Nos. 24-394, 24-396

In the Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, ET AL.,
v.
GENTER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA, EX REL. OKLAHOMA

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
v.
GENTER DRUMMOND, ATTORNEY GENERAL OF OKLAHOMA, EX REL. OKLAHOMA

On Writs of Certiorari to the Supreme Court of Oklahoma

BRIEF AMICI CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND A FORMER OKLAHOMA STATE OFFICIAL IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI[1]

Amicus Curiae, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared often before this Court as counsel for parties, e.g., *Trump v. Anderson*, 601 U.S. 100 (2024); *Locke v. Davey*, 540 U.S. 712 (2004); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ.* v. *Mergens*, 496 U.S. 226 (1990); or for amici, e.g., *Carson v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), addressing various constitutional and statutory issues. The ACLJ is dedicated to freedom of religious exercise, a properly understood Establishment Clause, freedom of speech and, rights of equal access in education free of religious discrimination.

Amicus Curiae, the Hon. Jon Echols, was elected to represent House District 90 in the Oklahoma House of Representatives and did so from 2012 to 2024. He served the people of Oklahoma as House Majority Floor Leader and was the longest-serving Majority Floor Leader in state history. Rep. Echols's years of experience in the House of Representatives, and in leadership of that chamber, along with his legal

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

education and experience, equip him with a unique perspective to offer this Court on certain issues raised in this case. In particular, with his first-hand experience as a state legislator and in legislative leadership, Rep. Echols speaks to how the uncertainty of First Amendment jurisprudence – as evidenced in this case – hamstrings state lawmakers and officials in their efforts to establish and implement policy touching on weighty matters involving religion and general public benefits like education. Just as markets need certainty, so do lawmakers. Rep. Echols respectfully urges this Court to set clear and consistent markers, consistent with the Founders' design and intent, enabling state officials to govern properly and efficiently – and in a constitutionally sound manner.[2]

SUMMARY OF ARGUMENT

A generally available public benefit program cannot exclude religious participants. There is no risk of establishment of religion from such a result, but instead, mutual toleration and respect reflects the best of our traditions.

This Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), carved out an exception to these principles to authorize excluding religious study from a generally available scholarship program. *Locke* was an aberration from this Court's precedent even when

[2] *Amici Curiae* take no position on issues presented in this case beyond those addressed herein.

it was decided. Long before *Locke,* this Court had regularly acknowledged, even taken for granted, that incentivized activities may involve religious entities or pursuit of religious goals. The guarantee of neutrality is protected, not offended, when the government, following neutral criteria, extends benefits to diverse viewpoints, including religious ones. In fact, the Free Exercise Clause requires that the government may not discriminatorily exclude otherwise qualified, eligible entities solely because of their religious identity or activities. It is laws that single out religious ministers for specific benefits that are the target of the Establishment Clause. Many past cases had reiterated that the State cannot withhold a benefit on the basis of religion, yet that was precisely what Washington did in *Locke*.

In cases since *Locke*, this Court repeatedly rejected *Locke*'s reasoning. In each of this Court's decisions in *Trinity Lutheran, Espinoza*, and *Carson*, the court below – which this Court reversed – had cited and relied upon *Locke*. *Locke* was likewise cited by the court below here. *Locke* has continued to loom and provide a purported justification for excluding religion from a generally available program. In response, this Court has repeatedly made clear that *Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use. While this narrowing was necessary, the problem is that even when it comes to supporting

religious education, *Locke*'s reasoning is still defective and unworkable, based on the mistaken belief in a justification for excluding religion from general benefits.

Locke relied on a historical misunderstanding that the Founders sought to exclude religion from generally available programs. The historical record refutes this. For example, James Madison's "Memorial and Remonstrance" opposed special taxes that specifically benefited religion, not the inclusion of religious entities in general programs. The First Congress, which ratified the First Amendment, also enacted the Northwest Ordinance that supported schools teaching "religion, morality, and knowledge" *Locke*, accordingly, aligns with and reflects the anti-Catholic "Blaine Amendments" rather than the founding generation's understanding of religious accommodation.[3]

ARGUMENT

I. THIS COURT SHOULD FINALLY OVERRULE *LOCKE V. DAVEY* AND RECOGNIZE THE CONSTITUTIONAL NECESSITY OF THE GENERAL AVAILABILITY OF PUBLIC PROGRAMS.

This Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson v. Makin*, 596 U.S. 767, 778 (2022).

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[3] *Locke* was also wrong even on its own terms, as amicus ACLJ has previously explained. *See* Amicus Brief of ACLJ, *Carson v. Makin*, No. 20-1088 (U.S. Sept. 8, 2021).

Locke v. Davey, 540 U.S. 712 (2004), was an aberration from this principle, inconsistent with this Court's prior precedent and repeatedly undercut by this Court's precedents since. The lower court's use of that decision here, despite the ways this Court has limited and cabined *Locke*, demonstrates that the time has come for that aberration to be corrected, *Locke* overruled, and the long history of religious accommodation recognized.

A. The general availability of public funds and benefits to religious organizations is not novel in this Court's precedent.

By sustaining "a public benefits program that facially discriminates against religion," *Locke v. Davey*, 540 U.S. 712, 726 (2004) (Scalia, J., joined by Thomas, J., dissenting), *Locke* was an aberration from this Court's precedent even when it was decided. Long before *Locke,* this Court had regularly acknowledged, even taken for granted, that incentivized activities may involve religious entities or pursuit of religious goals without posing any risk of violating the Establishment Clause. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947) (incorporating the Establishment Clause and approving the use of public funds, in a general program, to reimburse parents for their children's bus fares to attend Catholic schools); *Bd. of Educ. v. Allen*, 392 U.S. 236, 238 (1968) (holding that the provision of textbooks to parochial schools was consistent with the Establishment Clause); *Walz v. Tax Comm'n of NY,* 397 U.S. 664, 673 (1970) (upholding under the Establishment Clause a tax

exemption system that included properties dedicated to religious purposes); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (holding that policy excluding religious worship from university buildings violated Free Speech Clause and was not justified by Establishment Clause); *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481, 486 (1986) (unanimously holding that the State may, under the Establishment Clause and through a generally applicable financial aid program, pay a blind student's tuition at a sectarian theological institution); *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988) (upholding a statute under the Establishment Clause that enlisted a "wide spectrum of organizations" in addressing adolescent sexuality because the law was "neutral with respect to the grantee's status as a sectarian or purely secular institution"); *Mueller v. Allen*, 463 U.S. 388, 402 (1983) (upholding under the Establishment Clause a law that provided a deduction for education expenses included expenses at private religious schools); *Bd. of Educ.* v. *Mergens,* 496 U.S. 226, 248 (1990) (plurality opinion) (holding that Equal Access Act, requiring equal access for student religious groups to school forums, was constitutional under the Establishment Clause); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395-97 (1993) (holding that excluding church from a generally available program for displaying educational films violated the Free Speech Clause and was not justified by the Establishment Clause); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 843-44 (1995) (holding that excluding students from a program that paid printing costs for student

publications on the basis of their religious viewpoint violated the Free Speech Clause and was not justified by the Establishment Clause); *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002) (holding that a State educational voucher program that students could choose to use to attend religious private schools was constitutional under the Establishment Clause).

Even when this Court incorporated the Establishment Clause in *Everson,* 330 U.S. at 18, it acknowledged that we must "be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief." *Id.* at 16. The Court made clear that such an exclusion would be inconsistent with the Free Speech Clause:

> New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it 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. (emphasis in original).

This Court has stated repeatedly that the Establishment Clause does not require excluding religious groups from a generally available program. On the contrary, as seen in cases like *Widmar* and *Rosenberger*, such an exclusion itself is a violation of the First Amendment: "the guarantee of neutrality is

respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839; *see also Mergens,* 496 U.S. at 248 ("The message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."). The basic principle this Court emphasized again and again in case after case is that once the government makes a generally applicable program available, through funding or otherwise, it cannot then discriminate on the basis of religious identity or activities. *See Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 474 (2020) ("We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.").

