No. 26-1437

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CAMERON JOHNSON; LUKE THOMAS; and TRACE STEVENS,

Plaintiffs-Appellants,

v.

A. SCOTT FLEMING, in his official capacity as the Director of the State Council of Higher Education for Virginia; JOHN JUMPER, in his official capacity as the Chair of the State Council of Higher Education for Virginia; MAJOR GENERAL JAMES W. RING, in his official capacity as the Adjutant General of Virginia; and DONALD L. UNMUSSIG, in his official capacity as the Chief Financial Officer of the Virginia Department of Military Affairs,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia
Case No. 3:25-cv-00407-RCY

BRIEF OF AMICI CURIAE THE AMERICAN CENTER FOR LAW AND JUSTICE AND JOSHUA DAVEY IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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IDENTITY 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.*, *Alive Church of the Nazarene, Inc. v. Prince William Cnty., Va.*, 59 F.4th 92 (4th Cir. 2023), *Buxton v. Kurtinitis*, 862 F.3d 423 (4th Cir. 2017); or for amici, *e.g.*, *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump,* 167 F.4th 86 (4th Cir. 2026), *GenBioPro, Inc. v. Raynes*, 144 F.4th 258 (4th Cir. 2025), *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101 (4th Cir. 2018), addressing various constitutional and statutory issues. ACLJ attorneys represented Joshua Davey from the trial court to the Supreme Court in *Locke v. Davey*, 540 U.S. 712 (2004). The ACLJ is dedicated to the free exercise of religion, a properly understood Establishment Clause, free speech, and the right of equal access in education without religious discrimination.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), 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, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. This brief is filed with the consent of all parties pursuant to Fed. R. App. P. 29(a)(2).

Joshua Davey was the respondent in *Locke v. Davey*, the Supreme Court decision at the center of this appeal. As a college student in Washington State, Mr. Davey was awarded a Promise Scholarship but was denied the benefit solely because he chose to pursue a devotional theology major—a denial the Supreme Court narrowly upheld. Mr. Davey joins this brief to assist the Court in understanding the proper scope of the decision that bears his name and to urge that it not be applied in a manner that compounds its original error.

INTRODUCTION

Governments often employ incentives (grants, credits, and deductions) to pursue desired social goods, such as the fostering of charitable works and the education of 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 N.Y.*, 397 U.S. 664 (1970); *Mueller v. Allen*, 463 U.S. 388 (1983). What the government may not do, however, is provide neutral educational assistance to secular programs while arbitrarily withholding the same assistance from religious programs—or from some religious programs while extending it to others.

The Virginia Tuition Assistance Grant Program ("VTAG") contravenes this fundamental norm of evenhandedness. Despite its facial neutrality, the program excludes from eligibility institutions of higher education "whose primary purpose" is "to provide religious training or theological education," VA. CODE ANN. § 23.1-610, and in application discriminates even among religious degree programs themselves. The district court nevertheless sustained this discriminatory scheme by treating *Locke v. Davey* as mandatory and controlling precedent. JA.014. That ruling was erroneous.

As the Supreme Court's decisions in *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) make clear, *Locke* must be confined to its narrow facts. This Court should reverse the district court's judgment and hold that Virginia may not discriminatorily withhold otherwise neutral educational assistance from religious programs and institutions.

ARGUMENT

A generally available public benefit program cannot exclude religious participants. A generally available benefit that includes

religious participants poses no risk of establishing religion; it embodies mutual toleration and respect, and reflects the best of our traditions. *Walz*, 397 U.S. at 698 (tax exemption included properties dedicated to religious purposes); *Mueller*, 463 U.S. at 404 (deduction for education expenses included expenses at private religious schools). But the government may not provide neutral educational assistance to only some religious programs while denying it to others, or to secular programs while withholding it from religious ones.

The Supreme Court has "repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson*, 596 U.S. at 778. The district court nevertheless declared that the VTAG may arbitrarily discriminate between religious degrees when awarding otherwise neutral educational assistance. Such a holding violates decades of well-established precedent.

This Court should reverse the district court's holding and its application of *Locke v. Davey* because the Supreme Court has indicated that *Locke* should remain confined to its facts. The legal instability of *Locke* undermines any argument for extension of that precedent.

I. *Locke v. Davey* is too Questionable to be Applied or Extended to the Present Case.

The district court applied *Locke* as the "mandatory" law to be applied in this case. JA.014. But *Locke* provides no such support for the decision below, as *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), *rev'g Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779 (8th Cir. 2015); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464 (2020), *rev'g Espinoza v. Mont. Dep't of Revenue*, 435 P.3d 603 (Mont. 2018); and *Carson v. Makin*, 596 U.S. 767 (2022), *rev'g Carson v. Makin*, 979 F.3d 21 (1st Cir. 2020), amply demonstrate.

