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 OF RESPONDENT

**CHRIS KOSTER**
Attorney General of Missouri

JAMES B. FARNSWORTH
Assistant Attorney General
JAMES R. LAYTON
Solicitor General
*Counsel of Record*
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-1800
James.Layton@ago.mo.gov

*Counsel for Respondent*

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## CONSTITUTIONAL PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

"No state shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

"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.

## STATEMENT OF THE CASE

The Learning Center, a preschool-and-daycare ministry of Trinity Lutheran Church ("Trinity Lutheran"), applied for a competitive grant administered by the Missouri Department of Natural Resources (the "State"). Pet. App. 120a-130a.[1] Trinity Lutheran hoped to obtain public funds to offset the cost of resurfacing its playground with recycled scrap-tire material. *Id*. Though Trinity Lutheran's application scored well in comparison to applicants who were not chosen for funding, the State declined to approve the request, citing Article I, Section 7 of the Missouri Constitution, which reads, in pertinent part: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion …." MO. CONST., art. I, § 7. Pet. App. 152a-153a.

Trinity Lutheran sued, alleging that the State's decision not to fund its playground project violated its First Amendment right to freely exercise its religion and its Fourteenth Amendment right to equal protection of the law. Pet. App. 97a-118a. The district court granted the State's motion to dismiss Trinity Lutheran's claims, and the Court of Appeals for the Eighth Circuit affirmed. Pet. App. 1a-85a.

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[1] Because this case was decided below on a Motion to Dismiss, all facts are assumed to be true as alleged in the Petition.

## SUMMARY OF ARGUMENT

The people of Missouri have decided, as a matter of state constitutional policy, that public funds may not be directed to churches. This Court has recognized that state policymakers "retain broad discretion to make 'policy decisions' concerning state spending 'in different ways … depending on their perceptions of wise state fiscal policy and myriad other circumstances.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006). As part of that discretion, policymakers need not make funds available to satisfy every interest. *See Rust v. Sullivan*, 500 U.S. 173, 193 (1991). "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id.* While constitutional and statutory limitations may apply in some circumstances, "it is the democratic electoral process that first and foremost provides a check" on the selective advancement of government goals. *Cf. Walker v. Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2245 (2015) (discussing government speech).

Trinity Lutheran argues that the State's policy infringes its First Amendment right to free exercise of religion, but nothing about the policy prohibits the church from fully and freely engaging in religious exercise. Trinity Lutheran remains free, without any public subsidy, to worship, teach, pray, and practice any other aspect of its faith however it wishes. The State merely declines to offer financial

support. This Court has long held that the government does not infringe the exercise of a constitutional right by declining to subsidize it. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983). The Free Exercise Clause requires that the State not interfere with Trinity Lutheran's religious activities; it does not require the State to provide funding.

The State's policy is also consistent with long-standing principles of equal protection. Forbidding the direct payment of state funds to churches advances legitimate public interests, which include ensuring that no religious denomination receives preferential treatment over another by the State, respecting taxpayers' concerns of conscience, and protecting religious institutions from heightened government control. Trinity Lutheran's contention that this Court demand a more compelling interest—*i.e.*, that the Court apply strict scrutiny, rather than rational basis review—is contrary to settled precedent and would put at risk the many state and federal laws favoring religious groups over their non-religious counterparts. This Court has never applied such a standard in conducting equal protection review of laws differentiating between religious and non-religious groups absent an accompanying First Amendment violation. It should not do so now.

Because the constraints of the First and Fourteenth Amendments do not apply here, this Court should reaffirm the State's ability to follow the mandate of its citizens in setting spending policy consistent with its citizens' own judgment and values.

## ARGUMENT

### I. The State's decision not to subsidize Trinity Lutheran does not violate the Free Exercise Clause of the First Amendment.

Trinity Lutheran contends that the State has violated the Free Exercise Clause by categorically declaring religious organizations ineligible to compete for a playground-resurfacing subsidy. Pet. Br. at 11-22. But Trinity Lutheran's argument misinterprets the Free Exercise Clause, ignoring its text, history, and this Court's precedent. The Free Exercise Clause, by its plain language, prevents the government from "prohibiting" the free exercise of religion. It does not guarantee churches opportunities for public financing, nor does it require that the government act with strict neutrality toward religious and non-religious interests. The challenged policy places no meaningful restraint on Trinity Lutheran's ability to freely exercise its religion. For that reason, Trinity Lutheran's free exercise claim was properly dismissed.

#### A. The Free Exercise Clause forbids only government action that "prohibits" the free exercise of religion; it does not require that government subsidize churches.

The Free Exercise Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free*

*exercise thereof* . . . ." U.S. CONST. amend. I (emphasis added). It has been incorporated into the Fourteenth Amendment and is thus applicable to the states. *E.g. Emp't Div., Dep't. of Human Res. of Or. v. Smith*, 494 U.S. 872, 876-77 (1990) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

### 1. By its plain terms, the Free Exercise Clause applies only to government action that "prohibits" the free exercise of religion.

The Free Exercise Clause was adopted in reaction to the oppressive practices our Founders recognized in their former sovereign and similar governments throughout history. "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947). "In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed." *Id.* at 9. By the time our Constitution was ratified, "there was a widespread awareness among many Americans of the dangers of a union of Church and State." *Engel v. Vitale*, 370 U.S. 421, 429 (1962). To protect against such dangers, the Founders included in the First Amendment the Establishment Clause and the Free Exercise Clause. *See id.* at 429-30. The former clause forbids the enactment of laws "which establish an official religion," whereas the latter "depends on a

showing of governmental compulsion." *See id.* at 430-31.

Trinity Lutheran's contention that the Free Exercise Clause requires the government to provide equal funding opportunities to religious and non-religious groups alike entirely ignores the text of the Clause. In interpreting the scope and application of a constitutional provision, this Court must begin by looking to the plain text of the Constitution itself; if the meaning is clear, it need look no further. *See Reid v. Covert*, 354 U.S. 1, 8 n. 7 (1957) ("This Court has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning."). With respect to the Free Exercise Clause, "[t]he crucial word in the constitutional text is 'prohibit.'" *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (holding that government project disrupting forest sacred to Native American tribe did not violate tribe's free exercise rights because it did not prohibit the tribe from exercising its religion).

"[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963). It is clear that where the government imposes a criminal penalty on particular religious activity, the affected individual or group may successfully pursue a free exercise claim. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (city ordinances criminalized ritual animal sacrifice, which was a central component of the Santeria religion practiced

by the church that challenged the laws). "[I]ndirect coercion or penalties on the free exercise of religion, not just outright prohibitions," may raise free exercise concerns as well. *Lyng*, 485 U.S. at 450. This Court's precedent, however, "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs[,]" implicate the Free Exercise Clause. *Id*. at 450-51. This Court has explicitly rejected the proposition that the Free Exercise Clause is violated by any government action that merely "frustrates or inhibits religious practice" because, as the Court has pointed out, "the Constitution … says no such thing." *Id*. at 456.

**2. State policy declining to subsidize churches does not "prohibit" religious exercise.**

As the text of the First Amendment shows, the government must ensure that the exercise of religion remains unrestrained, but that does not mean the government must pay the church's bills. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng*, 485 U.S. at 451 (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963)).

