No. 15-577

In the

Supreme Court of the United States

TRINITY LUTHERAN CHURCH
OF COLUMBIA, INC.,

Petitioner,

v.

SARA PARKER PAULEY, Director,
Missouri Department of Natural Resources,

Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

State Constitution

TABLE OF AUTHORITIES—Continued

Page

Federal Statute

Rules of Court

Miscellaneous

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner Trinity Lutheran Church.[1] Founded in 1973, PLF is the oldest and most experienced public interest law foundation of its kind. PLF is headquartered in Sacramento, California, and provides a voice for thousands of individuals across the country who believe in limited government, private property rights, individual freedom, and free enterprise. To this end, PLF has participated in many cases involving the Equal Protection Clause, including *Schuette v. Coal. to Defend Affirmative Action Integration & Immigrant Rights & Fight for Equality By Any Means Necessary* (*BAMN*), 134 S. Ct. 1623 (2014); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); and *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

INTRODUCTION AND SUMMARY OF ARGUMENT

Trinity Lutheran Church applied for a grant under the Scrap Tire Program, a government-run program that solicits donations and then offers grants to make playgrounds safer by converting playground surfaces

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

from pea gravel to poured rubber. *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779, 782 (8th Cir. 2015). The Missouri Department of Natural Resources, which administers the program, believed it was compelled by the state constitution to reject Trinity Lutheran's grant application in favor of less qualified non-religious applicants. *See id.* (citing Mo. Const. art. I, § 7, which provides "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion").

Trinity Lutheran challenges the Department's actions under the Free Exercise, Establishment, and Equal Protection Clauses of the federal Constitution. Although courts generally analyze religious liberty claims under the religion clauses, unequal treatment on the basis of religion falls within the purview of the Equal Protection Clause as well. *See generally* Steven G. Calabresi & Abe Salander, *Religion & the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 Fla. L. Rev. 909 (2013). Similarly, although equal protection cases most commonly address discrimination on the basis of race, this Court's equal protection decisions reflect the view that differential treatment on the basis of religion is just as intolerable. *See, e.g.*, *Friedman v. Rogers*, 440 U.S. 1, 17 (1979) ("[D]istinctions such as race, religion, or alienage" are all inherently suspect.).

Moreover, the Court's skepticism of unequal treatment on the basis of religion under the Fourteenth Amendment does not hinge on its disposition of *other* constitutional claims. Rather, an independent analysis is required for each of the constitutional provisions because each protects

different rights: the Free Exercise Clause protects religious beliefs, *see Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 833 (1989), the Establishment Clause mandates government neutrality between religion and non-religion, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), and the Equal Protection Clause prohibits discrimination based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

An independent analysis of Trinity Lutheran's equal protection claim reveals the constitutional invalidity of the Department's decision to exclude religious entities from the Scrap Tire Program. Because disparate treatment on the basis of religion is subject to strict scrutiny, the burden is on the Department to show that its decision was narrowly tailored to serve a compelling interest. *See Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008). The Department has not met and cannot meet this burden. The decision below should be reversed.

ARGUMENT

I

DISCRIMINATION ON THE BASIS OF RELIGION MUST BE ANALYZED UNDER STRICT SCRUTINY

Although this Court has generally vindicated claims of religious discrimination through the religion clauses, it has never retreated from its repeated assertions that such discrimination would be viewed with as much of a jaundiced eye as racial discrimination under the Equal Protection Clause.

See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (classifications based on religion, race, and alienage are all "inherently suspect distinctions").

It is well-settled that laws that explicitly differentiate on the basis of race are subject to strict scrutiny, the most stringent standard of review. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005). The Court's decisions grouping racial discrimination with religious discrimination strongly imply that strict scrutiny is just as appropriate when reviewing open discrimination of religion. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 61 (1973) (Stewart, J., concurring) (equating the inherently suspect classifications of race, national original, alienage, indigency, and illegitimacy as unworthy of a presumption of constitutional validity).