Walz v. Tax Comm'n of NY, 397 U.S. 664 (1970), where this Court upheld tax exemptions for churches, recognized the unbroken chain of history supporting the availability to religious entities of generally available programs. This Court emphasized that "Congress, from its earliest days, has viewed the Religion Clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies." *Id.* at 677. This Court cited at length several statutes from early congresses that adopted such tax exemptions. *Id.* The historical record was irrefutable: "an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." *Id.* at 678. The historical record

was unanimous that churches were entitled to participate in the general system of taxation exemption.

> Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief.

Id. at 678.

In *Rosenberger*, this Court further refined these principles, holding that the First Amendment was violated when a University of Virginia funding program was denied to religious participants. Excluding religious participants from generally applicable funding is unconstitutional; "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression." *Rosenberger,* 515 U.S. at 828. The University of Virginia argued that banning funding of religious speech was justified based on the Establishment Clause, and in fact "the Fourth Circuit asserted that direct monetary subsidization of religious organizations and projects" is a unique Establishment Clause concern. *Id.* at 838. This Court wholeheartedly rejected this argument, emphasizing that it had repeatedly "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-

reaching government programs neutral in design." *Id.* at 839.

The guarantee of neutrality is protected, not offended, when the government extends benefits to diverse viewpoints, including religious ones. "When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax." *Locke v. Davey*, 540 U.S. 712, 726-27 (Scalia, J., joined by Thomas, J., dissenting).

B. *Locke* radically deviated from prior precedent and was incoherent on its own ground.

Locke v. Davey, 540 U.S. 712, 715 (2004), did not purport to overturn any of this Court's precedents. Nor did it challenge the notion that discrimination against religion as such would violate the Constitution. *See* 540 U.S. at 724 (distinguishing government action "evincing the hostility toward religion which was manifest in *Lukumi*"). But nonetheless, it created a gaping and confusing exception in this Court's precedent. Many past cases had reiterated that the state cannot withhold a benefit on the basis of religion, and that was "precisely what the State of Washington has done here. It has created a generally available public benefit . . . . It has then carved out a solitary course of study for exclusion: theology." *Id.* at 727 (Scalia, J., joined by Thomas, J., dissenting).

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. *Id.* 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 real 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 major 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 unconstitutional discrimination. *See id.* at 727 (Scalia, J., joined by Thomas, J., dissenting) ("Davey is not asking for a special benefit to which others are not entitled. . . . He seeks only equal treatment"). It is laws that single out religious ministers for specific benefits that are the target of the Establishment Clause. Justice Scalia's dissent highlighted the crucial importance of this distinction: "One can concede the Framers' hostility to funding the clergy *specifically*, but that says nothing about whether the clergy had to be excluded from benefits the State made available to all. No one would seriously contend, for example, that the Framers would have barred ministers from using public roads

on their way to church." *Id.* at 727-28.[4]

The distinction between special privileges and unique disabilities has growing importance in a time of expanding government. The more benefits and services a State undertakes to pay, deliver, control, or manage, the more important it becomes to resist discriminatory disqualifications. When a 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. The rationale of *Locke* rests upon this basic categorical error and blesses that very kind of discrimination. Disavowing that error leaves *Locke* without its asserted historical foundation.

Locke failed on its own ground. 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. Scholarship recipients, including clergy in training, could in fact specifically use scholarship funds for devotional theology study so long as they had declared a different major or were savvy enough not to declare any major.

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-

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[4] In fact, targeted exclusion of what is "essentially religious" from an otherwise general benefits program necessarily thrusts courts into the theological thicket.

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.