Recently, Justice Thomas observed, "[s]ince well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits." *Obergefell v. Hodges*, 135 S.Ct.

2584, 2631 (2015) (Thomas, J., dissenting). "Religious liberty is about freedom of action . . ., and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice." *Id.* at 2638. "Liberty," however, does not create an entitlement to government benefit—it is a negative right, "and is only the *absence of restraint*." *Id.* at 2635 (emphasis original).

Likewise, James Madison emphatically rejected the proposition that the free exercise of religion depends on government subsidy. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html. As Madison put it, "Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them[] . . . ." *Id.*

This Court has long held that the government has no obligation to fund its citizens' exercise of their constitutional rights. In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), the Court found no constitutional infirmity in a federal tax policy that withheld tax-exempt status from non-profit organizations that "engage in substantial lobbying." *Id.* at 542-44. The Court noted that by merely refusing to pay for the organization's lobbying activity, the government had "not infringed any First Amendment rights or regulated any First Amendment activity." *Id.* at 546 (citing *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)). The Court "reject[ed] the 'notion that

First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Id.*

Similarly, in *Harris v. McRae*, 448 U.S. 297, 316 (1980), this Court held that the government had no obligation to fund medically necessary abortions, despite constitutional protection for abortion rights and federal subsidies for other medically necessary services. *Id.* at 301-06, 316-17. In that case, the challenging party argued that "when an abortion is 'medically necessary to safeguard the pregnant woman's health, . . . the disentitlement to [M]edicaid assistance impinges directly on the woman's right to decide . . . to terminate her pregnancy in order to preserve her health.'" *Id.* at 305-06. For purposes of analysis, the Court assumed that women have a constitutionally-protected right to choose to have an abortion for health-related reasons, but held that, nevertheless, the government had no obligation to provide the resources needed to enable the woman to actually exercise that right. *Id.* at 316-17. As the Court pointed out, the government's decision not to fund medically necessary abortions left indigent women with "at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if [government] had chosen to subsidize no health care costs at all." *Id.* In other words, the government's refusal to provide funding for abortion services was not coercive in any constitutionally significant way.

The Court's reasoning in these cases echoes the principle expressed in *Lyng* and noted above—the First Amendment protects individuals from government interference, but it does not entitle

individuals to government subsidy. *See Lyng*, 485 U.S. at 451. "[A]lthough government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation." *Regan*, 461 U.S. at 549-50 (quoting *Harris*, 448 U.S. at 316) (bracketed language original). Although the organization seeking the subsidy in *Regan* "does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like," the Court reasoned, "the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'" *Regan*, 461 U.S. at 550 (quoting *Harris*, 448 U.S. at 318).

Like the complaining parties in *Regan* and *Harris*, Trinity Lutheran argues that its ability to fully realize a constitutional right has been frustrated by the government's decision to withhold public funding. But, as *Regan* and *Harris* teach, the Constitution does not create an entitlement to government funding simply by recognizing a right as fundamental or protected. *See Regan*, 461 U.S. at 550. And Trinity Lutheran's free exercise claim is much weaker than the constitutional claims asserted in *Regan* and *Harris* because Trinity Lutheran cannot even argue that its ability to exercise its constitutional right depends on government support. Trinity Lutheran concedes that its request for playground-resurfacing funding is "wholly secular." Pet. Br. at 39. If the government's refusal to provide indigent women with financial support for medically necessary abortions does not unconstitutionally burden affected women's abortion rights, the

government's refusal to subsidize a church's "wholly secular" playground-resurfacing project likewise does not create an unconstitutional burden on the church's right to freely exercise religion.

### 3. Like the program upheld by this Court in *Locke v. Davey*, the State's policy in this case does not prohibit the free exercise of religion.

In its focus not on any government prohibition, but rather on a government subsidy it believes it is entitled to receive, Trinity Lutheran's free exercise claim is most closely analogous to the claim rejected by this Court in *Locke v. Davey*, 540 U.S. 712 (2004). *Locke* involved a scholarship program administered by the State of Washington that provided financial aid to qualified students to use for postsecondary education expenses. 540 U.S. at 715-16. All students who met the program's qualifying criteria would receive funding, but students were ineligible for the scholarships if they chose to pursue a degree in theology. *Id*. That limitation was a consequence of a provision in the Washington Constitution that states, in pertinent part: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment." *Id*. at 716, 719, n.2 (quoting WASH. CONST. art. I, § 11).

The petitioner, Davey, qualified for the scholarship in all respects except that he wished to pursue a devotional theology degree, consistent with his interest in training for "a lifetime of

ministry, specifically as a church pastor." *Locke*, 540 U.S. at 717. Because his intended course of study was theological, Davey was denied scholarship funding. *Id*. Davey sued, alleging that Washington's refusal to award him scholarship funds solely because he wished to pursue a theological degree violated, among other constitutional provisions, the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 718.

This Court found no constitutional violation in Washington's decision to make students who pursued theological degrees ineligible for scholarship funding. *Id*. at 718-25. Importantly, the Court did not hold that Washington was required by the Establishment Clause to withhold the funds from Davey and other devotional students. *Id*. at 719. Instead, the Court reasoned, this situation fell within the "play in the joints" between the Establishment and Free Exercise Clauses of the First Amendment, where certain state actions may be "permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id*.

In finding that Washington's funding restriction did not violate the Free Exercise Clause, the Court focused especially on the minimal burden the policy placed on Davey's right to freely exercise his religion. *Id*. at 720-21. The Court contrasted Washington's scholarship policy with the city ordinances invalidated in *Lukumi*, noting that the ordinances at issue in that case "sought to suppress ritualistic animal sacrifices of the Santeria religion," going so far as to actually criminalize that particular religious

rite, whereas "[i]n the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind." *Id.* at 720. Washington's scholarship program, the Court pointed out, "does not deny to ministers the right to participate in the political affairs of the community" (contrasting *McDaniel v. Paty*, 435 U.S. 618 (1978)), nor does it "require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720-21 (contrasting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981); and *Sherbert v. Verner*, 374 U.S. 398 (1963)). The Court concluded, "[t]he State has merely chosen not to fund a distinct category of instruction." *Id.* at 721.

This Court's holding and analysis in *Locke* applies squarely to the present case. Trinity Lutheran, like Davey, applied for government funds but was denied funding because of its particular religious status (Pet. App. at 129a-130a, 152a); *Locke*, 540 U.S. at 717. The State's funding policy here places no meaningful burden on Trinity Lutheran's religious practice—certainly not such a burden that it could reasonably be called a "prohibition" on the free exercise of religion. Despite its ineligibility for the playground-resurfacing grant, there is not a single thing that Trinity Lutheran is prohibited from or penalized for doing as a consequence of state action. It can still worship as it sees fit. It can teach as it sees fit. It can even resurface its playground as it sees fit. The State has merely chosen not to subsidize Trinity Lutheran's activities.

