitutions that predated the Federal Constitution regularly invoked God, and many recognized public worship as a “necessary condition to the overall good of the state and its citizens.” Craig B. Mousin, *State Constitutions and Religious Liberty, in Religious Organizations in the United States, A Study of Identity, Liberty, and the Law* 175 (2006). Many of the early colonists, especially those of New England, even viewed their public life more as building a church than building a government. *Id.* at 177. This is unsurprising because “the Bible still remained the primary source book for understanding life and society,” so much so that early state constitutions “frequently recall[ed] the classic biblical covenants that were based on a societal thanksgiving for God’s saving role and promise of benefits for continuing that life.” *Id.* at 178.

The 1638 Fundamental Orders of Connecticut, which some historians regard as “the first written constitution known to history that created a government” as well as “the beginning of American democracy,” see *Historical Antecedents, The First Constitution of Connecticut*, Conn. Gen. Assembly, <https://www.cga.ct.gov/asp/content/constitutions/FirstConstitution.htm> (last visited Aug. 25, 2026), explicitly mentions Christianity as both the basis and the driving force behind Connecticut’s existence:

Forasmuch as it hath pleased the Almighty God . . . [we] therefore . . . enter into Combination and Confederation together, to maintain and preserve the

liberty and purity of the Gospel of our
Lord Jesus which we now profess

Fundamental Orders of Connecticut of 1639, *reprinted in The Public Records of the Colony of Connecticut Prior to the Union with New Haven Colony, May, 1665*, at 20–21 (1850) (cleaned up).

Similarly, the preamble of the Massachusetts Constitution acknowledges “the goodness of the great Legislator of the universe” in giving the state’s inhabitants an opportunity to establish a new civil government and “devoutly implores His direction” in that undertaking. Mass. Const. pmb1.

The Northwest Ordinance—which predated the Bill of Rights and served as a foundation for the addition of States to the Nation—specifically mentioned education as a sphere of public life *inseparable from religion*: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” Confederation Cong., An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio, art. 3 (1787). The first Congress reenacted the Northwest Ordinance on the same day that James Madison proposed the amendments that would become the Bill of Rights—suggesting that the Framers intended religion and government to cooperate with each other within the framework created by the Establishment Clause. See *Wallace*, 472 U.S. at 100 (Rehnquist, J., dissenting).

Religious practice imbued almost every aspect of life for early Americans, up to and including the

creation and operation of their governments. Indeed, during the revolutionary era, only three States had constitutional clauses specifically forbidding the establishment of a state religion, while 12 had constitutional clauses ensuring the free exercise of religion. See 37 *The Documentary History of the Ratification of the Constitution* 58 (John P. Kaminski et al. eds., 2020). *Locke* invokes past hostilities toward state-supported clergy in an attempt to root itself in some sort of American historical tradition, but glosses over the fact that religious practice and purpose in public life are much deeper traditions that predate the country itself.

B. The history of the Establishment Clause also discredits the *Locke* majority's idea that strict separation of church and state is required by the Constitution.

The debates and events that led to the creation of the Establishment Clause reveal that the Framers' predominant concern was to ensure that the Federal Government could not impose a national religion and squash the practices of religious minorities in the fledgling country—not to institute strict separationism.

Prior to 1776, most colonies had state-supported churches, and the enforcement of religious observance was sometimes harsh. See G. Alan Tarr, *Church and State in the States*, 64 Wash. L. Rev. 73, 81 (1989) (explaining that Virginia authorities would often arrest non-Anglican ministers for “disturbing the peace”). However, the diversity of colonial religious establishments, as well as the presence of colonies with no established religion at all, see *Public Funding*

of Religious Activity in 18th-Century America, Pew Rsch. Ctr. (May 14, 2009), <https://www.pewresearch.org/religion/2009/05/14/shifting-boundaries2/> (explaining that Delaware, Pennsylvania, New Jersey, and Rhode Island never compelled taxpayer support for a church), meant that colonists could settle where their religious practice would be backed by the state, or at least not interfered with. See Arlin M. Adams, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1562–68 (1989). Where there were religious establishments, state support often entailed taxpayer-backed funding for certain ministers. See Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 853 (1985). In the years leading up to the Revolution, Rhode Island, Pennsylvania, Delaware, New Jersey, and New York all permitted relatively free religious exercise, while states in New England and the South established Puritanism or Anglicanism. See Adams, *supra*, at 1567.

