**No. 15-577**

IN THE

# Morris Tyler Moot Court of Appeals at Yale

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TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
*Petitioner*,

v.

SARA PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,
*Respondent*.

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**On Writ of Certiorari**
**to the United States Court of Appeals**
**for the Eighth Circuit**

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## BRIEF FOR PETITIONER

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COMPETITOR ID: 117
*127 Wall Street*
*New Haven, CT 06511*
*(203) 432-4992*

*Counsel for Petitioner*

## QUESTION PRESENTED

The State of Missouri's Department of Natural Resources provides grants to nonprofit organizations for the purchase of recycled tires to resurface playgrounds. However, as a matter of official policy the Department prohibits organizations that are owned or controlled by a church from receiving otherwise generally available funds through this benefit program.

The question presented is whether the exclusion of church-affiliated organizations from receiving otherwise neutral and secular playground-resurfacing grants violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

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The court of appeals' opinion is reported at 788 F.3d 779. The district court's opinion granting Respondent's motion to dismiss is reported at 976 F. Supp. 2d 1137. The order of the district court denying Petitioners' motion to reconsider and for leave to file an amended complaint is available at 2014 WL 11516091.

## JURISDICTION

The judgment of the court of appeals was entered on May 29, 2015. A petition for rehearing en banc was denied on August 11, 2015. The petition for writ of certiorari was filed in this Court on November 4, 2015, and was granted on January 15, 2016. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the First Amendment and Section 1 of the Fourteenth Amendment to United States Constitution are provided in the Joint Appendix. *See* J.A. 1.

Article I, Section 7 of the Missouri Constitution provides:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship.

Mo. Const. art. I, § 7.

Section 260.273 of the Missouri Revised Statutes is reproduced in the Appendix to this brief.

## STATEMENT OF FACTS

### I. The Rejection of Trinity Lutheran's Application Solely on the Basis of Religion

For 35 years, the Learning Center has provided preschool and daycare services in Columbia, Missouri. Initially established as a non-profit corporation, the Learning Center merged into Trinity Lutheran Church of Columbia, Inc. ("Trinity Lutheran") in 1985. It admits

students of "any sex, race, color, religion, nationality, and ethnicity." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 976 F. Supp. 2d 1137, 1140 (W.D.Mo. 2013). A ministry of Trinity Lutheran, the Learning Center incorporates daily religious instruction into its preschool and daycare programs. The Learning Center, which operates on Trinity Lutheran's premises, maintains a playground for its students.

The state of Missouri's Department of Natural Resources ("the Department") offers Playground Scrap Tire Surface Material Grants as a solid waste management program. The Department awards these grants to qualifying organizations—public and private nonprofit daycare centers and other nonprofit entities—for the purchase of recycled tires to resurface playgrounds. See Mo. Rev. Stat. § 260.273.6(2); Mo. Code Regs. Ann. tit. 10, § 80-9.030. The Department funds the recycling grants through a small fee imposed on the sale of all new tires sold within the state. See Mo. Rev. Stat. § 260.273.2. Each year the Department grades and ranks the applications it receives, and it awards grants based on those rankings.

In 2012, Trinity Lutheran applied for one of these generally available grants for the Learning Center. The grant would allow the Learning Center to make its playground safer by replacing the gravel that covers it with a rubber surface made from recycled tires.

The Department ranked Trinity Lutheran's application fifth out of forty-four applications received in 2012. The Department approved and funded fourteen grant applications that year. See *Trinity Lutheran*, 976 F. Supp. 2d at 1140. Trinity Lutheran's was not among those granted. Instead, on May 21, 2012, Trinity Lutheran received a message from the Department explaining:

> [A]fter further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."

*Id*. at 1155. In other words, "but for the fact that the Learning Center was run by a church, it would have received a playground-surfacing grant." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 790 (8th Cir. 2015) (Gruender, J., dissenting).

## II. Procedural Background

Petitioner, Trinity Lutheran, filed this action against Sara Pauley, acting in her official capacity as Director of the Missouri Department of Natural Resources, in the Western District of Missouri. The suit alleged that the Department's "policies and actions in denying grants to applicants who are churches or connected to churches" were unconstitutional as applied to Trinity Lutheran. *Id*. at 782. In particular, Petitioner alleged that the denial of its grant application violated the Equal Protection Clause of the Fourteenth Amendment and its First Amendment right to free exercise of religion. Petitioner sought injunctive and declaratory relief.