Trinity Lutheran argues that the categorical exclusion of religion from the playground-resurfacing program makes the differential treatment here more egregious than that of the Washington program in *Locke*. Pet. Br. at 44. But, in fact, the two government policies are alike in their exclusivity. By the terms of the playground-resurfacing grant, any entity "owned or controlled by a church, sect, or denomination of religion" is ineligible for funding. Pet. App. at 128a. In *Locke*, any student who was "pursuing a degree in theology" was ineligible for scholarship aid. 540 U.S. at 716. Trinity Lutheran argues that the State's policy here focuses on who receives funding, whereas the Court's concern in *Locke* focused only on how the funds would be used. Pet. Br. at 40. But this is a difference in phrasing, not fact. In both cases, a definable class of funding applicants was deemed ineligible—here, applicants who choose to operate as part of a church; in *Locke*, students who choose to pursue theology degrees. If the government can refuse a subsidy to the latter group without thereby prohibiting its members from freely exercising their religion, the same can be said of the State's policy toward the former.

The State's refusal to make direct payments to churches, like the scholarship policy upheld in *Locke*, has strong historical roots. The Court in *Locke* emphasized that a state's traditional anti-establishment interest plainly includes a prohibition on funding religious training, and that Washington's policy to that effect "is scarcely novel." *Locke*, 540 U.S. at 722. The same can be said of the State's prohibition against making a direct money payment

to a church. This Court has recognized, even in upholding public programs that support religious institutions in other ways, that "special Establishment Clause dangers" exist "where the government makes direct money payments to sectarian institutions." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 842 (1995) (citations omitted). Trinity Lutheran's insistence that its playground-resurfacing project is secular does not solve the problem—money is fungible, and a dollar saved on capital improvements is an extra dollar that can be spent for religious teaching, salaries for church staff, or other religious purposes. It does not necessarily follow, of course, that the State would violate the Establishment Clause if it broadened funding availability to include churches. It simply means that the First Amendment leaves the State room to make a policy choice—this is, as the Court put it, the "play in the joints."

Trinity Lutheran mistakes the State's adherence to traditional anti-establishment values for hostility to religion. Pet. Br. at 41-42. In so arguing, the church claims that Article I, Section 7 of the Missouri Constitution has a "credible connection to the religious bigotry exhibited by the Blaine Amendment" (Pet. Br. at 42-43). Yet Trinity Lutheran offers nothing to support this allegation, and the facts suggest otherwise. The text of Missouri's Article I, Section 7 shares little in common with the text of the Blaine Amendment. The Blaine Amendment, originally proposed in 1875, focused specifically on withholding state aid from funds devoted to public schools. *See, e.g.*, Mark

Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 556-57 (2003). Article I, Section 7 of the Missouri Constitution, in contrast, effected a broader "no-aid" provision much more like the State of Washington's, with which this Court found no fault in *Locke*. 540 U.S. at 719 n.2, 723-24. And despite Trinity Lutheran's contention that the State was motivated by bias against Catholics, the text of Article I, Section 7 is both even-handed ("no money shall ever be taken from the public treasury … in aid of *any* church, sect, or denomination of religion . . .") and protective of religious freedom ("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.

In addition, the debates surrounding the adoption (and subsequent readoption) of Article I, Section 7 reveal no anti-Catholic or anti-religious bias at all. To the contrary, the primary concern expressed at the 1875 debate seemed to be whether the legislature would be permitted to pay a chaplain if the provision was adopted. *See* DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, Vol. IV, at 55-63 (Isidor Loeb & Floyd C. Shoemaker, eds., 1938). A better explanation of the Section's purpose can be found in the debates during the 1943-1944 constitutional convention, during which the Section was readopted. There, Delegate Phillips of St. Louis explained, without objection, that the purpose of

Section 7 was to prevent religious establishment by states as seen in the founding era:

> In a great many of our communities when they came over here from England they were granted charters and under those charters the right was given to certain church institutions to levy taxes against the members of the congregation and I think in some of the New England towns, the town council levied taxes against the members of the congregation for support of the church. And one of the fundamental, one of the things that is involved in this language was to stop that sort of thing.

DEBATES OF THE 1943-1944 CONSTITUTIONAL CONVENTION OF MISSOURI. Vol. 6, at 1504 (2008) (available at: http://digital.library.umsystem.edu/cgi/t/text/pageviewer-idx?c=mcd;cc=mcd;sid=3b57654fea64cd8c6e2b07d1f4ff6d51;rgn=full%20text;idno=mcd194506;view=image;seq=14).

Delegate Phillips's observation echoed the analysis of the Missouri Supreme Court, which had recently held that Article I, Section 7 forbade the State from directly funding a parochial school. *Harfst v. Hoegen*, 163 S.W.2d 609 (Mo. banc 1942). In so holding, the Court extolled the virtues of parochial education, characterizing it as "an embodiment of one of the highest ideals that man may enjoy." *Id*. at 614. Even so, the Court recognized the paramount principle of "religious freedom and religious equality," describing it as a "guiding star in the

growth and development of our form of government." *Id.* at 611. The Court determined that the absolute separation of church and state as expressed in the Missouri Constitution preserved religious liberty for Missouri's citizens and peace in the state:

> If the [public] management of this [parochial] school were approved, we might next have some other church gaining control of a school board and have its pastor and teachers introduced to teach its sectarian religion. Our schools would soon become the centers of local political battles which would be dangerous to the peace of society where there must be equal religious rights to all and special religious privileges to none. The faithful observance of our constitutional provisions happily makes such a condition impossible.

*Id.* at 614.

The only connection suggested by Trinity Lutheran between Article I, Section 7 of the Missouri Constitution and the national Blaine Amendment is temporal coincidence. Pet. Br. 43. But history shows that Missouri's interest in maintaining a strict separation of church and state predated the Blaine Amendment's national emergence by half a century. Missouri's original Constitution, adopted in 1820 as part of Missouri's statehood, included language stating that "no man can be compelled to erect, support, or attend any place of worship, or to maintain any minister of the gospel, or teacher of

religion . . .” MO. CONST. art. XIII, § 4 (1820).[2] The Constitution adopted in 1875 expanded upon this concept, to be sure, but it would be factually inaccurate to suggest that Missouri’s prohibition against collecting taxes or fees for religious purposes began with Blaine. Article I, Section 7’s connection to the national Blaine Amendment is no more credible here than was the connection of Washington’s no-aid provision to the Blaine Amendment as discussed in *Locke*, and the argument should be afforded no more weight.

Without its “Blaine Amendment” argument, Trinity Lutheran’s contention that the State has exhibited hostility to religion is reduced to a tautology: the State’s unlawful, differential treatment of church-owned daycares exhibits hostility to religion, Trinity Lutheran argues, and the State’s hostility to religion makes its differential treatment of church-owned daycares unlawful. Pet. Br. at 41-42. But as will be discussed in greater detail in Part II, *infra*, the State of Missouri repeatedly and consistently enacts policies, including Article I, Section 7 of its Constitution, that are protective of religious freedom and aim to support religious objectives. Its decision not to use state funds to support religious organizations is rational, and there is nothing to suggest that it is the product of religious animus.

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[2] Portions of this section were readopted in what would become Article I, Sections 5 and 6 of the Missouri Constitution of 1875.

Trinity Lutheran also points out that, in *Locke*, Davey requested state funds for an inherently religious purpose—theological education—whereas Trinity Lutheran's intent to resurface its playground is entirely secular. Pet. App. at 36-41. But this distinction does not work in Trinity Lutheran's favor. A state's refusal to support an aspiring pastor's religious education surely exerts a greater pressure on free religious exercise than does a state's refusal to subsidize a church daycare's secular capital improvement project.