Following this Court's lead, the Third, Eighth, and Tenth Circuits treat religious discrimination with the same sort of elevated skepticism with which they treat racial discrimination. The Third Circuit's decision in *Hassan v. City of New York*, 804 F.3d 277, 301 (3d Cir. 2015), is one such example. The New York Police Department Program at issue in that case allegedly monitored Muslims in the City following the September 11th attacks by sending undercover officers into neighborhoods that Department believed to be heavily Muslim. *Id.* at 285. The Third Circuit applied heightened scrutiny to the equal protection claim, noting that "it has long been implicit in the Supreme Court's decisions that religious classifications are treated like others traditionally subject to heightened scrutiny." *Id.* at 299.

The Third Circuit's decision in *Hassan* was hardly groundbreaking. Rather, the circuit court followed this

Court's "decades-long succession of statements" treating religion as a suspect class. *Id.* at 300 (citing, among others, *Armstrong*, 517 U.S. at 464; *Friedman*, 440 U.S. at 17; *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979)). As the Third Circuit observed, this Court's treatment of religion as a suspect class is just as venerable as the suspect-classification doctrine itself. *Hassan*, 804 F.3d at 299-300. This Court's famous "Footnote Four," which provides the basis for differing standards of judicial review, specified that legislation should "be subjected to more exacting judicial scrutiny" if it is "directed at particular *religious*, or national, or racial minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (emphasis added). The Court's modern equal protection jurisdiction simply extends that protection to members of majority groups. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) (the standard of review is equal protection cases "is not dependent on the race of those burdened or benefitted by a particular classification").

The treatment of religious discrimination as synonymous with racial discrimination makes perfect sense, given that "religious discrimination in the United States is intertwined with that based on . . . national origin and race." *Hassan*, 804 F.3d at 303. Courts from the early 1900s onward conflated Arabs and Muslims "because of the entrenched belief that Arab and Muslim identity was one in the same." Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U Ann. Surv. Am. L. 29, 34 (2013). As a consequence, government programs that target Muslims have also ensnared Arabs and other people of Middle Eastern descent. *Id.* at 34-35. In *Hassan*

itself, the police allegedly targeted "Muslims by using ethnicity as a proxy for faith." *Hassan*, 804 F.3d at 303 n.15. Thus, treating religious discrimination the same as racial discrimination simply reflects the awareness that religious prejudice is often just racial bigotry by another name.

Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 810, 816 (8th Cir. 2008), is another case in which a court applied strict scrutiny to a claim of unequal treatment on the basis of religion. In *Patel*, a Muslim inmate claimed that the Bureau of Prisons violated the Equal Protection Clause by failing to provide a particular type of Islamic diet. The Court rejected the inmate's claim, because it found that the kosher option offered by the Bureau was compatible with all religious beliefs, and thus did not discriminate at all. *Id.* at 810. Yet the Eighth Circuit left no doubt that a policy that *did* discriminate on the basis of religion would be subject to strict scrutiny because "[r]eligion is a suspect classification." *Id.* at 816.

The Tenth Circuit reached the same conclusion. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010). The relevant claim in that case, which Plaintiff raised for the first time at oral argument, was that prison officials violated the Equal Protection Clause by failing to provide Muslim inmates with halal meals, but providing kosher meals to Jewish inmates. *Id.* at 1322. The Tenth Circuit denied this Equal Protection claim because the prisoner did not assert it in his pleadings. *Id.* Yet the court suggested a different outcome had the claim been adequately pleaded, because religion is a suspect class. *Id.*

In all, the circuit courts that have addressed religious discrimination under the Equal Protection

Clause have hewed to this Court's unequivocal statements on this issue. Because discrimination on the basis of religion is just as pernicious as discrimination on the basis of race, religious discrimination is analyzed under strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

II

STRICT SCRUTINY MUST BE APPLIED TO CLAIMS OF RELIGIOUS DISCRIMINATION INDEPENDENT OF FREE EXERCISE AND ESTABLISHMENT CLAIMS

Trinity Lutheran's equal protection claim must be decided on its own merits; it cannot be resolved by asking whether Trinity *also* has a valid First Amendment claim. That is because the Equal Protection, Free Exercise, and Establishment Clauses are different, and require independent consideration.