Respondent moved to dismiss the complaint for failure to state a claim. The district court granted the motion on September 26, 2013. In reaching this decision, the district court reasoned that the case was "analogous to *Locke v. Davey*." *Trinity Lutheran*, 976 F. Supp. 2d at 1147 (citing *Locke v. Davey*, 540 U.S. 712 (2004)). Interpreting *Locke*, the district court first found "the existence of a longstanding and legitimate antiestablishment interest" in excluding Trinity Lutheran from the playground-resurfacing program. *Id*. at 1151. The district court then weighed the state's interest against the "relatively minor burden" the exclusion placed on Trinity Lutheran to find that the exclusion of religious institutions from the grant program did not violate the Free Exercise Clause. *Id*. Again citing *Locke*, the district court stated that without a violation of the Free Exercise Clause, Trinity's Equal Protection claim also must be dismissed. On January 7, 2014, the district court denied Trinity Lutheran's post-dismissal motion for leave to file an amended complaint.

On May 29, 2015, the Eighth Circuit affirmed the dismissal by a divided vote. Adopting slightly different reasoning than the district court, the majority opinion held that *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 383-84 (W.D.Mo. 1973), *aff'd,* 419 U.S. 888 (1974)—a summary affirmance of the dismissal of a facial challenge to the Article I, § 7 of the Missouri Constitution—controlled the outcome of this case. The majority noted that invalidating the exclusion of churches from programs like the one at issue in this case "may be a logical constitutional leap in the direction the Court recently seems to be going." *Trinity Lutheran*, 788 F.3d at 785. However, in the majority's view, "only the Supreme Court can make that leap." *Id*.

Judge Gruender dissented. He argued that the majority incorrectly characterized Trinity Lutheran's as-applied challenge as a facial challenge to "avoid fully grappling with *Locke* by merely pointing to an instance [in *Luetkemeyer*] in which this state constitutional provision has been upheld." *Id*. at 790 (Gruender, J., dissenting). Judge Gruender's dissent extensively analyzed *Locke* and its application to the instant case. He concluded that, under *Locke*, "in the absence of a historic and substantial interest, the Department's latitude to discriminate against religion does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Id*. at 793-94 (Gruender, J., dissenting) (citations omitted). On January 15, 2016, this Court granted certiorari.

## SUMMARY OF ARGUMENT

By categorically excluding Trinity Lutheran from receiving an otherwise secular and neutral playground-resurfacing grant solely on the basis of religion, the Department violated the Free Exercise and Equal Protection Clauses. The Court should reverse the decision below.

**I.** The Department's facially discriminatory rejection of Trinity Lutheran's Scrap Tire Grant application unconstitutionally violated Trinity Lutheran's right to Free Exercise.

*First*, the Department's facially discriminatory policy is subject to strict judicial scrutiny. As applied to Trinity Lutheran's playground-resurfacing grant application, the policy and actions of the Department fail to satisfy the Free Exercise Clause's requirements of neutrality and general application. Under the Free Exercise Clause, laws and policies that are not of general application and neutral towards religion must undergo the most rigorous judicial scrutiny. Categorical exclusions from otherwise available public programs on the basis of religion are not of general application and neutral, and thus must be reviewed under strict scrutiny.

*Second*, the Department's discriminatory exclusion of Trinity Lutheran from the Scrap Tire Grant program cannot pass strict scrutiny because it was not narrowly tailored to a compelling state interest. Achieving greater separation of church and State than that required by the Establishment Clause is not a compelling interest. Without a valid Establishment Clause concern, the Department lacks a sufficient compelling interest. Moreover, the Department's categorical exclusion is not the least restrictive means available to achieve its goals because it already has accountability regulations in place to prevent playground-resurfacing funds from being used for religious purposes. Because the Department has less restrictive means available, its policy cannot be considered narrowly tailored. The Department's facially discriminatory policy, as applied to Trinity Lutheran's playground grant application, satisfies neither requirement of strict scrutiny, and thus unconstitutionally violates the Free Exercise Clause.

*Third*, the narrow exception to the application of strict scrutiny created in *Locke v. Davey*, 540 U.S. 712 (2004), does not apply to the Department's categorical exclusion of church-affiliated institutions from its benefit program. In order to fit the *Locke* exception, the Department's policy would have to be justified by a historic and substantial state interest and place a relatively minor burden on scholarship recipients. However, the Department lacks a

historic and substantial interest in not rubberizing a playground surface with recycled tires, especially as compared to the longstanding antiestablishment concern with funding the training of clergy at issue in *Locke*. Similarly, whereas the scholarship program created only a relatively minor burden by creating flexible rules for scholarship recipients, the blanket prohibition at issue in this case left the Learning Center with a stark choice between participating in the grant program or maintaining its affiliation with Trinity Lutheran.