In highlighting the secular nature of its renovation project, Trinity Lutheran confuses potential Establishment Clause issues with the free exercise question presented. Trinity Lutheran cites a series of cases in which this Court held that government grants to religious institutions for secular purposes did not violate the Establishment Clause. Pet. Br. at 38-39 (citing *Comm. for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (state funds could be used to reimburse religiously affiliated schools for conducting state-required tests); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736 (1976) (grants may be provided for secular purposes to colleges and universities, including religiously affiliated institutions); *Hunt v. McNair*, 413 U.S. 734 (1973) (state could issue bonds in support of religiously affiliated college where funding had secular purpose)). But this argument misses the point. The State does not argue that giving Trinity Lutheran funds for playground resurfacing would violate the Establishment Clause. Instead, the State merely contends that its decision

not to subsidize playground improvements does not "prohibit" Trinity Lutheran from freely exercising its religion. It is difficult to conceive of a less oppressive burden on the exercise of religion than the State's decision not to pay for an elective upgrade to a church's physical property that the church insists is "not remotely religious" (Pet. Br. at 37).

Finally, Trinity Lutheran attempts to distinguish *Locke* by referring to the State's playground-resurfacing grant program as a "generally available public benefit" that, Trinity Lutheran claims, the State cannot withhold from religious groups. Pet. Br. at 11, 17, 29-31, 34, 37, 39, 44. But, in fact, the grant program is one of *limited* availability. The program is funded by a fee assessed on the retail sale of new tires, and only five percent of that fund, at most, may be spent on the scrap-tire grants. Mo. Rev. Stat. § 260.273 (2014 Supp.)[3]; 10 CSR 80-9.030(2) (May 31, 2016); Pet. App. at 89a. Because resources are limited, the State developed a process by which interested applicants compete for funding. 10 CSR 80-9.030(5). As Trinity Lutheran acknowledges, only fourteen of the forty-four applicants in 2012 received funding. Pet. Br. at 6; Pet. App. at 154a. In other words, more than two-thirds of the applicants, each of whom may well have met the minimum qualifications to receive money under the grant program, nevertheless were rejected. While the State applies a point-based scoring system to provide some structure and consistency to its decision-making, ultimately the program administrators must make

[3] All references to Mo. Rev. Stat. are included in the 2012 Cumulative Supplement unless noted otherwise.

subjective, discretionary decisions regarding who will receive funds and who will not. *See* Pet. App. at 120a-154a.

Trinity Lutheran's misapprehension of the playground-resurfacing grant program as a "generally available public benefit" is essential to its constitutional argument; when that mistaken premise is rejected, the rest of the argument collapses. Trinity Lutheran's position appears to be that because non-religious daycares may all receive playground-resurfacing grants, the refusal to provide religious daycares with similar funding "violates the Free Exercise clause no less than if [the State] had imposed a special tax." *See Locke*, 540 U.S. at 726 (Scalia, J., dissenting). But not all non-religious daycares receive the funding—as noted above, just over thirty percent of those that applied for funding in 2012 received it. Pet. App. at 154a. Trinity Lutheran does not attempt to argue that its right to freely exercise its religion would have been violated had it been denied funding simply because its application failed to achieve a sufficiently high score to prevail over other more competitive applicants. Nor does it argue that its ability to freely exercise its religion was impaired prior to its application for funding, when its playground was surfaced with pea gravel. But if Trinity Lutheran's freedom to exercise religion is unaffected by whether it actually receives any money or actually resurfaces its playground, the State's refusal to provide funding here cannot possibly have burdened the church's religious practice. Trinity Lutheran's ability to freely practice its religion, having been deemed ineligible for grant

funding here, is no different than had it been denied funding simply because its application was uncompetitive, or had the grant program never been created at all.

This distinction differentiates the present case from every case cited by Trinity Lutheran in which a free exercise violation has been found. In each case in which a government benefit was withheld due to someone's religious exercise, the benefit was one that all similarly-situated, qualified individuals were entitled to receive, without a discretionary decision to be made by government administrators. *Contrast, e.g.*, *Sherbert*, 374 U.S. 398 (government withheld unemployment benefits from employee whose religious beliefs forbade her from working on the Sabbath); *Hobbie,* 480 U.S. 136 (same); *Thomas*, 450 U.S. 707 (government refused to pay unemployment benefits for worker whose religious beliefs prevented him from making weapons); *McDaniel v. Paty,* 435 U.S. 618 (1978) (state law excluded ministers from political participation by disqualifying them from holding public office); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (state constitution disqualified anyone who would not declare a belief in God from seeking state office). By punishing religious adherence with the deprivation of a vested right, the burden placed on religious practice in these cases went beyond mere "frustration" or "inhibition" and crossed the line into "prohibition." Trinity Lutheran tries to characterize the playground-resurfacing grant program as an entitlement akin to these other benefits, but it is not.

Because Trinity Lutheran cannot demonstrate that its free religious exercise was impacted at all—

let alone "prohibited"—by the State's discretionary decision not to fund its secular playground-improvement project, Trinity Lutheran's free exercise claim must fail.

### B. The Free Exercise Clause permits the State to address religious and non-religious interests in a non-neutral manner.

Unable to show that any aspect of its religious practice was "prohibited" by the State's policy, Trinity Lutheran relies on dicta appearing in some of this Court's cases to argue that the Free Exercise Clause requires the State to maintain strict neutrality between religious and non-religious persons and groups. Pet. Br. at 11-22 (citing *Lukumi*, 508 U.S. at 542; *Hobbie*, 480 U.S. at 148; *Sherbert*, 374 U.S. at 409). But Trinity Lutheran conflates this Court's free exercise jurisprudence with precedent analyzing the Establishment Clause and Equal Protection Clause, and thus mistakenly asserts that the Free Exercise Clause requires neutrality when, in fact, the Constitution "says no such thing." *Cf. Lyng*, 485 U.S. at 450.

In fact, this Court has repeatedly upheld, and has even required, government conduct that is decidedly non-neutral. Much of this Court's precedent applying the Free Exercise Clause involves government failure to accommodate demands for religious exemptions from otherwise neutral policies. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, for example, this Court held that the First Amendment exempts churches from generally-

applicable employment discrimination laws with respect to the church's employment of clergy. 132 S.Ct. 694, 702-03, 706 (2012). The Court noted that the Free Exercise Clause prevents the government "from interfering with the freedom of religious groups to select their own [ministers]," and that to hold otherwise would interfere with "the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id*. at 703, 706. Notably, the Court found unsatisfactory the suggestion that the right to free association, which would apply neutrally to religious and secular groups, adequately protects the church from government interference, observing that the First Amendment "gives special solicitude to the rights of religious organizations." *Id*. at 706.