Government action may violate the Equal Protection Clause without impinging on a person's rights under the Free Exercise Clause. Justice White's concurrence in *McDaniel v. Paty*, 435 U.S. 618 (1978) illustrates this principle. In that case, an ordained minister challenged a Tennessee law that disqualified him from serving as a delegate to the state's constitutional convention based on his decision to pursue a religious vocation as directed by his beliefs. *Id.* at 621, 643. Tennessee argued that the law was necessary to avoid an Establishment Clause violation, explaining that ministers could inappropriately use their position to promote religion or discriminate against another faith. *Id.* at 628-29. The plurality rejected this rationale, and held that the law violated

McDaniel's First Amendment right to the free exercise of his religion because McDaniel was excluded because of his position as a minister. *Id.* at 627, 629.

Justice White, concurring in the judgment, rejected the majority's reliance on the Free Exercise Clause, and noted he would have invalidated the Tennessee law under the Equal Protection Clause instead. *Id.* at 643 (White, J., concurring). In Justice White's view, the law at issue was perfectly compatible with the Free Exercise Clause, because the law did not interfere with the minister's "ability to exercise his religion as he desires." *Id.* at 644. Yet that conclusion did not end the case. Not only did Justice White conduct an independent analysis of the minister's equal protection claim, he concluded that the claim would have prevailed, because the law unjustifiably prohibited a class of citizens (ministers) from participating in the electoral process. *Id.* at 645 (White, J., concurring). Though Justice White acknowledged the State's legitimate interest in avoiding an Establishment Clause violation, he did not believe banning all ministers from serving as a delegate was an appropriate means, because other states successfully avoided violating the Establishment Clause "without burdening ministers' rights to candidacy." *Id.*

Establishment Clause claims must also be considered separately from Equal Protection Clause claims. The analytical differences required by these two separate constitutional claims are illustrated in *Satawa v. Macomb Cnty. Road Comm'n*, 689 F.3d 506 (6th Cir. 2012). In that case, John Satawa placed a creche on the median of a public road every year at Christmas time. *Id.* at 511. At the urging of the

Freedom from Religion Foundation, Macomb County officials demanded that Satawa remove the creche. *Id.* at 512. The next year, Satawa applied for a permit to display the creche, but the County denied it, fearing a lawsuit based on the Establishment Clause. *Id.* at 512-13. Satawa then sued, and the Sixth Circuit ruled that the County did not violate the Establishment Clause by denying his permit application. *Id.* at 528. Although the court noted that the government was motivated by a faulty understanding of the Establishment Clause, the action of denying the permit did not favor or disfavor religion. *Id.* at 527-28. Thus, there was no violation of the Establishment Clause. *Id.*

The Sixth Circuit court then discussed, without deciding, the Equal Protection claim, which had been dismissed by the trial court on summary judgment. *Id.* at 516. Noting that the county sought to distinguish a permanent monument—a gazebo across the street from the creche—from the temporary display of the creche, the court held that the district court should not have granted summary judgment on the equal protection claim. *Id.* at 528-29. The Sixth Circuit reasoned that treating the creche—a religious symbol—"differently than other items on the median" requires analysis under a strict scrutiny standard, which the County could not satisfy. *Id.* at 529.

For these reasons, this Court should review Trinity Lutheran's Equal Protection claim under strict scrutiny no matter how it decides the First Amendment claims. Under the relevant precedent, including those discussed above, "religion gets Fourteenth Amendment protection in addition to and above and beyond any First Amendment protections

that religion gets under the Establishment and Free Exercise Clauses." Calabresi & Salander, *supra*, at 919.

III

THE DEPARTMENT'S EXCLUSION OF RELIGIOUS ENTITIES FROM OTHERWISE GENERALLY APPLICABLE BENEFITS FAILS STRICT SCRUTINY

In this case, the Department's denial of Trinity Lutheran's grant application is subject to—and fails—strict scrutiny. The *only* reason that the Department refused to give a single one of fourteen grants to Trinity Lutheran—the fifth most deserving applicant by the Department's own calculation—is because Trinity Lutheran is a church. *See Trinity Lutheran*, 788 F.3d at 782 (Department letter stating that "constitutional limitations" in the Missouri Constitution prevented it from awarding a grant to Trinity Lutheran).

