NO. 15-577

# In the Supreme Court of the United States

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

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
*Respondent*.

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

## BRIEF OF *AMICUS CURIAE* ETHICS & RELIGIOUS LIBERTY COMMISSION IN SUPPORT OF PETITIONER

MICHAEL LEE FRANCISCO
*Counsel of Record*
MRDLAW
3301 West Clyde Place
Denver, CO 80211
(303) 325–7843
michael.francisco@mrd.law

*Counsel for* Amicus Curiae

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Other Authorities**

## INTEREST OF AMICUS CURIAE[1]

The Ethics & Religious Liberty Commission ("ERLC") is the public policy and engagement arm of the Southern Baptist Convention. With more than 15 million members and over 46,000 churches nationwide the Southern Baptist Convention is America's largest Protestant denomination. The ERLC is charged with addressing public policy affecting such issues as freedom of speech, religious liberty, marriage and family, the sanctity of human life, and ethics.

Religious freedom is an indispensable, bedrock value for Southern Baptists. The ERLC engages culture with the gospel of Jesus Christ by speaking in the public square for the protection of religious liberty and human flourishing. The correlated guarantee of freedom from government interference in matters of faith protects church members by fostering a society where religious adherents from all faiths may follow the dictates of their conscience in the exercise of religion.

The thousands of churches represented by the ERLC have an interest in not being discriminated against in government aid programs, like the

---

[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici and their counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to this filing. Their letters of consent are on file with the Clerk. As required by Rule 37.2(a), counsel for amici curiae provided timely notice of the intent to file this brief to all parties' counsel of record.

playground resurfacing program in Missouri at issue in this case. For the same reasons Trinity Lutheran Church of Columbia was prevented from receiving a government grant, any given Southern Baptist congregation could likewise be prevented from participating in government programs purely on the basis of religion. The ERLC brings a unique perspective on the impact of religious liberty decisions throughout the nation.

## SUMMARY OF ARGUMENT

Americans are appropriately apprehensive about the government becoming entangled with religion. Many challenging cases attempt to draw the line between permissive government support of religion and prohibited establishment of religion. This is not hard case, however. Missouri has a grant program to resurface playgrounds using recycled tires. The State excluded Trinity Lutheran's otherwise meritorious application purely because it was a church. Yet nobody fears an established church by means of a recycled tire surface on a playground.

Churches and religious citizens ought not be discriminated against, as has happened in this case and a growing number of related cases where this Court's narrow decision in *Locke v. Davey*, 540 U.S. 712 (2004) has been expanded into a shield for discrimination against religion under the guise of "play in the joints" between the Free Exercise and Establishment Clauses. This is just such a case. The Eighth Circuit allowed Missouri to discriminate against a church because a facially discriminatory provision of its constitution states that "no money shall ever be taken from the public treasury, directly

or indirectly, in aid of any church ….” Mo. Const. art. 1, § 7. That categorical exclusion of religious actors survived scrutiny under the U.S. Constitution because it fell within the “play in the joints” between the Free Exercise Clause and Establishment Clause. *Locke*, 540 U.S. at 720. Whatever play exists, however, cannot foster discrimination against religion. Contrary to the Eighth Circuit’s holding below, the better reading of *Locke* is that it does not endorse such acts of overt discrimination on the basis of religion, but instead allows for religion to participate in civic life on equal terms with non-religion, so long as there is no legitimate Establishment Clause concern.

The ERLC is concerned not only with the unjustified treatment of Trinity Lutheran Church in this case but also with the overall trend of churches and religious actors being excluded from participating in government programs. This disturbing trend is not only a correctable misapplication of *Locke*, but a violation of the Free Exercise, Establishment, and Equal Protection Clauses, which protect religion from being treated with hostility. The Court should grant Trinity Lutheran Church’s certiorari petition.

## ARGUMENT

### I. Churches should be allowed to participate in government programs on equal footing with other civic organizations.

America has always enjoyed the presence of churches in civic life. Our nation was founded with the prevalent belief that religion provides a moral foundation necessary for successful republican self-

government. The mediating role of churches in society is no less valuable today than at the birth of the American experiment in self-government.

### A. Religious pluralism allows church participation in civic life without establishing religion.

The commitment to religious liberty as enshrined in the First Amendment provides freedom to every church to pursue its own spiritual ends. Those ends frequently include valuable contributions to the community, including social services, education, and other acts of mutual aid and benevolence to citizens in need. To so operate, churches must be free from undue interference from civic powers to pursue ministry in its many forms.