**II.** The Department unconstitutionally violated Trinity Lutheran's right to Equal Protection.

*First*, the Department denied Trinity Lutheran's application solely on the basis of a suspect classification. The use of suspect classifications, such as race, religion, or alienage, is subject to strict scrutiny. Without a compelling interest or narrow tailoring, the Department's policy cannot pass constitutional muster under this review. *Second*, even if this Court applies rational review, the Department's policy was an unconstitutional and irrational application of a state constitutional provision that intentionally disadvantages religious groups.

## ARGUMENT

### I. THE DEPARTMENT'S FACIALLY DISCRIMINATORY POLICY AND ACTIONS VIOLATED TRINITY LUTHERAN'S FREE EXERCISE RIGHT.

#### A. The Department's Facially Discriminatory Policy is Subject to Strict Scrutiny.

The Religion Clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I. The two Clauses—the Establishment Clause and the Free Exercise Clause—have been made applicable to the States by incorporation into the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Though "frequently in tension," *Locke*, 540 U.S. at 718, the Establishment Clause and the Free Exercise Clause together "require[] the state to be neutral in its relations with groups of religious believers and non-believers." *Everson v. Board of Education*, 330 U.S. 1, 18 (1947); see also *Thomas v. Review Bd. of Indiana*

*Employment Security Div.*, 450 U.S. 707, 717 (1981) (noting the Free Exercise Clause's "constitutional requirement for government neutrality").

Neutrality requires that "[s]tate power is no more to be used so as to handicap religions, than it is to favor them." *Id*. In general, under the Free Exercise Clause, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990)).

However, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id*. at 546. Thus, a law "failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32.

The requirements of neutrality and general application "are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id*. at 531. As this Court held in *Lukumi*, "the minimum requirement of neutrality is that a law not discriminate on its face." *Id*. at 533.[1]

Here, the Department's policy of excluding religious institutions from an otherwise neutral and secular benefit program facially discriminates on the basis of religion. The Missouri regulation governing "Scrap Tire Grants" makes the grants generally "available for end use as shock absorbing scrap tire playground or running track material." Mo. Code Regs. Ann. tit. 10, §

[1] Mere compliance with facial neutrality, while necessary, is not sufficient. The Free Exercise Clause extends beyond the requirement of facial neutrality to forbid even "subtle departures from neutrality," *Gillette v. United States*, 401 U.S. 437, 452 (1971), or any "purpose to disapprove of a particular religion or of religion in general," *Lukumi*, 508 U.S. at 532. The policy at issue here fails to meet even the minimum requirement of facial neutrality.

80-9.030(2)(A). The district court found that "public and private nonprofit day care centers and other nonprofit entities are eligible to submit grant applications." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 976 F. Supp. 2d 1137, 1140 (W.D. Mo. 2013). In 2012, the Department ranked Trinity Lutheran's application to resurface the Learning Center's playground fifth out of forty-four applications for Scrap Tire Grants. *Id*. The Department awarded fourteen grants, but denied Trinity Lutheran's application solely "because of the Department's policy to not give grants to religious organizations." *Id*.

In other words, "but for the fact that the Learning Center was run by a church, it would have received a playground-surfacing grant." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 790 (8th Cir. 2015) (Gruender, J., dissenting). Similarly-situated applicants for the otherwise neutral and secular benefit program received grants. Indeed, ten applicants who were less well-qualified than the Learning Center, according to the Department's own rankings, also received grants. The Learning Center, however, was excluded from the benefit program solely on the basis of its affiliation with a religious organization. Thus, as applied to Trinity Lutheran's grant application,[2] the Department's policy violates the "minimum requirement of neutrality . . . that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. For that reason, the policy must undergo "the most rigorous of scrutiny." *Id*. at 546.