Because the Department's actions accord differential treatment on the basis of religion, the Department must satisfy strict scrutiny. That standard requires the Department to prove that its actions further a compelling state interest and are "narrowly tailored" to further that interest. *Adarand*, 515 U.S. at 227. The Department cannot come close to satisfying either requirement.

A. No Compelling Interest Justifies the Department's Exclusion of Religious Entities from the Scrap Tire Program

The only compelling interest that the Department puts forward is an interest in complying with the state

constitution's Establishment Clause. *See Trinity Lutheran*, 788 F.3d at 782. That interest cannot justify targeting religion in a way that violates the federal Constitution. *Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.").

In *Widmar v. Vincent*, 454 U.S. 263, 275-76 (1981), this Court invalidated a state university's policy of opening its facilities to student activities except for groups engaged in religious activities. In attempting to justify its open exclusion of religious organizations, the University pointed to the same provision relied upon by the Department in this case: Article I, section 7, of the Missouri Constitution. *Compare id.* at 277, *with Trinity Lutheran*, 788 F.3d at 782. The Court rejected the University's argument, noting that any interest in "achieving greater separation of church and State" as embodied in the state constitution "is limited by the Free Exercise Clause and . . . the Free Speech Clause" of the federal Constitution. *Id.* at 277. The Department's effort to justify its discriminatory treatment of religious entities here is no more than an attempt to re-litigate *Widmar*. In this case, as in *Widmar*, the Court should reject Missouri's efforts to rely upon state constitutional interests when doing so would shatter federal constitutional guarantees.

B. The Department's Decision to Exclude Religious Entities from the Scrap Tire Program Is Not Narrowly Tailored

Even if the Department's interest in overriding federal constitutional provisions with state constitutional justifications were somehow compelling, the Department's actions were not narrowly tailored to

further that interest. Narrow tailoring requires "serious, good faith consideration of workable . . . alternatives" that do not mechanically exclude disfavored groups. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

The Department could have conformed to the State's constitution by examining the connection between the fund and the practice of religion itself. Even a cursory glance at the Scrap Tire Program would have revealed that funding safer playgrounds—unlike using public funds to train clergymen, *cf. Locke v. Davey*, 540 U.S. 712, 722-23 (2004)—does nothing to promote religion at the expense of secular activities.

A government program *might* satisfy the narrow tailoring requirement if the exclusion were limited to activities that explicitly promote religious interests—*e.g.*, federal funds for "sectarian instruction or religious worship." 20 U.S.C. § 1062(c). Yet the government cannot satisfy narrow tailoring when it gratuitously excludes religious organizations from an otherwise secular program.

Missouri hardly implicates its Establishment Clause when it provides "police and fire" services to churches or when it gives welfare checks to the religious poor, who may use that money for religious purposes (tithing) or non-religious ones (buying milk). *Widmar*, 454 U.S. at 274. Just as with fire services and welfare checks, grants under the Scrap Tire Program, which are used to fund safer playgrounds, do not threaten secularism at all.

Here, the Department explicitly passed over a better qualified applicant that was religious for less qualified applicants that were secular. That action is

no more permissible than a fire truck that speeds past burning churches or a welfare program that disregards applications from the religious poor in favor of those from less-deserving atheists.

All this explains why the Department has strained to convince the Court that the proper standard in this case is mere rational basis review. After all, the only world in which the Department's open hostility toward religion can conceivably pass constitutional muster is a world that requires judges to "cup [their] hands over [their] eyes." *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring). But the government cannot evade strict scrutiny under the Equal Protection Clause simply by relying upon *other* constitutional provisions, whether found in the federal or state constitution. Instead, if the Department wants to deny churches the same funds it distributes to other, less-qualified entities, it must demonstrate that its decision is narrowly tailored to further a compelling interest. The Department's failure to do so dooms its efforts to reconcile its exclusion of churches from the Scrap Tire Program with the Equal Protection Clause's prohibition on discriminatory treatment.

CONCLUSION

The decision below should be reversed.

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Respectfully submitted,

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