The uniquely American experience with religious pluralism and the protection of free exercise of religion means most churches do not want government-sponsored or government-established religion. Government-sponsored religion interferes with a church's ability to live out a religious faith free from government meddling.

Religious views, along with any other sincere views, must be welcomed on equal terms in civil society. Indeed, "the pluralist model is based on the accommodation position … government accommodation of all people's rights to express, or refrain from expressing, religious convictions and religious beliefs." Richard Land, *The Divided States of America* 76 (2011). Embracing a pluralistic society with many competing religious faiths will mean "no one is penalized for his or her views; neither those

with religiously informed moral values, nor those with religion-free convictions." *Id.* at 174.

America has long valued the equal right of citizens, including religious citizens with competing views, to participate in civil society on the same footing. In James Madison's 1785 *Memorial and Remonstrance Against Religious Assessments*, the influential Founding Father opposed a bill to provide for established government religious teachers on two grounds. First, he opposed it on the basis of conscience because the "religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." Second, he opposed it on the grounds of equality as "the Bill violates that equality which ought to be the basis of every law … all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights."[2]

As this Court put it more recently, "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992). Indeed, the "design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Id.*

---

[2]Available at http://founders.archives.gov/documents/Madison/01-08-02-0163

The freedom of the religious sphere to operate without government coercion does not, however, necessitate a clinically secular state where religious actors are kept from public life. Government can, and should, accommodate religiously-neutral actors in government programs, allowing participation on an equal basis for religious and non-religious constituents.

Just as police and fire service responds to calls from churches and stores alike, government programs can allow religious applicants to participate in government programs irrespective of their religious nature without undermining the appropriate level of distance between church and state. More passive government services, such as road signs naming a church or school, likewise serve religious and non-religious on the same basis.

The alternative, excluding church and religion from otherwise neutral government programs, would not fulfill the "benevolent neutrality" the Court has long embraced whereby "State power is no more to be used so as to handicap religions, than it is to favor them." *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 669 (1970) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). A broad exclusion of religion is not neutral, let alone benevolent.

Society writ large benefits when churches and religious actors are accommodated and encouraged to participate in public life. Churches bring a number of positive benefits to communities that would be diminished if the courts embrace a legal position permitting discrimination against religious actors in government programs. Just a few of the benefits to

society from healthy and vibrant churches include local economic development, social services for the poor and vulnerable, community educational programs, and civic engagement.

### B. There are an increasing number of government programs that should be open to church participation.

There are ample opportunities for churches or affiliated religious institutions to participate in government programs. From the charitable choice provision in the Welfare Reform Bill of 1996 where states were required to include religious organizations as eligible contractors for social services, 15 U.S.C. § 604a, to the creation of the Office of Faith-Based and Community Initiatives by President Bush in 2001, Exec. Order No. 13,199, 66 FR 8499 (January 31, 2001), there are more opportunities than ever before for the government to accept churches and religious actors as equal participants in social programs.

The opportunity for churches to participate alongside others in government programs should not be mistaken for a mandate requiring churches to participate. Many in the religious community, including the Southern Baptist Convention, elect not to participate in government programs at the state or federal level for religious or practical reasons. What is important is that the government treats churches fairly and allows them to choose between participation and non-participation.

The Eighth Circuit's decision in *Trinity Lutheran Church of Columbia v. Pauley*, 788 F.3d 779 (8th Cir. 2015) disrupts the benevolent neutrality and lack of

hostility towards religion protected by the First Amendment. The Missouri state grant program was generally open to applicants and Trinity Lutheran's application would have been approved, the majority decision holds, but for the fact it was a church. This is discrimination against a church purely on account of it being a church.

In addition to needlessly diminishing the ability of churches to participate in civic life, the result below misapplies this Court's precedent by permitting the government to expressly exclude churches because they are churches, which is the sort of hostility towards religion the Court has often warned against. *See, e.g., Wallace v. Jaffree,* 472 U.S. 38, 85(1985) (Burger, C.J., dissenting) ("For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion.").

The Ethics & Religious Liberty Commission defends the right of churches throughout the country to enjoy religious freedom. It is concerned that this Court's Religion Clause precedent is being misunderstood and misapplied by lower courts to sanction discrimination against churches.

## II. Lower courts are expanding *Locke v. Davey* to permit discrimination against churches well beyond any Establishment Clause concerns.