Moreover, the fact that the Department's facially discriminatory policy excludes the Learning Center from a public benefit program, rather than assessing a fine against the church or

[2] Though the exclusion of Trinity Lutheran from the grant program was justified solely by reference to the Missouri Constitution's prohibition on providing public funds to religious organizations, Petitioner's challenge is to the Department's policy and actions in denying Petitioner's grant application, not a facial challenge to the constitutionality of the state constitutional provision itself. See *Trinity Lutheran*, 788 F.3d at 791 (Gruender, J., dissenting) (explaining why this challenge is as-applied).

regulating its conduct, does not allow it to circumvent strict judicial scrutiny. Government imposition of a choice between one's religious beliefs and the receipt of a government benefit "puts the same kind of [presumptively unconstitutional] burden upon the free exercise of religion as would a fine imposed against . . . Saturday worship." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 140 (1987) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)); see also *Locke*, 540 U.S. at 720-21 (suggesting that a law cannot "require students to choose between their religious beliefs and receiving a government benefit").

This Court has frequently reiterated that "our decisions have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000); see *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988) ("governmental action [cannot] penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."); *Thomas*, 450 U.S. at 716 ("[A] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."); *Everson*, 330 U.S. at 16 (holding that the Free Exercise Clause prohibits states from "exclud[ing] 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").

The Department's facially discriminatory policy excludes church-affiliated preschools and daycare centers from participating in an otherwise available public program. In doing so, it violates the minimum requirement of neutrality. Thus, the policy must undergo strict scrutiny.

**B. The Department's Facially Discriminatory Policy Cannot Pass Strict Scrutiny.**

The Department cannot carry its heavy burden under strict scrutiny. To satisfy strict scrutiny, the Department's policy "must advance 'interests of the highest order' and must be

narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). First, the Department lacks a compelling interest in excluding church-affiliated preschools from its playground-resurfacing program. Second, even if the Department had a compelling interest (which it does not), its use of a categorical exclusion is not narrowly tailored to that interest.

**1. Without a Valid Establishment Concern, the Department's Interest Is Not Compelling.**

The Department does not have a compelling interest in excluding the Learning Center from receiving funding for a rubber playground surface. In the context of the Free Exercise Clause, "[t]he compelling interest standard that we apply . . . is not watered down but really means what it says." *Id.* ((quoting *Smith*, 494 U.S. at 888) (internal quotation marks omitted).

The Department cannot have a compelling interest in maintaining a greater separation of church and state than required by the United States Constitution. Rather, in order to have a governmental interest that ranks as compelling in this context, the Department must have a valid Establishment Clause concern. As this Court held in another as-applied challenge to the same provision of the Missouri Constitution:

> the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause . . . . In this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling.'

*Widmar v. Vincent*, 454 U.S. 263, 276 (1981). This Court's holding in *Widmar*—that achieving separation of church and State beyond that required by the Establishment Clause is not compelling—controls the inquiry into whether the Department has a compelling interest.

Here, the district court found that the Department's sole interest in "Trinity's exclusion from the aid program in this case was based on the Missouri Constitution's heightened separation of church and state." *Trinity Lutheran*, 976 F. Supp. 2d at 1155. Indeed, the Department

specifically quoted Article I, Section 7 of the Missouri Constitution as the basis for why "the department is unable to provide this financial assistance . . . as contemplated by the grant application." *Id.* Crucially, however, the court of appeals held that, based on this Court's recent precedents, "it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause." *Trinity Lutheran*, 788 F.3d at 784.[3] Thus, the Department lacks a valid concern that providing a playground-resurfacing grant to the Learning Center would violate the Establishment Clause. Cf. *Widmar*, 454 U.S. at 274-75 (quoting *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 747 (1976)) ("If the Establishment Clause barred the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'").

Admittedly, "a State has a compelling interest in not committing *actual* Establishment Clause violations." *Locke*, 540 U.S. at 730 (Scalia, J., dissenting). However, this Court has "never inferred from this principle that a State has a constitutionally sufficient interest in discriminating against religion in whatever context it pleases, so long as it claims some connection, however attenuated, to establishment concerns." *Id*. Therefore, the Department cannot point to compliance with Missouri's heightened separation of church and state as a compelling interest that justifies its facially discriminatory policy and actions.