Similarly, in *Sherbert*, *Hobbie*, and *Thomas*, three cases cited by Trinity Lutheran, government employees claimed that facially neutral government policies limiting the availability of unemployment benefits violated their rights to freely practice their religion. *See Sherbert*, 374 U.S. at 402; *Hobbie*, 480 U.S. at 139-40; *Thomas*, 450 U.S. at 709-11. In essence, this Court found the government's failure to accommodate the individuals' religious beliefs violated the Free Exercise Clause not because the government failed to treat religious individuals the same as everyone else, but because it failed to treat them differently. Without granting a religious exemption, the Court held, a neutral government policy had imposed such a significant consequence on the affected individuals' religious exercise that it qualified as a "prohibition." *See Sherbert*, 374 U.S. at

404 (government pressure on complainant to "forego that [religious] practice is unmistakable"); *Hobbie*, 480 U.S. at 141 (noting that "important" benefit was conditioned on conduct proscribed by individual's religion, thereby putting "substantial pressure" on religious adherent to violate his beliefs) (quoting *Thomas*, 450 U.S. at 717-18).

Trinity Lutheran cites a number of cases in which this Court has discussed the importance of "neutrality," but none of those cases turn on the application of the Free Exercise Clause. Several involved government efforts to suppress religious speech or limit a church's access to a public forum. *See Rosenberger*, 515 U.S. 819 (University's refusal to provide equal funding to Christian-oriented student newspaper unlawfully regulated speech based on viewpoint)*; Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (exclusion of Christian club from school-created public forum was unconstitutional viewpoint discrimination); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (school could not limit religious group's use of limited public forum on school property on basis of group's religious viewpoint); *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015) (municipal code imposing stricter limits on signs posted by non-profits than on those posted by others was content-based restriction in violation of First Amendment right to free speech).

Other cases involved policies favoring religious organizations or objectives that this Court held violated (or did not violate) the Establishment Clause. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (law requiring school day to

begin with Bible reading violated the Establishment Clause); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (state violated Establishment Clause when redrawing school district boundary lines with purpose of including only property owned by particular Jewish sect); *Marsh v. Chambers*, 463 U.S. 783 (1983) (state legislature's practice of beginning each day with a state-paid chaplain's prayer does not violate Establishment Clause); *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014) (town's practice of opening town board meetings with prayer does not violate Establishment Clause); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990) (Equal Access Act, requiring schools to provide same school-property access to religious as to non-religious clubs, does not violate Establishment Clause); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (state-sponsored program allowing parents to use vouchers to help pay for their children's religious education did not violate Establishment Clause).

And still others discuss the application of the Equal Protection Clause in circumstances having nothing to do with religion. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (applying the Equal Protection Clause to law involving mental-disability classification); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (reliance on race-based classification in child-custody dispute failed to satisfy strict scrutiny under Equal Protection Clause). Trinity Lutheran has cited these cases to support its argument that the Constitution, in many contexts, prohibits status-based discrimination. Pet. Br. at 15-18. But this is an

equal protection argument masquerading as a free exercise claim.[4] These cases shed little light on the First Amendment question—whether differential treatment of religious and non-religious groups "prohibits" the free exercise of religion.

It is undisputed that the policy at issue in this case is not facially neutral—churches are, by virtue of their religious character, ineligible for playground-resurfacing grant funding. But this Court examined a similarly non-neutral policy in *Locke* and found it constitutionally sound, emphasizing the lack of coercive effect on the disadvantaged students' religious practice. *See Locke*, 540 U.S. at 720-21. While neutrality toward religion may be, in many instances, powerful evidence that a state policy is compliant with the Free Exercise Clause, it is neither a necessary nor a sufficient factor. The Free Exercise Clause protects religious liberty by demanding government non-interference, not neutrality.

Because the State's refusal to provide funding for a "wholly secular" playground-resurfacing project in no way prohibits Trinity Lutheran from fully and freely exercising its religion, the church's Free Exercise Clause claim fails.

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[4] Trinity Lutheran's Equal Protection Clause claim is addressed in Part II, *infra*.

## II. The State's decision not to subsidize Trinity Lutheran's playground-resurfacing project does not violate the Equal Protection Clause of the Fourteenth Amendment.

Trinity Lutheran next argues that the State's unequal treatment of religious groups in determining eligibility for the playground-resurfacing subsidy program violates the Equal Protection Clause of the Fourteenth Amendment. Pet. Br. at 22-44. But Trinity Lutheran's argument applies the wrong standard of review and overlooks the legitimate, rational bases underlying the State's policy choice.

The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Generally, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440. "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude,[] and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* (citations omitted).

### A. Government policies that treat the class of "all religious groups" differently from similarly situated non-religious groups survive equal protection review if supported by a rational basis.

When evaluating the constitutionality of a government policy that treats similarly situated groups differently, this Court applies the highest level of scrutiny only if the distinction interferes with the exercise of a fundamental right or if it differentiates based on a suspect classification. *E.g. Vacco v. Quill*, 521 U.S. 793, 799 (1997). Absent such circumstances, the Court will uphold the policy "so long as it bears a rational relation to some legitimate end." *Id.*

Trinity Lutheran contends that the Court should apply strict scrutiny to the State's exclusion of religious organizations from the playground-resurfacing grant program because the State's policy "employs a suspect classification." Pet. Br. at 22-27. But Trinity Lutheran's argument finds no support in the cases it cites or elsewhere in this Court's precedent for the proposition that the class of "all religious groups," as opposed to "all non-religious groups," constitutes a suspect classification.

### 1. This Court applies rational-basis review to policies that treat "all religious groups" differently from similarly situated non-religious groups.

Nothing in this Court's precedent suggests that a policy differentiating "all religious groups" from "non-religious groups" requires anything but rational basis review in the absence of an accompanying violation of the Free Exercise or Establishment Clause. To the contrary, in *Locke* this Court applied rational basis review in summarily upholding Washington's policy withholding scholarship funds from theology students. 540 U.S. at 720 n.3. The Court explained that because it found no violation of the Free Exercise Clause in the state's program, equal protection analysis required only the rational basis test, which the program passed. *Id*.

Likewise, in *Johnson v. Robison*, 415 U.S. 361 (1974), the Court declined to apply any form of heightened scrutiny to a law purportedly burdening religious individuals who declined military service as conscientious objectors. *Id.* at 375 n. 14. The Court held that denial of certain veteran's educational benefits to these individuals did not violate their fundamental right to free exercise of religion, and then addressed their Equal Protection claim, stating, "since we hold . . . that the [challenged] Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational basis test." *Id*.

Trinity Lutheran appears to concede that, in the absence of a First Amendment violation, a policy differentiating on the basis of religion does not call for strict scrutiny on the theory that the free exercise of religion is a fundamental right. Pet. Br. at 24-25 ("[I]t is completely unsurprising that the *Locke* court would judge a fundamental-right claim under rational basis scrutiny after concluding the law did not violate the fundamental right in question.").

Trinity Lutheran argues instead that strict scrutiny is required because "religion" creates "an inherently suspect classification." Pet. Br. at 22-27. To support this argument, Trinity Lutheran cites a handful of cases in which this Court has listed "religion" among those distinctions deemed "inherently suspect." Pet. Br. at 22-23. But none of the cited cases actually apply strict scrutiny to a law differentiating between "all religious groups" and "non-religious groups." In fact, none involve religious classifications at all. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (evaluating city's economic regulation exempting long-established vendors, but not newly established vendors, from certain requirements); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 649-51 (1992) (reviewing state law establishing venue differently depending on whether a corporate defendant was based in-state or out-of-state); *Plyler v. Doe*, 457 U.S. 202, 205, 223-30 (1982) (analyzing state law denying undocumented schoolchildren a free public education); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (considering federal program advantaging minority applicants for new broadcast licenses)

(overruled by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)). Trinity Lutheran has failed to cite a single case in which this Court has applied strict scrutiny to a law treating religious groups differently from non-religious groups or in which this Court characterized "all religious groups" as a suspect classification.