As debates over the Constitution took place, Antifederalists wanted to ensure that the document would prohibit the Federal Government from snuffing out the diversity of religious practice that had taken root in the states. To be sure, Antifederalists feared an establishment of religion by *Congress*, not necessarily by States. See Steinberg, *supra*, at 631; see also Don Drakeman, *Things I Thought I Knew — Part 3: The Antifederalists and Religion*, L. & Religion Forum (Sep. 21, 2012), <https://lawandreligionforum.org/2012/09/21/things-i-thought-i-knew-part-3-the-antifederalists-and-religion/>. An Old Whig, for example, used a federal religious establishment—a common Antifederalist

concern—as the rationale for including a bill of rights in the Constitution:

[I]f a majority of the *continental legislature* should at any time think fit to establish a form of religion, for the good people of this continent . . . what is there in the proposed constitution to hinder their doing so? Nothing; for we have no bill of rights.

An Old Whig V, *reprinted in 3 The Complete Anti-Federalist* 37 (Herbert J. Storing ed., 1981) (emphasis added).

As concerned as they were about the Federal Government usurping power over religion, however, Antifederalists frequently extolled the benefits of religion in public service. See Kurt T. Lash, *Power and the Subject of Religion*, 59 Ohio St. L. J. 1069, 1083 (1998) (stating that “a number of Antifederalists criticized the [Constitution] for its lack of any religious test and its failure to officially recognize the Deity.”). As the Constitution was being ratified, multiple States also submitted amendments that would protect against a federal establishment.

Even founding-era practitioners of minority religions, who sought “a freedom from penalties” and “unequal distribution of government salaries and other benefits on account of differences in religious belief,” did not seek a strict separationism. Philip Hamburger, *Separation of Church and State* 12 (2004). One example was Virginia Presbyterians, who were dissatisfied with the State’s Anglican establishment and pressed for government to protect Christianity in

general, or simply to ensure the free exercise of religion and favor no sect. *Id.* at 102–03.

The Framers of the Establishment Clause, especially James Madison, were then faced with the task of drafting an amendment that was responsive to all these concerns. Madison, who worked up the initial version of the Religion Clauses, “saw the Amendment as designed to prohibit the establishment of a *national* religion, and perhaps to prevent discrimination among sects.” *Wallace*, 472 U.S. at 98 (Rehnquist, J., dissenting) (emphasis added). As then-Justice Rehnquist pointed out, “[t]here is simply no historical foundation for the proposition that the Framers intended to build the ‘wall of separation’ that was constitutionalized in *Everson*.” *Id.* at 106 (Rehnquist, J., dissenting).

Put simply, *Locke* ignores history. Instead, the *Locke* majority tried to portray Madison’s past concerns about religious establishments in *Virginia* as being directly embodied in the Establishment Clause. The *Locke* Court pointed to Madison’s Memorial and Remonstrance Against Religious Assessments as an example of the American “tradition” of suspicion toward state funding going toward religious ministers. See *Locke*, 540 U.S. at 722–23. Portraying the Remonstrance as an interpretive aid for the Establishment Clause is puzzling for a few reasons, namely because Madison never offered it as a lens through which to view the Clause, and because Madison himself noted that “the legitimate meaning of the [Establishment Clause] must be derived from the text itself.” See Corwin, *supra*, at 13; Letter from James Madison to Thomas Ritchie (Sep. 15, 1821),

reprinted in 9 *The Writings of James Madison* 71 n.1 (Gaillard Hunt ed., 1910).