Locke relied on a purported interest in refusing to fund the clergy, but in reality, blessed a program that funded the clergy in all manner of ways unless a clerical major was declared. In essence, the restriction did not exclude budding ministers from educational funding; rather it *penalized* those who declared a certain major at a certain time, regardless of whether they ultimately even pursued that major. *See* n. 2 *supra*. The arbitrary nature of this classification highlights the inconsistencies of *Locke*'s reasoning and the need for a baseline principle of no discrimination in generally applicable programs, a principle that is "irreconcilable with [*Locke*]'s decision, which sustains a public benefits program that facially discriminates against religion." *Locke*, 540 U.S. at 726 (Scalia, J., joined by Thomas, J., dissenting).

C. The triumvirate of *Trinity Lutheran*, *Espinoza*, and *Carson* undermined all of *Locke*'s reasoning.

In recent years, this Court has reiterated that 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. These recent cases began in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017). In *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 480 (2020), this Court held that a ban on aid only to "sectarian" schools violates the nondiscrimination norm articulated in *Trinity Lutheran* and "the decades of precedents on which it relied," *Espinoza*, 591 U.S. 484. And then, in *Carson v. Makin*, 596 U.S. 767, 789 (2022), this Court held that Maine, with a program that "operates to identify and exclude otherwise eligible schools on the basis of their religious exercise," had likewise violated the Free Exercise Clause. In each case, this Court had to carefully distinguish *Locke*, which the lower courts had relied upon – and abused.

In *Trinity Lutheran*, this Court held that by denying a generally available program to religious schools, the State violated the First Amendment because it "require[d] Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program." *Trinity Lutheran*, 582 U.S. at 466. Missouri barred a religious school from obtaining a State funding grant for the school's playground. By contrast, Missouri allowed secular private schools to

obtain State funding grants for their schools' playgrounds. Missouri's law reflected an unconstitutional policy of "No churches need apply." *Id.* at 465. This Court minced no words: discriminating against religious schools because the schools are religious, excluding Trinity Lutheran "from a public benefit for which it is otherwise qualified" because of its religious status, "is odious to our Constitution." *Id.* at 467.

The Respondent in *Trinity Lutheran* attempted to avoid this inescapable conclusion "by arguing that the free exercise question in this case is instead controlled by our decision in *Locke v. Davey*." *Trinity Lutheran Church of Columbia, Inc.*, 582 U.S. at 464. Likewise, 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). This Court distinguished *Locke* on the basis that the program in *Locke* did not prevent students from attending religious schools, while here, "Trinity Lutheran is put to the choice between being a church and receiving a government benefit." *Trinity Lutheran*, 582 U.S. at 465. That distinction is certainly accurate, but as Justice Scalia's dissent in *Locke* highlighted, *Locke* still, regardless of its specific facts, gave the imprimatur to excluding religion from a generally available benefit program; the exact type of exclusion does not change the basic constitutional problem.

In *Espinoza v. Montana Department of Revenue*, this Court held that States cannot bar religious organizations from participating in public benefit programs on account of their religious identity and practice. "Montana's no-aid provision [impermissibly] bars religious schools from public benefits solely

because of the religious character of the schools." *Espinoza*, 591 U.S. at 476. The Constitution "condemns discrimination against religious schools and the families whose children attend them." *Id.* at 488. In *Espinoza,* too, "Seeking to avoid *Trinity Lutheran*, the Department contends that this case is instead governed by *Locke v. Davey*." *Id.* at 479. The State supreme court below had likewise relied upon *Locke*, despite this Court's intervening decision in *Trinity Lutheran*. *Espinoza v. Montana Dep't of Revenue*, 435 P.3d 603, 608-09 (Mont. 2018). This Court, again, distinguished *Locke based on its facts*, specifically on what it described as the narrow use-based nature of the restriction in *Locke*.

Finally, despite this Court's repeated limitations and warnings against *Locke*'s use, the First Circuit continued to rely on *Locke*:

> even if *Espinoza* suggests that *Locke* is a narrower ruling than *Eulitt* understood it to be, we do not read *Espinoza* to hold that a use-based restriction on school aid necessarily violates the Free Exercise Clause unless it mimics the restriction in *Locke*. *Espinoza* certainly does not expressly set forth any such rule.