[3] At the time *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd,* 419 U.S. 888 (1974), a case relied upon by the court of appeals, was decided the State likely could not have extended a Scrap Tire grant to Trinity Lutheran without violating the Establishment Clause. However, more than three decades of Supreme Court precedent make clear that the Department no longer has any valid Establishment Clause concern. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell*, 530 U.S. 793; *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

Moreover, the Department greatly "overstates the significance [of its] concern about giving a grant directly to the Learning Center, rather than having the money filtered through the independent choice of private individuals." *Trinity Lutheran*, 788 F.3d at 793 (Gruender, J., dissenting). This Court's precedents clearly establish that "[a]lthough private choice is one way to break the link between government and religion, it is not the only way." *Id*. (quoting *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.,* 567 F.3d 278, 295 (6th Cir. 2009)); see *Am. Atheists,* 567 F.3d at 295 (collecting cases to demonstrate that the Supreme Court "has sustained a number of neutral aid programs that distributed aid directly to religious organizations—without filtering the aid through private choice—where the aid itself had no religious content and any actual diversion was de minimis"). Where, as here, the benefit program itself lacks religious content and contains accountability provisions that prevent diversion of the aid granted, the fact that the grant would be provided directly to the Learning Center does not itself create a compelling interest or a valid antiestablishment concern.

Similarly, the Department lacks a compelling interest in preventing the mistaken appearance of the endorsement. Where a State merely declines to penalize a preschool for its association with a religious institution, "[n]o reasonable observer is likely to draw . . . an inference that the State itself is endorsing a religious practice or belief." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring); see *Locke*, 540 U.S. at 729 (Scalia, J., dissenting).

Finally, the Department cannot have a compelling interest in rejecting Trinity Lutheran's application in order to protect its citizens' pocketbooks. Missouri funds the Scrap Tire Grant program through a small fee imposed on the sale of all new tires sold within the state. See Mo. Rev. Stat. § 260.273.2. Each year, including in 2012, the Department distributes all of the funds available to it for the Scrap Tire Grant program and still has applications it must reject. That

money—and no money from any other source—is specifically designated for the Scrap Tire program. All of the earmarked money is used to provide grants. Missouri did not save any taxpayer money by denying Trinity Lutheran's application for facially discriminatory reasons, but rather redirected that money to provide a Scrap Tire Grant to a lower-ranked applicant. Thus, it would create zero additional cost for Missouri taxpayers and new-tire purchasers for the Department not to categorically exclude religious institutions from the benefit program.

The Department cannot point to a valid Establishment Clause concern, fear of the mistaken appearance of endorsement, or even a budget constraint that would justify its facially discriminatory rejection of the Learning Center's application. Therefore, it lacks a compelling governmental interest and must fail strict scrutiny.

**2. The Department's Categorical Exclusion Was Not Narrowly Tailored.**

Even if the Department actually had a compelling interest in denying church-affiliated preschools access to its playground-resurfacing program (which it does not), its categorical exclusion would not be narrowly tailored to that interest. In the context of the Free Exercise Clause, narrow tailoring means that the law or policy in question must be "the least restrictive means of achieving some compelling state interest." *Thomas*, 450 U.S. at 718.

The Department's categorical exclusion is not "the least restrictive means" of achieving its (non-compelling) interest in maintaining a heightened separation of church and State. In fact, the Missouri regulation governing "Scrap Tire Grants" already prescribe a far less restrictive means of preventing generally available and secular playground-resurfacing funds from being used for religious purposes. The regulation's sub-section on "Accountability" creates "appropriate controls and safeguards" through a detailed accounting system. Mo. Code Regs. Ann. tit. 10, § 80-9.030(7)(F). Scrap Tire Grant recipients must "separate [their] receipts and eligible expenditures from those allocable to other programs and activities." *Id.* Additionally,

recipients must "make [their detailed accounting of the use of grant funds] available to the department for inspection." *Id.* These provisions provide the Department with a less restrictive means of preventing its playground-resurfacing funding from being used for religious purposes.

Because nothing on this record suggests "that the Learning Center regularly uses its playground for religious activities," *Trinity Lutheran*, 788 F.3d at 793 (Gruender, J., dissenting), the "Accountability" requirements provided a far less restrictive option that was available to the Department. Thus, the Department's facially discriminatory denial of the Learning Center's application was not narrowly tailored to any purported governmental interest.

Under the Free Exercise Clause, a law or policy that is not neutral or not of general application must satisfy both prongs of strict scrutiny. See *Lukumi*, 508 U.S. at 546. The Department's facially discriminatory policy, as applied to Trinity Lutheran's playground grant application, can satisfy neither.

### C. *Locke*'s Narrow Exception to Strict Scrutiny Does Not Apply Here.

Additionally, the *Locke* exception does not apply to the Department's facially discriminatory policy. See *Locke v. Davey*, 540 U.S. 712 (2004). The exception—which would allow the Department to avoid strict scrutiny—does not apply because the Department lacks a historic and substantial antiestablishment interest and because the policy places more than a relatively minor burden on Trinity Lutheran.