But importantly, the Remonstrance is inapplicable to *Locke* because Madison was addressing a state issue—not the federal issue that would arise four years later. As Justice Scalia’s dissent in *Locke* points out, Madison in the Remonstrance opposed Patrick Henry’s Bill Establishing a Provision for Teachers of the Christian Religion, a law that would have compelled Virginia taxpayers to support teachers of the Christian religion. What Madison was speaking out against was “not the *inclusion of religious ministers in public benefits programs* like the one at issue [in *Locke*], but laws that *singled them out* for financial aid.” *Locke*, 540 U.S. at 727 (Scalia, J., dissenting) (emphasis added). As hostile as one wants to portray the Framers as being toward laws that divert public resources, “[n]o one would seriously contend . . . that the Framers would have barred ministers from using public roads on their way to church.” *Id.* at 727–28 (Scalia, J., dissenting).

The Establishment Clause may have embodied many different concerns and ideas—such was unavoidable in a fledgling nation with many kinds of religious practices, but a strict separation between church and state was not one of them. Madison and other Framers sought to ensure that a federally imposed religion could not stifle the States’ religious traditions. They did not seek to build the “wall” that many believe the Establishment Clause creates.

IV. Overruling *Locke* will make this Court's Establishment Clause precedent more consistent and more historically sound.

This Court has begun espousing a view of Establishment Clause caselaw that accounts for the Nation's rich history and traditions vis-à-vis religion. The historical folly of the "wall of separation" theory implicit in *Locke* is rightly contradicted not only by newer Establishment Clause decisions, but even among older decisions; *Locke* is an outlier.

For example, despite its striking separationist language, *Everson* actually upheld the challenged bus service program, which extended to both public and sectarian school children, explaining that

cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a *neutral* in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. *State power is no more to be used so as to handicap religions, than it is to favor them.*

Everson, 330 U.S. at 18 (emphases added).

It is difficult, if not impossible, to construe Washington's—and now Virginia's—singling out devotional theology as an area of study to which public

scholarship funds *cannot* flow as anything other than a “handicap” on religion condemned in *Everson*.

Other Establishment Clause cases from this Court espouse a more historically sound view of the interaction between state and religion than both *Locke* and *Everson* offer. Petitioner cites cases such as *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), which discussed the anti-Catholic basis for statutes banning state aid for sectarian schools. And Justice Kavanaugh has outlined many other examples, see *Am. Legion*, 588 U.S. at 68–71 (Kavanaugh, J., concurring). Among those examples is *Town of Greece v. Galloway*, where the Court explained that its decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), “must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’” *Town of Greece v. Galloway*, 572 U.S. 565, 575–76 (2014) (quoting *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in part)).

As for the intersection between education and the Establishment Clause, in *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court again examined history in upholding Jefferson Parish, Louisiana’s use of federal aid to provide educational materials and equipment to many Catholic schools. The majority in *Mitchell* candidly discussed the anti-Catholic history behind hostility to funding private schools and expressed that “hostility to [state] aid to pervasively sectarian schools

has a shameful pedigree that we do not hesitate to disavow.” *Id.* at 828.

And *Kennedy v. Bremerton School District*, another example from the educational realm, contains a helpful reminder that the Framers’ intent behind the Establishment Clause was to end religious coercion, not ban religion from public life:

To be sure, this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, “make a religious observance compulsory.” Government “may not coerce anyone to attend church,” nor may it force citizens to engage in “a formal religious exercise.” No doubt, too, coercion along these lines was *among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.*

Kennedy v. Bremerton School District, 597 U.S. 507, 536–37 (2022) (emphasis added) (citations omitted).

CONCLUSION

The Court is well on its way to erasing the bad history promoted by cases like *Locke*, and by granting the instant petition, it has an opportunity to continue laying a better and more consistent foundation on which to build the Establishment Clause.

For the above reasons, the Court should grant the petition.

Respectfully submitted,

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