Carson v. Makin, 979 F.3d 21, 44 (1st Cir. 2020). Thus, when the case came to this Court, yet again, "Maine and the dissents invoke[d] *Locke v. Davey*, 540 U.S. 712 (2004), in support of the argument that the State may preclude parents from designating a religious school to receive tuition assistance payments." *Carson*, 596 U.S. at 788. And yet again,

this Court had to limit *Locke* to the very specific facts of pursuing a religious degree. "*Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits." *Id.* at 789.

A review of this crucial trifecta of *Trinity Lutheran*, *Espinoza,* and *Carson* demonstrates that *Locke* continues to loom and provide a purported justification for excluding religion from a generally available program. In *Carson v. Makin*, this Court yet again struck down a Maine program that provided tuition assistance to parents because the program barred religious schools from participation. Because Maine chose to offer a public benefit to its citizens, it could not exclude religious schools "solely because of their religious character." *Carson*, 596 U.S. at 796 (quoting *Trinity Lutheran*, 582 U.S. at 462). In doing so, Maine "effectively penalize[d]" religious schools and parents from freely exercising their religion. *Id.* (quoting *Trinity Lutheran*, 582 U.S. at 462).

This Court's precedent has repeatedly narrowed and limited *Locke* to vocational religious majors, refusing to apply the decision beyond the specific facts it considered. While this narrowing was necessary, the problem revealed by *Locke*'s continued existence is that even when it comes to supporting religious education, *Locke*'s reasoning is still defective and unworkable. *Locke*, even as an isolated exception, is irreconcilable with this Court's precedent.

D. History and tradition confirms the availability of general programs to religious entities.

Finally, a historical misunderstanding underpins *Locke* and should be rejected here also. While "the views of one man do not establish the original understanding of the First Amendment." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 856 (1995) (Thomas, J., concurring), the views of James Madison have been rightly seen as crucial to understanding the Constitution's scope. *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947). The views of Madison in particular, and the Founders in general, demonstrate that excluding religious entities from generally available programs was never understood to be required by the First Amendment.

As Justice Thomas explained, James Madison and his Memorial and Remonstrance Against Religious Assessments do not suggest that religious groups should be excluded from generally available programs. *Rosenberger*, 515 U.S. 819, 854 (1995) (Thomas, J., concurring) (discussing James Madison's Memorial and Remonstrance Against Religious Assessments (reprinted in *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 63-72 (1947) (appendix to dissent of Rutledge, J.))). Madison's Remonstrance was written against a tax, the proceeds of which were to be appropriated "by the Vestries, Elders, or Directors of each religious society . . . to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship, and to none other use whatsoever." *See Everson* v. *Bd. of Educ. of Ewing,* 330 U.S. 1, 74

(1947) (appendix to dissent of Rutledge, J.). This assessment, in other words, was not a general or neutral program, but on its face a specific religious tax that benefited religious entities alone.

Accordingly, Madison's objection was based on the explicit lack of equality. "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*, 515 U.S. at 854 (Thomas, J., concurring). In other words, Madison's ire "involved not the inclusion of religious ministers in public benefits programs like the one at issue here, but laws that singled them out for financial aid." *Locke*, 540 U.S. at 727 (Scalia, J., joined by Thomas, J., dissenting).

According to Madison, the Virginia assessment was flawed because it "violate[d] that equality which ought to be the basis of every law." Madison's Remonstrance p.4, reprinted in *Everson,* 330 U.S. at 66 (appendix to dissent of Rutledge, J.). The assessment violated the "equality" principle not because it allowed religious groups to participate, *but because the bill singled out religious entities for special benefits*. It imposed, in other words, a religious tax that specifically benefited religion: "the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions." *Id.*

In other words, Madison's concern was a government benefit specifically and uniquely for religious speech, a "Religious Assessment." To state the obvious, Madison wrote a "Memorial and Remonstrance Against Religious Assessments." He did not write a "Memorial and Remonstrance Against

Assessments that Happen to Provide a Benefit to Religious Individuals." Accordingly, "there is no indication that at the time of the framing he took the dissent's extreme view that the government must discriminate against religious adherents by excluding them from more generally available financial subsidies." *Rosenberger*, 515 U.S. at 856-57 (Thomas, J., concurring).