"Over the past decade, the Supreme Court has eroded *Locke*'s foundation." *Hall v. Fleming*, No. 25-1574, 2026 U.S. App. LEXIS 13779, at *15 (4th Cir. May 13, 2026) (Richardson, J., concurring). Moreover, the *Locke* decision represents an especially ill-suited candidate to construct an antagonistic body of law towards religion. Long before *Locke,* the Supreme Court had regularly acknowledged, even taken for granted, that incentivized activities may involve religious entities or the 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); *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).

The Supreme Court has emphasized this principle repeatedly. *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"); *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).

Locke worked no revolution in constitutional jurisprudence, did not purport to overturn any of the Supreme Court's precedents, and did not 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 itself from a situation like the one here by stating

that "[t]he State ha[d] merely chosen not to fund a *distinct* category of instruction." *Id.* at 721 (emphasis added).

In any event, the *Locke* decision does not provide support for any rule that would justify discrimination against an *entire school*, as such, regardless of declared major, just because of the school's religious mission and purpose. This is a rule directly targeted at associational interests. *Compare* VA. CODE ANN. § 23.1-610 (excluding from tuition assistance program institutions of higher education "whose primary purpose" is "to provide religious training or theological education").

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 held that this denial reflected a historical refusal to use tax money to fund the training and maintenance of clergy. *Id.* at 722-23 & n.6. To be sure, this "historic and substantial" concern, *id.* at 725, was real. However, the 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 actual historical footprint.

There is a significant difference in kind, not just in degree, between doling out a special benefit to a select profession (e.g., clergy) and singularly denying an otherwise generally available benefit (e.g., scholarships, access to public parks, use of public libraries) only for a select group. The former is a privilege; the latter is unconstitutional 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.") (citation omitted).

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 (emphasis in original).

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 versus carrying a political banner; wearing a yarmulke versus wearing a pullover cap; growing a long beard for religious reasons versus 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 amounts to religious 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. Only to the eyes of a believer is the religious act "essentially" different. The federal and state courts are not equipped or even permitted to render such inherently religious assessments. While disallowing a special assessment for ministers would not require courts to determine whether Ethical Culture or Veganism count as religions (none of these receives 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.

The distinction between special privileges and unique disabilities possesses growing importance in a time of expanding government. The more benefits and services the state undertakes to pay, deliver, control, or manage, the more important it becomes to resist discriminatory disqualifications. For example, when the state undertakes the financing of 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 categorical error. Disavowing that error leaves *Locke* without its asserted historical foundation. Hence, this Court ought not to extend or apply *Locke* to any situation not squarely within the four corners of that precedent. And as noted above and by Plaintiffs, this case is not in all respects a carbon copy of *Locke*.

b. The Decision in *Locke* Was Unnecessary.

Compounding the weakness of the rationale in *Locke* is the fact that determination of the opinion's central issue was completely unnecessary

to resolve 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. Br. for Resp't at 10 n.4, *Locke*, 540 U.S. 712 (No. 02-1315) (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). However, 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;
- 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.*;
- Theology, even by an actual minister or minister in training, so long as the theology was taught from a nonbelieving perspective, Br. at 6–7.

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, *Locke*, 540 U.S. at 725 n.9;
- Changed his major after sophomore year or, like amicus 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, https://www.theichthus.com/blog/2004/04/the-real-losers-of-locke-v-davey (last visited May 28, 2026), and is now a partner at a law firm, *Joshua D. Davey*, TROUTMAN PEPPER LOCKE, www.troutman.com/professionals/joshua d davey (last visited May 26, 2026)).

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 (quoting *Locke*, 540 U.S. at 724-25). And as noted above, scholarship recipients, including clergy in training, could 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 during their first two years of college.

Meanwhile, students like Joshua Davey were penalized for their voluntary declaration of a major that they were not even 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. *Locke* should certainly not be extended to serve as the basis for a broad mandate to treat certain religious degree programs as pariahs when neutral, generally available benefits are at stake.

II. The *Locke* Decision Should Be Confined to its Facts.

As the Supreme Court did in *Trinity Lutheran*, *Espinoza*, and *Carson*, this Court can achieve an appropriate result here without overruling *Locke* (which, of course, would be beyond its power). This Court should simply follow the Supreme Court's lead by recognizing that *Locke* is confined to its facts.

a. Extending *Locke* Will Lead to More Errors.