In *Locke*, this Court recognized a narrow exception to the rule that "the First Amendment generally prohibits discrimination against religion as such." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008) (citing *Locke*, 540 U.S. at 720 and *Lukumi,* 508 U.S. at 533). Specifically, it upheld a college scholarship program that prevented students from using the scholarship to pursue a degree in devotional theology—a degree the Court characterized as "an essentially religious endeavor" and "akin to a religious calling." *Locke*, 540 U.S. at 721.

The *Locke* Court explained that the scholarship program was not subject to the Free Exercise Clause's presumption of unconstitutionality for facially discriminatory laws due to: 1) the "historic and substantial state interest" in not funding the religious training of the clergy; and 2) the "relatively minor burden" the restriction placed on scholarship recipients. *Id*. at 725. Limiting the scope of the decision, the Court noted that "we can think of few areas in which a State's antiestablishment interests come more into play [than in paying for the training of church leaders]." *Id*. at 722. The Court concluded that "[i]f any room exists between the two Religion Clauses, it must be here." *Id*. at 725.[4]

The Department's discriminatory rejection of the Learning Center's playground grant application does not fit into this limited "room" between the Religion Clauses. To the contrary, *Locke*'s "holding that 'minor burden[s]' . . . are tolerable in service of 'historic and substantial state interest[s]' implies that major burdens and categorical exclusions from public benefits might not be permitted in service of lesser or less long-established governmental ends." *Colo. Christian Univ.*, 534 F.3d at 1255-56.

First, the Department lacks a historic and substantial interest in "not rubberizing a playground surface with recycled tires." *Trinity Lutheran*, 788 F.3d at 793 (Gruender, J., dissenting). Second, because the Department's policy lacks the flexibility of the scholarship program in *Locke*, it did not place a relatively minor burden on Trinity Lutheran.

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[4] Admittedly, some lower courts have read *Locke* more broadly to imply that courts should "apply rational basis scrutiny," *Eulitt ex rel. Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344, 356 (1st Cir. 2004), to any "education funding decision," *id*. at 355. However, *Locke* "did not overrule any prior cases subjecting funding decisions to constitutional scrutiny." *Colo. Christian*, 534 F.3d at 1255. Indeed, "[t]hat First Amendment challenges to selective funding would be subject only to rational basis scrutiny seems especially unlikely after *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008)." *Id*. at 1255 n.2. As this Court noted in *Heller*, "[o]bviously [rational review] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right," including First Amendment rights. 554 U.S. at 628 n.27.

**1. The Department Lacks a Historic and Substantial Interest in Scrap Tire Grants.**

Unlike the government interest at stake in *Locke*, the Department's "concern about direct funding for a rubber playground surface" is not "historic and substantial." *Id.* In *Locke*, "the only interest at issue . . . [was] the State's interest in not funding the religious training of clergy." *Locke*, 540 U.S. at 722 n.5. Citing "popular uprisings against procuring taxpayer funds to support church leaders," that have occurred "[s]ince the founding of our country," the Court asserted that there are "few areas in which a State's antiestablishment interests come more into play." *Id*. at 722. The Court further explained that "[t]raining someone to lead a congregation is an essentially religious endeavor." *Id*. at 721. For that reason, "majoring in devotional theology is akin to a religious calling as well as an academic pursuit." *Id*. Notably, providing state funding for such "vocational religious instruction," *id*. at 725, has long been considered "one of the hallmarks of an 'established' religion." *Id*. at 722.

The interest at issue in this case, however, is neither historic nor substantial. In *Locke*, the state's historic interest in prohibiting the use of scholarship funds for vocational religious instruction traced directly to "concerns that were specific to paying for training the clergy." *Trinity Lutheran*, 788 F.3d at 792 (Gruender, J., dissenting). By contrast, here "the Department seeks to enforce a general prohibition on aid to a church that is in no way specific to the playground-surfacing grant program." *Id*. The application of the Missouri's antiestablishment provision to the Scrap Tire Grant program "therefore lacks the correspondence between the past and the Department's present interest that the Court found significant in *Locke*." *Id*.