When this Court has described "religion" as an inherently suspect classification, it has done so in reference to laws drawing distinctions among religious denominations, advantaging one over another. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338-39 (1987) (noting that "laws discriminating *among* religions are subject to strict scrutiny . . . .) (emphasis original) (citing *Larson v. Valente*, 456 U.S. 228, 246 (1982)). The Missouri Constitution does not discriminate among religious sects or denominations—indeed, it expressly forbids such discrimination. *See* MO. CONST. art. I, § 7 (". . . 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."). Thus, the language Trinity Lutheran relies on to support its standard-of-review argument has no application here.

In fact, when analyzing laws differentiating between "all religious groups" and non-religious groups, this Court has applied rational basis review. In *Amos*, a former employee of a secular, non-profit facility owned and operated by the Church of Jesus Christ of Latter-Day Saints sued for wrongful termination. 483 U.S. at 329-34. He alleged that the

provision of Title VII of the Civil Rights Act of 1964 that permits religious employers to discriminate on the basis of religion against employees who have non-religious jobs violated the Establishment Clause and the Equal Protection Clause. *Id*. The Court first found no Establishment Clause violation in Title VII, and then turned to Equal Protection. *Id*. at 334-39. The employee argued that the law "offend[ed] equal protection principles by giving less protection to the employees of religious employers than to the employees of secular employers." *Id*. at 338. The Court agreed that Title VII treated religious and non-religious employers differently, but required only a rational basis for the policy, noting that where a law treats all religious denominations equally, there is no justification for applying strict scrutiny if the law does not violate the Establishment Clause. *Id*.

**2. The class of "all religious groups," as opposed to individual religious sects, does not meet the traditional criteria considered in identifying suspect classes.**

Further weighing against Trinity Lutheran's request that this Court characterize "all religious groups" as a singular, suspect class is that the indicia typically considered by this Court in identifying suspect classes are absent. When determining whether a classification qualifies as "suspect," this Court historically has declined to designate it as such if "the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command

extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (declining to characterize as suspect a classification based on relative poverty). Individual religious denominations may certainly qualify as suspect classes under this definition. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938) (suggesting that a "more searching judicial inquiry" would be required for statutes directed at "particular religious . . . minorities."). A class comprising "all religious groups," however, does not.

Any suggestion that "religion," generally speaking, confers upon a person or group "political powerlessness" in the United States ignores the extent to which religion is deeply intertwined with our political and cultural history. As this Court has observed,

> [R]eligion has been closely identified with our history and government . . . . The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself . . . . It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are "earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . .

> guide them into every measure which may be worthy of his [blessing . . . .]"

*Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (quoting *Schempp*, 374 U.S. at 212-13). If "all religious groups" can even be characterized as a discrete and insular class, that class has two unique and powerful protections against governmental meddling—the Establishment and Free Exercise Clauses of the First Amendment. *See e.g. Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970) (the Court, applying the First Amendment, "will not tolerate either governmentally established religion or governmental interference with religion."); U.S. CONST. amend. I. Armed with the First Amendment, the class of "all religious groups" enjoys greater freedom from the burden of government than does virtually any other class in the nation.

And history shows that when the class of "all religious groups" has been unable to achieve its desired results by relying on the First Amendment, it is able to drive policy through the political process. For example, the enactment of the Religious Freedom Restoration Act ("RFRA") and subsequent enactment of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") demonstrate the political power of religious interests. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877-79 (1990), this Court held that "an individual's religious beliefs" do not "excuse him from compliance" with generally applicable, otherwise valid state laws. In so holding, the Court acknowledged that the Free Exercise Clause confers broad protections upon

religious practice, but reasoned that to permit an individual to excuse himself from compliance with the law based solely on his religious beliefs "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id*. at 877, 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878)). In concluding its opinion, however, the Court gave advocates for broad religious power reason to hope, noting that a society so committed to religious freedom that it would enshrine the Free Exercise Clause into its Constitution "can be expected to be solicitous of that value in its legislation as well." *Smith*, 494 U.S. at 890.

Just three years later, Congress displayed the extent of its solicitousness by enacting RFRA, which, by its express terms, sought to abrogate the Court's ruling in *Smith*. *See Burwell v. Hobby Lobby Stores, Inc*., 134 S.Ct. 2751, 2761 (2014); 42 U.S.C. § 2000bb(a)(4) (1993). Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." *See* 42 U.S.C. § 2000bb-1(a) (1993). The government could persist in its regulation only if it could demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. 42 U.S.C. § 2000bb (1993). This legislation did not just codify free exercise jurisprudence that pre-existed *Smith*, it imposed a new, more demanding standard such that "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object

of stifling or punishing free exercise." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). This Court held in *City of Boerne* that in enacting RFRA, Congress had overstepped its authority under Section 5 of the Fourteenth Amendment to regulate the states. *Id.* at 534-36. As a result, RFRA could apply only to action by the federal government. *See Hobby Lobby*, 134 S.Ct. at 2761.

Again, Congress responded. *Id.* Three years later, it enacted RLUIPA, which "imposes the same general test as RFRA but on a more limited category of government actions." *Id.* (citing *Cutter v. Wilkinson*, 544 U.S. 709, 715-16 (2005)). Congress applied RLUIPA to programs or activities that receive federal financial assistance, thereby extending its reach to the states. *See* 42 U.S.C. § 2000cc(a)-2000cc-1 (2000). RLUIPA also omitted any reference to the First Amendment, defining the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and mandated that the law be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *See Hobby Lobby*, 134 S.Ct. at 2762 (citing 42 U.S.C. § 2000cc-5(7)(A) (2000), § 2000cc-3(g) (2000)).

The class of "all religious groups" has proven effective not just in moving federal policy, but also in achieving favorable results in Missouri. Numerous provisions of Missouri law, both in statute and in the Missouri Constitution itself, confer benefits upon "religion" and religious individuals and groups based solely on their religious identity. For example,

the Missouri Human Rights Act, which, among other things, forbids employers in the state from discriminating against employees on the basis of race, color, religion, national origin, sex, ancestry, age, or disability, exempts "corporations and associations owned and operated by religious or sectarian groups" from its definition of "employer." Mo. Rev. Stat. §§ 213.010(7) (2000), 213.055 .1(1) (2000). Likewise, Missouri law exempts child-care facilities and foster homes operated by religious organizations from the requirement that those facilities be licensed by the State. Mo. Rev. Stat. §§ 210.211.1(5) (Supp. 2014), 210.516.1(5) (Supp. 2014). Missouri law also exempts individuals who assert a religious objection from the requirement that their children receive immunizations before attending school. Mo. Rev. Stat. § 167.181.3 (2012 Cum. Supp.). And in 2012, the citizens of Missouri amended the State Constitution to add an additional layer of protection to religious freedom in the state, including express protections for the right to pray, the right of the Missouri General Assembly to invite clergy to pray at public meetings, and the right of Missouri students to express their religious beliefs in their school assignments and refuse assignments that violate their beliefs. MO. CONST. art. I, § 5. Trinity Lutheran's suggestion that the State of Missouri is hostile to religion or seeks to deny religious organizations "the right to establish their religious self-definition in the political, civic, and economic life of [the] larger community" (Pet. Br. at 42) (internal marks and citations omitted) has no basis in fact.