Little more than a decade ago, this Court faced a challenge to the State of Washington's exclusion on "funding the religious training of the clergy." *Locke*, 540 U.S. at 722 n.5. The Court was careful to limit the

reach of this holding so as to preclude the case from being misunderstood as a justification for discrimination against religion generally. *Locke* has been rapidly misconstrued by lower courts, including the Eighth Circuit by a divided vote here, as a justification for raw discrimination against churches, even in areas far afield from the traditional concerns of the Establishment Clause. As lower courts continue to misread and misunderstand *Locke*, the cherished rights of churches and religious adherents to be free from discrimination at the hands of the government are imperiled.

### A. *Locke v. Davey* has been misunderstood and misapplied by the Eighth Circuit as a basis for tolerating discrimination against churches.

The *Trinity Lutheran* panel only timidly relied on *Locke*, noting the "active academic and judicial debate about the breadth of the decision." 788 F.3d at 785. The panel's reluctance to follow *Locke* also took the form of speculating that the Supreme Court "seems to be going" in a different direction, but "[i]n our view, only the Supreme Court can make that leap." *Id.*

In the end, the panel moved past its concerns with *Locke's* future and concluded the daycare run by Trinity Lutheran Church could be categorically excluded from a government program providing grants for playground resurfacing. The exclusion followed the Missouri Constitution's prohibition on government funding either directly or indirectly to a church, which the Eighth Circuit held "does not conflict with the First Amendment or the Equal

Protection Clause of the United States Constitution." *Id.*

If allowed to stand, such an endorsement of discrimination against religious groups based purely on religion (not on Establishment Clause considerations) will only increase the number of courts countenancing discrimination against religion in the name of *Locke*. Judge Gruender in his dissent from the *Trinity Lutheran* panel has it right; following the Tenth Circuit's understanding of *Locke*, in the absence of any Establishment Clause concerns like the targeted funding of devotional theology in Washington, "the Department's 'latitude to discriminate against religion … does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support.' " *Id.* at 794 (quoting *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008).

*Locke*, after all, involved a carefully cabined exclusion of students receiving scholarships to study devotional theology. The Court emphasized the limited nature of the scholarship exclusion, as students could still use scholarships to attend religious schools, or even study theology at religious schools. 540 U.S. at 724–25. In short, the Washington exclusion was carefully crafted to avoid the state funding clergy. The funding of clergy, unlike grants for pour-in-rubber playground surfaces, has raised the specter of established religion dating back to the time of the founding. James Madison's *Memorial and Remonstrance* in 1785, *supra* part I, was a response to a bill proposing state funding of clergy. Likewise, government funding of clergy was a core component

of the established church in England that the First Amendment was designed to avoid. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2152 (2003) (discussing public taxation support for ministers as an element of establishment).

The panel's reading of *Locke* steps well beyond the historically rooted concerns about established religion. The Constitution protects churches and religious citizens not only from the threat of an established religion, but also from governmental discrimination against religion.

### B. *Locke* has been extended well beyond the education funding context.

The concerns of Justice Scalia's dissent in *Locke* have played out, as courts are using *Locke* to "justify the singling out of religion for exclusion from public programs in virtually any context." 540 U.S. at 730 (Scalia, J., dissenting), including, in this case, government grants for resurfacing playgrounds.

The majority of the older cases applying *Locke* have involved government funding of education, as *Locke* itself involved. *See, e.g.*, Petition for Writ of Certiorari, *Douglas Cnty. School Dist. v. Taxpayers for Public Educ.*, No. 15-557 (Oct. 28, 2015). Those cases have been amply highlighted by Trinity Lutheran Church's Petition as well as the briefs in support of the petitioners in *Douglas Cnty*, *id.* The ERLC highlights how the *Locke* precedent has been extended in areas outside education funding in a way that erode a church's ability to participate in many other aspects of civic life. In these cases, far afield

from concerns over religious funding of education, governments have been discriminating against churches or religious citizens in the context of general government grants or programs. If the state can discriminate against a church, purely because it is a church, for a program distributing recycled tires to make playgrounds more safe, where is the limit to the permitted areas of government discrimination? The following cases are examples of the diverse contexts in which this Court's decision in *Locke* has been presented beyond the education funding cases.

1. *Recycled tire grants in* Trinity Lutheran Church of Columbia v. Pauley.

The facts of this case reflect a generally applicable government grant program specific to playgrounds, not education. To this day the Missouri Department of Natural Resources describes the types of eligible applicants without reference to excluding churches.[3] Even so, the Eighth Circuit held the Missouri Constitution prevents the playground scrap tire surface material grants from going to a church-owned daycare playground.