Again and again, the Supreme Court has reversed lower courts that relied upon *Locke*. In *Trinity Lutheran*, the Eighth Circuit relied upon

Locke, *Trinity Lutheran*, 788 F.3d at 785, and the Supreme Court reversed. *Trinity Lutheran*, 582 U.S. at 464. In *Espinoza*, the state supreme court likewise relied upon *Locke*, despite the Supreme Court's intervening decision in *Trinity Lutheran*, *Espinoza*, 435 P.3d at 608-09, and again the Supreme Court reversed. *Espinoza*, 591 U.S. at 479. In *Carson*, the First Circuit also relied on *Locke*, *Carson*, 979 F.3d at 44, and yet again the Supreme Court reversed. *Carson*, 596 U.S. at 788. And in the present case, the district court invoked *Locke*, JA.009, despite the Supreme Court's rulings in *Trinity Lutheran*, *Espinoza*, and *Carson*. While this Court cannot overturn *Locke*, it should confine *Locke* to its facts so that it does not generate yet another erroneous result in this case.

In *Espinoza*, the Supreme 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." 591 U.S. at 484. And then, in *Carson*, the Supreme 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. 596 U.S. at 789. In each case, the Supreme Court

had to carefully distinguish *Locke*, which the lower courts had relied upon—and abused.

In *Trinity Lutheran*, the Supreme 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." 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. The Supreme 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*." *Id.* 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). The Supreme 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*, the Supreme 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 the Supreme Court's intervening decision in *Trinity Lutheran*. *Espinoza v. Montana Dep't of Revenue*, 435 P.3d 603, 608-09 (Mont. 2018). The Supreme 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 the Supreme 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 the Supreme 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, the Supreme 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*, the Supreme 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).

The Supreme 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.

b. *Locke's* Facts Are Not Analogous to the Present Case.

Locke's facts involved a college student specifically seeking to become clergy. 540 U.S. at 717. The state constitution specifically stated that state funds could not be used to *train clergy*. WASH. CONST. amend. LXXXVIII ("No public money . . . shall be appropriated for or applied to any religious . . . instruction . . . ."). The college was the entity deciding what degree was categorized as a clergy training degree. *Locke*, 540 U.S. at 717. The student sought to use a state-funded scholarship to pay for his degree after enrolling in a degree specifically for training clergy. *Id.*

Here, Plaintiffs are not exclusively seeking to become clergy, and further, the state constitution does not specifically prohibit the use of state funds to train clergy. Moreover, it is the state, rather than the college, that is categorizing which degrees are excluded from eligibility.

Further, Plaintiffs are enrolling in state-excluded degrees that are indistinguishable from eligible degrees. For example, eligible programs include "Religion: Evangelism," "Religion: Christian Counseling," and "Religious Studies: Theology and Apologetics." *VTAG and Other Virginia State Aid*, LIBERTY UNIV., https://www.liberty.edu/student-financial-services/vtag/ (last visited May 26, 2026) (open list under "Religious

Undergraduate Degree Programs" subcategory, "Eligible Programs"). But the degrees Plaintiffs seek to pursue, "Pastoral Leadership" and "Music and Worship: Worship Tech" are not eligible. *See id.*; JA.047, 094.

The facts presented also deviate from *Hall*, which this Court found to be "directly analogous", 2026 U.S. App. LEXIS 13779, at *4, to *Locke* in that Plaintiffs have not selected their majors to pursue only a religious vocation. *See id.*, at *3 (plaintiff changed major in response to her "hear[ing] God's call to ministry"); JA.044–045. (Plaintiff Johnson has a potential goal of becoming a pastor, but is also interested in real estate or leading a community-building nonprofit, and plans to pursue a minor in business); JA.340, 047 (Plaintiff Thomas plans to either be a worship pastor or pursue a commercial musical career in singing/songwriting).

Locke responded to a state constitutional prohibition that directly addressed the issue presented. Extending it to the facts here—which include secular components and inconsistent funding exclusions—is neither required nor responsive to the Supreme Court's treatment of *Locke*. This Court should not apply or extend *Locke* in this case.

* * *

The very first Congress that 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 is not recorded to have found any problem with the provision of such neutral benefits, and "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)). This Court should apply the long-standing tradition that general benefits should be available to all, not denied based on religion.

CONCLUSION

This Court should reverse the judgment of the district court.

Respectfully submitted,

/s/ Nathan J. Moelker
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because it contains 4,587 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

Date: June 2, 2026

/s/Nathan J. Moelker
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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2026, I electronically filed a copy of the foregoing *Amici Curiae* Brief using the ECF System which will send notification of that filing to all counsel of record in this litigation.

Date: June 2, 2026

/s/Nathan J. Moelker
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