While individual religious denominations may enjoy greater or lesser political influence at any particular time, the single class of "religious groups" has a history not of political powerlessness, but of almost singular political potency. By any traditional measure, the class of "all religious groups" cannot be characterized as suspect.

### 3. Applying strict scrutiny to government policies that treat the class of "all religious groups" differently from similarly situated non-religious groups would jeopardize the many state and federal policies that provide special advantages to religious groups.

Trinity Lutheran argues throughout its brief that it wants to be "treated on equal terms" with other, similarly situated groups. *See* Pet. Br. at 21-22, 34, 42. But, of course, Trinity Lutheran, like all religious organizations, is *not* treated on equal terms with similarly situated, non-religious entities. Instead, Trinity Lutheran enjoys a host of legal benefits afforded it solely because it is a religious organization. *See* Part II.A.2, *supra*. Trinity Lutheran asks this Court to hold that government policies that treat religious organizations differently than non-religious organizations must be subjected to strict scrutiny under the Equal Protection Clause, a standard that permits classifications only if they "are narrowly tailored to further compelling governmental interests." *E.g. Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). But the application of such a standard would imperil not only the policy Trinity

Lutheran challenges here, but also the many benefits that state and federal governments afford religious groups by virtue of the groups' religious identity.

If this Court were to adopt Trinity Lutheran's proposal, characterizing "all religious groups" as a suspect class and thereby requiring strict scrutiny for any policy disadvantaging "all religious groups" relative to non-religious groups, then the Court must also apply strict scrutiny in the inverse situation, where policy advantages "all religious groups" relative to non-religious groups. This Court has held that equal protection of the law is reciprocal—the "principle of equal protection" does not permit "the recognition of special wards entitled to a degree of protection greater than that accorded others." *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2417 (2013) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978)).

Again, *Amos* is instructive. In *Amos*, the law (Section 702 of Title VII) provided to religious organizations a benefit unavailable to any similarly situated non-religious employer—the right to discriminate against employees, even those whose jobs involved no religious function, on the basis of the employee's religious preference. 483 U.S. at 329-33. This Court had no trouble articulating a rational basis to support the law. *Id.* at 339. But it is not so clear that the religious-organization exemption would survive strict scrutiny. Does the government have a compelling interest in permitting religious organizations to discriminate against employees with secular jobs on the basis of that employee's religion, especially when, as Justice Brennan pointed out in

concurrence, such an exemption tends to burden the employees' own religious liberty? *See* 483 U.S. at 340-41 (Brennan, J., concurring). And is the exemption narrowly tailored to achieve that interest, even though it permits the religious employer to discriminate against an employee whose work has no discernable religious function? *See id.* at 342-43. Perhaps so, but such a conclusion would require a more searching equal protection analysis than the summary discussion in *Amos* provides.

Likewise, any case in which RFRA or RLUIPA has been applied to grant a special religious exemption to an otherwise generally applicable law may be vulnerable to reconsideration. As discussed above, RFRA and RLUIPA were enacted to provide greater protection to religious organizations than is required by the First Amendment. *See Hobby Lobby*, 134 S.Ct. at 2761. The Court might find little difficulty in articulating a rational basis to support these laws. It would need to closely examine, however, whether a policy that grants religious adherents sweeping power to avoid compliance with generally applicable laws, yet denies that same power to non-religious objectors, no matter how sincere and deeply felt their objections, can survive strict scrutiny.

State policies may require reexamination as well. As noted above, for instance, Missouri law exempts church-owned child-care centers like Trinity Lutheran's from licensure requirements,[5] whereas

[5] Despite its statutory exemption, Trinity Lutheran has voluntarily chosen to acquire a state license. Pet. App. at 131a.

the church's non-religious competitors are required to obtain and maintain a license to operate. Mo. Rev. Stat. § 210.211. Like the religious-exemption to employment-discrimination laws at issue in *Amos*, the licensure exemption is rationally justifiable in that it limits potential governmental interference with the exercise of religion. *Cf. Amos*, 483 U.S. at 339. It is less clear that the government's interest in granting this exemption to a generally-applicable safety regulation is compelling, however, or that the exemption is narrowly tailored to serve that interest.

The State has a legitimate interest both in prohibiting the direct payment of public resources to religious organizations and in providing special accommodation to religious entities to ensure that their religious practice is free of undue interference. This Court should decline Trinity Lutheran's invitation to upend decades of settled law and instead reaffirm that a state policy treating religious and non-religious groups differently does not offend the Equal Protection Clause as long as the policy is supported by a rational basis.

### B. The exclusion of religious organizations from eligibility from the State's playground-resurfacing subsidy program is supported by a rational basis.

In conducting rational-basis review, this Court will overturn a government policy only if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only

conclude that the [government's] actions were irrational." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000). The challenged policy carries with it "a strong presumption of validity,[ . . .] and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993); *see also Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."). Further, it is not necessary that the policymaker ever actually articulate the purpose or rationale supporting the classification at issue, *id*. at 315 (citing *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992)), and it is "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315. "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Id*. (citations omitted).

Here, the State's policy prohibiting expenditures from the State's treasury to a church is amply supported by a rational basis. Like the Establishment Clause itself, the State's policy protects against governmental favoritism, actual or perceived, toward particular religious denominations, respects taxpayers' freedom of religion and conscience, and protects religious organizations from creeping government influence. *See, e.g.*, Nelson

Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1272-74 (2008).

First, the State's policy categorically excluding all churches and religious organizations from receiving state funds prevents politicians and program administrators from exhibiting, or appearing to exhibit, favoritism toward particular religious denominations. As this Court has observed, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). And in a competitive grant program like the State's playground-resurfacing grant, preferential treatment is inherent in the process—some applicants will receive funding and others will not, even if all are "qualified." By categorically excluding churches from eligibility, the government avoids the problem of funding Catholics but not Lutherans, or Methodists but not Muslims. *See Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971) (noting that where state funding program benefitted "relatively few religious groups," "[p]olitical fragmentation and divisiveness on religious lines are . . . likely to be intensified"); *cf. Town of Greece v. Galloway*, 134 S.Ct. 1811, 1841-42 (2014) (Kagan, J., dissenting) (arguing that town's practice of opening board meetings with a prayer, most of which were Christian in nature, diminished the "First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government.").