---

[3] *See* Missouri Dep't of Natural Resources PUB2425, 12/2014, *Playground Scrap Tire Surface Material Grant Application Instructions for Form 780-2143*, available at http://dnr.mo.gov/pubs/pub2425.htm ("**Who may apply for a playground scrap tire surface material grant?** Public school districts, private schools (depending on status), park districts, nonprofit day care centers, other nonprofit entities and governmental organizations other than state agencies are eligible to submit applications. Privately owned, residential backyard areas, and private in-home day care centers are ineligible.").

*2. Use of government facilities in* Bronx Household of Faith v. Board of Education of City of New York.

New York City Schools in *Bronx Household of Faith* made school facilities generally available outside school hours for use by the community. However, it excluded by rule "worship services," which precluded the Bronx Household of Faith from utilizing an otherwise available school facility on weekends. While the case involved the physical location of a school, the government program at issue was purely one of facility use after hours. The Second Circuit's most recent decision in *Bronx Household of Faith* (the fifth Circuit decision in the litigation) squarely affirmed the government's direct discrimination against the Bronx Household of Faith because of its religion. *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 750 F.3d 184, 190 (2d Cir. 2014), *cert. denied,* 135 S. Ct. 1730 (2015).

The first substantive precedent relied upon by the Second Circuit in *Bronx Household of Faith* was *Locke*, which the court interpreted to mean the government could discriminate in access to facilities without violating the Free Exercise Clause because *Locke* allowed the exclusion of certain theology scholarships. *Id.* at 190. The Second Circuit went on to equate funding of clerical education in *Locke* to the facts in front of them because the "Supreme Court has expressly ruled that where motivated by Establishment Clause concerns, a government decision to exclude specified religious causes from eligibility to receive state education subsidies" is constitutional. *Id.* at 193.

The court thus morphed the longstanding Establishment Clause concerns of funding clergy into a general right to exclude religion as the Establishment Clause "disfavor[ing] public funding of religion," even when that public funding was not funding per se, but mere access to government facilities as a subsidy that applicants (including the Bronx Household of Faith) would pay the government to use. As the dissent noted, this is not a subsidy in the normal sense, *id.* at 207 (Walker, J., dissenting) let alone government funding of the type at issue in *Locke*.

3. *Provision of youth residential services in* Teen Ranch v. Udow.

In this case, a faith-based organization provided youth residential services for delinquent, neglected, abused, and emotionally troubled youth under contract with the state. *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 406 (6th Cir. 2007). The Sixth Circuit relied on *Locke* to support excluding Teen Ranch's religious programming without violating the Free Exercise or Equal Protection Clauses. *Id.* at 409–10.

These cases all stand for the proposition that *Locke* is being applied broadly beyond the specific historically-informed context of state funding of clergy. The longer this Court lets the uncertainty and confusion percolate, the more churches and religious adherents will be discriminated against because of religion by being excluded from government aid, such as scholarships, neutral grant programs, as well as the use of government facilities.

### C. Churches deserve equal treatment, not exclusion and discrimination.

Churches deserve equal and fair treatment at the hands of the government. This case and the many other cases following *Locke* are not pleading for a special exemption from a law that would otherwise apply. Quite the opposite, these are cases seeking equal treatment for religion in government programs or benefits. Trinity Lutheran Church should have had its application for a playground resurfacing grant evaluated on the same terms as those applications from other playgrounds. It is not special treatment, but mere fairness that is sought.

The Court has frequently endorsed the neutrality towards religion that permits churches and religious adherents to participate on the same terms as others. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs …"); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947) (the government cannot exclude individuals "because of their faith or lack of it, from receiving benefits of public welfare legislation.").

No less than the Free Exercise Clause, Establishment Clause, and Equal Protection Clause protect the right of Trinity Lutheran and other churches to be participants in public life without being marked for exclusion solely because of religion. It is a mistake to extend *Locke* so far as to undermine the principle of benevolent neutrality that undergirds the balance between the Free Exercise and

Establishment Clauses. This Court should grant certiorari to restate the limits of *Locke* and affirm the rights of churches to be free from express discrimination in violation of the U.S. Constitution.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL LEE FRANCISCO
*Counsel of Record*
MRDLAW
3301 West Clyde Place
Denver, CO 80211
(303) 335-7843
michael.francisco@mrd.law

December 7, 2015