Moreover, as discussed in detail above, failing to categorically exclude the Learning Center from receiving a neutral and secular grant for the resurfacing of a pre-school playground certainly would not raise substantial or even valid antiestablishment concerns. Unlike the religious training of clergy at issue in *Locke*, "schoolchildren playing on a safer rubber surface

made from environmentally-friendly recycled tires has nothing to do with religion." *Id*. at 793. In fact, "[i]f giving the Learning Center a playground-surfacing grant raises a *substantial* antiestablishment concern, the same can be said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be." *Id*.; see also *Locke*, 540 U.S. at 734 (Scalia, J., dissenting) ("Today's holding is limited to training the clergy. . . . What next? Will we deny priests and nuns their prescription-drug benefits on the ground that taxpayers' freedom of conscience forbids medicating the clergy at public expense?").

For this reason, the *Locke* exception is and should remain "confined to certain 'historic and substantial state interest[s],' and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ.*, 534 F.3d at 1255 (quoting *Locke,* 540 U.S. at 725). Here, the Department lacks a historic and substantial interest to justify its categorical exclusion of church-affiliated institutions from the neutral and generally available Scrap Tire Grant program.

**2. The Burden Placed on Trinity Lutheran Is Greater Than That in *Locke*.**

Similarly, the burden placed on Trinity Lutheran by the Department's facially discriminatory policy was not "relatively minor" in the sense contemplated by *Locke*. The scholarship program in *Locke* went "a long way toward including religion in its benefits." *Locke,* 540 U.S. at 724. Scholarship recipients could still "attend pervasively religious schools," *id*., and could still "take devotional theology courses," *id*. at 725, as long as that was not their major. Indeed, recipients who wanted to major in devotional theology could "still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology." *Id*. at 721 n.4. In short, the prohibition on pursuing a degree in devotional theology did not "require students to choose between their religious beliefs and receiving a government

benefit." *Id*. at 720-21. This flexibility made the exclusion of funding for the pursuit of devotional degrees "a relatively minor burden" on recipients. *Id*. at 725.

Here, by contrast, "the Department categorically prohibited the Learning Center from receiving a playground-surfacing grant because it is run by a church." *Trinity Lutheran*, 788 F.3d at 792 (Gruender, J., dissenting). Such a "blanket prohibition is different in kind from the disfavor of religion that was present in *Locke*." *Id.* Barring the Learning Center from receiving a Scrap Tire Grant based solely on its affiliation with Trinity Lutheran forces a stark choice between religious beliefs and receiving a government benefit that cannot be considered a relatively minor burden under *Locke*. Thus, the Department's policy both lacks a historic and substantial justification and imposes a more-than-minor burden. Therefore, it cannot be upheld under the narrow *Locke* exception.

## II. THE DEPARTMENT'S FACIALLY DISCRIMINATORY POLICY AND ACTIONS VIOLATED TRINITY LUTHERAN'S EQUAL PROTECTION RIGHT.

Even if this Court were to find that the Department's facially discriminatory policy has somehow not violated Trinity Lutheran's right to free exercise, that policy would still be an unconstitutional violation of Equal Protection.

### A. Distinctions Based on Suspect Classifications Are Subject to Strict Scrutiny.

Under the Equal Protection Clause, when "a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, *religion*, or alienage," the use of that classification is subject to strict scrutiny. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (emphasis added).

Here, the Department's letter explaining its rejection of Trinity Lutheran's application stated that the Learning Center's affiliation with a "church, sect or denomination of religion" was the sole reason for treating it differently from similarly situated applicants. *Trinity Lutheran*, 976 F. Supp. 2d at 1155. Indeed, it is undisputed that the Learning Center's application was

otherwise superior to other applications that were granted. When a state utilizes a suspect classification such as religion, the "intent to discriminate forbidden under the Equal Protection Clause is merely the intent to treat differently." *Colo. Christian*, 534 F.3d at 1260 (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701 (2007)).

In other words, the Department employed the suspect classification of religion as the basis of its singling out of the Learning Center for differential and facially discriminatory treatment. Thus, the Department's policy and actions, as applied to Trinity Lutheran, are subject to strict scrutiny under the Equal Protection Clause. As explained in detail above, the Department's policy is not narrowly tailored to a compelling state interest. Thus, it will fail strict scrutiny, regardless of whether that scrutiny is triggered by a violation of Free Exercise's requirement of neutrality or Equal Protection's proscription of the use of suspect classifications.

**B. The Department's Policy Exhibits Irrational Prejudice.**

This Court should not apply rational-basis review due to the presumptive invalidity of facial discrimination and suspect classifications under the Free Exercise and Equal Protection Clauses. Even under rational review, however, the Department's policy cannot pass constitutional muster because it is not "rationally related to a legitimate governmental interest." *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973).