The use of facially neutral criteria in the decision-making process cannot wholly alleviate the risk of

perceived favoritism. Even neutral criteria, fairly applied, can have a disparate, negative impact on less-advantaged groups. *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (finding unlawful for employment discrimination purposes any practices, procedures, or tests that "are fair in form, but discriminatory in operation."). For example, one factor on which Trinity Lutheran's playground-resurfacing grant application was scored was expected utilization—Trinity Lutheran was asked to "[d]escribe the number of people served by the project and the approximate geographic area of Missouri that will benefit from the project." Pet. App. at 121a. This is a reasonable, facially neutral criterion for differentiating between applications for funding, and one might expect to see something like it in virtually any competitive grant process. But its inclusion will mean that churches with larger congregations will tend to prevail over small churches in funding contests every time. With repeated successes, the larger churches will appear to be preferred by the State over less popular denominations, even if selection criteria are facially neutral. The State may rationally wish to avoid the appearance of sectarian favoritism by entirely excluding churches from eligibility.

Trinity Lutheran worries that some children, aware that their church is ineligible for government-funded playground improvements, may wrongly be led to believe that they are "less worthy of protection simply because they enjoy recreation on a playground owned by a church." Pet. Br. at 42. If children expressed such concern, they might be comforted

to learn about our nation's longstanding legal tradition separating church and state and about the special legal protections churches enjoy to protect their independence and freedom from government intrusion. Adopting Trinity Lutheran's rule, on the other hand, could trouble a different subset of children—those who belong to denominations that cannot muster the resources to effectively compete for government funding. Those children might ask why they "are less worthy of protection" simply because they do not belong to the popular church down the street. The best answer those children could receive is, "A state employee thought the other church deserved it more." It is not irrational for the State to prefer the former hypothetical scenario to the latter.

Trinity Lutheran, citing *Widmar v. Vincent*, 454 U.S. 263, 278 (1981), argues that this Court has already determined that a state's anti-establishment interest, if such interest does not rise to the level of an actual Establishment Clause violation, is insufficiently compelling to justify discriminating against religious groups. Pet. Br. at 28-31. In *Widmar*, the Court held that a public university that provided access to its facilities for student-group meetings could not exclude religious groups from using such facilities. 454 U.S. at 267. The Court explained that because the university had created a public forum by opening its facilities for student use, the Free Speech Clause of the First Amendment prohibited the university from excluding religious groups absent a compelling state interest and narrowly tailored regulation. *Id.* at 268-70. Providing

"equal access" to religious groups would not violate the Establishment Clause, the Court reasoned, and whatever remaining interest the university had in excluding the religious groups was insufficient to overcome "the most exacting scrutiny" required by the university's content-based regulation of speech. *Id*. at 275-76.

Trinity Lutheran's reliance on *Widmar* is misplaced here for at least two reasons. First, *Widmar* involved the official creation of an open forum, implicating the free-speech rights of potential participants, whereas this case does not. For the reasons explained above, rational basis review applies in this case, not the strict scrutiny that applies when an open forum is closed to particular viewpoints. Second, the "open forum" created in *Widmar* was described as a generally available benefit—that is, it appears that any qualifying group who wished to use it would be permitted to do so, without having to compete for space. *Id*. at 264-65, 274. Because facility access did not appear to be awarded competitively, university decision makers would not risk providing preferential access to certain religious sects over others.

In this last distinguishing characteristic, this case is unlike the hypothetical Trinity Lutheran poses in which a state refuses to provide services such as police, fire, and ambulance protection to churches or religious organizations. Pet. Br. at 31. Such services truly are generally available benefits—when someone in need calls for help, the police respond without considering whether the caller has submitted a sufficiently competitive proposal.

Because discrimination is not inherent in the allocation of emergency services as it is in competitive grants, it would be difficult to articulate a rational basis for depriving religious groups of those services. Moreover, the provision of these emergency services might be considered so important that, if called upon to review the rationality of any policy cutting off such services for certain groups, the Court might require a substantial justification before affirming. *Cf. Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) (holding that state's refusal to provide free public education to undocumented immigrant children was so damaging to the affected children that a substantial justification was needed). In short, withholding police or fire-protection services from a church would impose an incredible hardship on its members. Withholding funding for a new playground surface does not.

Second, the State may rationally decide that, to avoid requiring taxpayers to contribute funds to religious denominations whose values are different from their own, no public funds may be directed toward any churches or religious organizations whatsoever. By shaping policy consistent with the separation of church and state contemplated by the Establishment Clause, states can avoid the "divisive political potential" that follows when states make direct payments to religious groups. *See Lemon*, 403 U.S. at 622-23. The State may wish to respect the individual religious consciences of taxpayers and relieve them of the obligation to fund religious groups with beliefs or practices they find repellent. To do so without discriminating on the

basis of religious viewpoint requires the State to withhold funding from all religious organizations alike.

The State's interest in accommodating taxpayers' freedom of conscience serves more than the individual interests of those taxpayers—it is vital to the success of state programs. States develop grant programs because they want to motivate positive action. *E.g. Maher v. Roe*, 432 U.S. 464, 469-76 (1977) (noting that states have broad power to encourage through spending programs actions deemed to be in the public interest). If taxpayers protest a particular program because religious groups they oppose are getting tax dollars, the state objective advanced by that program is jeopardized. States thus have an interest in minimizing controversy over functional grant programs. Limiting eligibility to non-religious groups helps to advance that interest.

Finally, the people of Missouri have a rational interest in guarding against the increased probability of government interference with religious institutions that may accompany the receipt of government grants. "Throughout our Nation's history, religious bodies have . . . 'acted as critical buffers between the individual and the power of the State.'" *Hosanna-Tabor*, 132 S.Ct. at 712 (Alito, J., concurring) (citations omitted). To serve that function, "the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Id.* Infusing churches with public money threatens that important value. As this Court noted in *Lemon*, "[t]he history of government grants of a continuing cash subsidy

indicates that such programs have almost always been accompanied by varying measures of control and surveillance." 403 U.S. at 621. Justice Jackson warned in *Everson* that "[m]any groups have sought aid from tax funds only to find that it carried political controls with it[,]" and observed that "[i]t is hardly lack of due process for the Government to regulate that which it subsidizes." 330 U.S. at 27-28 (Jackson, J., dissenting).

Even a program as benign as the one at issue in this case opens the door to increased government control. Grant recipients must maintain and produce on demand financial records reflecting the expenditure of funds, and recipients must be prepared to defend the "appropriateness" of each expenditure. Pet. App. at 95a. Additionally, grant recipients are expected to craft curriculum and public statements to the satisfaction of state program administrators. Pet. App. at 122a-123a. Presumably, the more closely the applicant's message aligns with governmental interests, the better the applicant's chances of receiving the grant. To be sure, applicants voluntarily and knowingly choose to submit to this government interference in exchange for a financial reward. But the people of Missouri may reasonably be wary of programs that allow government to exert increased authority over religious institutions, whether the institutional leadership invites it or not. A broad "no-aid" provision like the one in Article I, Section 7 is a rational prophylactic against gradually increasing government interference with religious autonomy.

The State's interest in avoiding sectarian battles for public resources, protecting taxpayers from financially supporting groups they find objectionable, and shielding religion from intrusive government regulation is rational and legitimate. The exclusion of religious groups from eligibility from the playground-resurfacing grant program does not violate the Equal Protection Clause.

## CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully Submitted,

**CHRIS KOSTER**
Attorney General of Missouri

JAMES B. FARNSWORTH
Assistant Attorney General
JAMES R. LAYTON
Solicitor General
*Counsel of Record*
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1800
James.Layton@ago.mo.gov

*Counsel for Respondent*

DATED: June 28, 2016