And in fact, the historical evidence that government programs at the founding provided religious benefits is irrefutable. Religious entities receive benefits from almost all public programs, of course, such as roads, fire departments, police services, and the like. Religious exemptions from property taxation, as discussed *supra*, seem to be as old as taxation itself. "Consistent application of the dissent's 'no-aid' principle would require that 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring) (quoting *Zobrest* v. *Catalina Foothills School Dist.,* 509 U.S. 1, 8 (1993)).

But there is a very specific example that should guide this Court here. The very first Congress which ratified the Bill of Rights also ratified the Northwest Ordinance of 1787. *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. Article III of that enactment had provided: "Religion, morality, and knowledge . . . being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.* at 52, n.(a). As Justice Thomas emphasized, "Congress subsequently set aside federal lands in the Northwest Territory and other territories for the use of schools." *Rosenberger*,

515 U.S. at 862 (Thomas, J., concurring) (citing Act of Mar. 3, 1803, ch. 21, § 1, 2 Stat. 225-226; Act of Mar. 26, 1804, ch. 35, § 5, 2 Stat. 279; Act of Feb. 15, 1811, ch. 14, § 10, 2 Stat. 621; Act of Apr. 18, 1818, ch. 67, § 6, 3 Stat. 430; Act of Apr. 20, 1818, ch. 126, § 2, 3 Stat. 467). These schools were not public in the modern sense, and "[m]any of the schools that enjoyed the benefits of these land grants undoubtedly were church-affiliated sectarian institutions[.]" *Id.* But the early Congress, including its member James Madison, is not recorded to have found any problem with the provision of such neutral benefits.

Sadly, although the voice of the founding was clear that "Americans from 1789 to 1825 accepted and practiced governmental aid to religion and religiously oriented educational institutions," *Rosenberger*, 515 U.S. at 863 (Thomas, J., concurring) (quoting C. Antieau, A. Downey, & E. Roberts, Freedom From Federal Establishment, Formation and Early History of the First Amendment Religion Clauses 174 (1964)), in a dark chapter of our history, this principle was abandoned through Blaine Amendments. Blaine Amendments codified the idea that religious or sectarian schools should be excluded "from otherwise permissible aid programs. . . . This doctrine, born of bigotry, should be buried now." *Mitchell v. Helms*, 530 U.S. 793, 829 (2000). This Court emphasized that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." *Id.* at 828. Members of this Court have highlighted the shameful history of Blaine Amendments. *Espinoza*, 591 U.S. at 500–03 (Alito, J., concurring); *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 19, 77 n.3 (2019) (Thomas, J., concurring). The

Blaine Amendment "would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S. at 828. This Court has made clear that such provisions are out of step with the history and tradition of the Founding and the constitutional principle of accommodation for religious practice.

In *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 507 (2022), this Court finally interred the zombie *Lemon* test, stating "this Court long ago abandoned *Lemon* and its endorsement test offshoot." *Id.* at 534. Now that Lemon has been interred, its progeny should also be buried. *Lemon* "'invited chaos' in lower courts, led to 'differing results' in materially identical cases, and created a 'minefield' for legislators." *Id.* (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995) (plurality opinion) (emphasis deleted)). *Locke* is a fruit of *Lemon*'s poisonous tree and has had the same effects. The time has likewise come for it to be overruled and for this Court to apply the long-standing tradition that general benefits should be available to all, not denied based on religion.

CONCLUSION

For these reasons, amici curiae respectfully urges this Court to overrule the *Locke* decision and reverse the judgments below.

Respectfully submitted,

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