Although state action is presumptively valid under rational review, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Id*. at 534. In particular, equal protection means that "all persons similarly situated should be treated alike," *Cleburne v. Cleburne Living Center, Inc*, 473 U.S. 432, 439 (1985), and government policies may not "rest on an irrational prejudice," *Id.* at 450. As discussed above, "but for the fact that the Learning Center was run by a church, it would have

received a playground-surfacing grant." *Trinity Lutheran*, 788 F.3d at 790 (Gruender, J., dissenting). By enforcing a categorical exclusion against the Learning Center's application, the Department treated Trinity Lutheran differently from similarly situated applicants on the basis of religion.

Moreover, that basis—justified solely by reference to Article I, Section 7 of the Missouri Constitution—stems directly from an invidious history of irrational prejudice against religion. Missouri's antiestablishment provision, adopted in 1875, is a stricter state version of the failed federal Blaine Amendment. See generally Steven K. Green, The Blaine Amendment Reconsidered, 36 Am. J. Legal Hist. 38 (1992). The Blaine Amendment, which "would have amended the Constitution to bar any aid to sectarian institutions," stemmed from "pervasive hostility to the Catholic Church," and "it was an open secret that 'sectarian' was code for 'Catholic.'" *Mitchell*, 530 U.S. at 828. The "shameful pedigree," *id*., of the Blaine Amendments was not before the Court in *Locke* because it was undisputed that the challenged provision was not a Blaine Amendment. Here, however, the exclusion of Trinity Lutheran from the grant program was explicitly based on the Missouri constitutional equivalent to the pernicious Blaine Amendment. Thus, because irrational prejudice against religion underlies the Department's policy, it must fail even rational review.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Competitor ID: 117
*Counsel for Petitioner*
*127 Wall St.*
*New Haven, CT 06511*
*(203) 432-4992*

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## APPENDIX

### Mo. Rev. Stat. § 260.273

1. Any person purchasing a new tire may present to the seller the used tire or remains of such used tire for which the new tire purchased is to replace.

2. A fee for each new tire sold at retail shall be imposed on any person engaging in the business of making retail sales of new tires within this state. The fee shall be charged by the retailer to the person who purchases a tire for use and not for resale. Such fee shall be imposed at the rate of fifty cents for each new tire sold. Such fee shall be added to the total cost to the purchaser at retail after all applicable sales taxes on the tires have been computed. The fee imposed, less six percent of fees collected, which shall be retained by the tire retailer as collection costs, shall be paid to the department of revenue in the form and manner required by the department of revenue and shall include the total number of new tires sold during the preceding month. The department of revenue shall promulgate rules and regulations necessary to administer the fee collection and enforcement. The terms "sold at retail" and "retail sales" do not include the sale of new tires to a person solely for the purpose of resale, if the subsequent retail sale in this state is to the ultimate consumer and is subject to the fee.

3. The department of revenue shall administer, collect and enforce the fee authorized pursuant to this section pursuant to the same procedures used in the administration, collection and enforcement of the general state sales and use tax imposed pursuant to chapter 144 except as provided in this section. The proceeds of the new tire fee, less four percent of the proceeds, which shall be retained by the department of revenue as collection costs, shall be transferred by the department of revenue into an appropriate subaccount of the solid waste management fund, created pursuant to section 260.330.

4. Up to five percent of the revenue available may be allocated, upon appropriation, to the department of natural resources to be used cooperatively with the department of elementary and secondary education for the purposes of developing environmental educational materials, programs, and curriculum that assist in the department's implementation of sections 260.200 to 260.345.

5. Up to fifty percent of the moneys received pursuant to this section may, upon appropriation, be used to administer the programs imposed by this section. Up to forty-five percent of the moneys received under this section may, upon appropriation, be used for the grants authorized in subdivision (2) of subsection 6 of this section. All remaining moneys shall be allocated, upon appropriation, for the projects authorized in section 260.276, except that any unencumbered moneys may be used for public health, environmental, and safety projects in response to environmental or public health emergencies and threats as determined by the director.

6. The department shall promulgate, by rule, a statewide plan for the use of moneys received pursuant to this section to accomplish the following: (1) Removal of scrap tires from illegal tire dumps; (2) Providing grants to persons that will use products derived from scrap tires, or use scrap tires as a fuel or fuel supplement; and (3) Resource recovery activities conducted by the department pursuant to section 260.276.

7. The fee imposed in subsection 2 of this section shall begin the first day of the month which falls at least thirty days but no more than sixty days immediately following August 28, 2005, and shall terminate January 1, 2020.