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

BRIEF OF THE STATES OF NEVADA, ARIZONA, ARKANSAS, COLORADO, GEORGIA, MONTANA, OHIO, OKLAHOMA, UTAH & WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the U.S. Constitution, particularly the Free Exercise and Equal Protection Clauses, can a State, after choosing to offer a neutral, generally available program to the public, administer it in ways that exclude some citizens on account of their religious beliefs?

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INTEREST OF *AMICUS CURIAE*[1]

The State of Nevada and other Amici States have a vital interest in protecting the constitutional rights of all state residents—whatever their religious beliefs. For example, the State of Nevada exists "for the protection, security and benefit of the people." Nev. Const. art. I, § 2. Consistent with those obligations, the State—acting through its Attorney General—is authorized by its citizens to commence, join, or participate in any suit necessary "to protect and secure the interest of the State." Nev. Rev. Stat. § 228.170.

Amici States' interest is particularly acute here. At least three States—Nevada, Colorado, and Missouri—are currently confronted with litigation that raises questions about the limits that the U.S. Constitution imposes on state constitutions' Blaine or No-Aid provisions. *See*, *e.g.*, *Duncan v. Nevada*, No. A-15-723703-C (Nev. D. Ct., Clark Cnty., filed Aug. 27, 2015); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist*., 351 P.3d 461 (Colo. 2015), *petitions for a writ of cert. pending*, Nos. 15-556, 15-557, 15-558; *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 778 F.3d 779 (8th Cir. 2015), *petition for a writ of cert. pending*, No. 15-577. State and lower federal courts are deeply split on those limits, and States frequently find themselves as defendants on both sides of the question.

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[1] Counsel for Nevada notified parties' counsel of record more than ten days before the filing of this *amicus* brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2004, this Court in *Locke v. Davey* said that Washington State could exclude from a state's tuition aid program a collegian seeking a "devotional degree" that, by its nature, was "an essentially religious endeavor."[2] So this theology student could not enjoy state aid that his classmates in, say, anthropology or film studies might. But the Court emphasized that Washington's program went "a long way toward including religion in its benefits," and that its narrow restrictions on an otherwise broadly available public benefit were carefully tailored to avoid "funding the religious training of clergy," which historically "was one of the hallmarks of an 'established' religion."[3]

Other than *Locke*, this Court has in recent years consistently emphasized the principle of neutrality in considering programs of generally available state aid: religious individuals and organizations should not be treated any better than other eligible recipients of state money, but no worse either. *See infra*, Section IV. But since *Locke*, state and federal jurists have widely disagreed on how much of an exception *Locke*'s "play in the joints" metaphor allows in excluding religious organizations and individuals from otherwise generally available, neutral programs of state aid. *Locke* concluded that a State, when it decides to offer a benefit to all but a select few, on account of their faith, can "draw[] a more stringent line" than the one

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[2] 540 U.S. 712, 721, 725 (2004).

[3] *Id.* at 722 & n.6, 724.

sketched by the U.S. Constitution.[4] This case presents the question in the most striking terms of when that line, pushed too far, becomes an impermissible state-imposed disability.

Amici States believe that the Court has taught, in many cases, that when it comes to generally available, neutral programs, the U.S. Constitution, especially its Free Exercise and Equal Protection Clauses, requires faith-blindness almost as rigorously as it does color-blindness. But some courts have read *Locke* to approve interpretations of state provisions that, as here, arguably push "no aid" into the realm of discrimination *against* religion. Amici States respectfully ask the Court to use this case to clarify the limits of *Locke*'s recognition of "play in the joints."

ARGUMENT

I. *Locke* and the No-Aid conundrum

Locke was narrow. The "only interest at issue," the Court said, was Washington's interest in "not funding the religious training of clergy,"[5] an interest so rooted in history as to be practically in a class by itself.[6] The Court emphasized that Washington's "disfavor" of faith, if it could be characterized as such, lay in its refusal to create a pastor. But the panel below split

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[4] *Id.* at 722.

[5] *Id.* at 722 n.5.

[6] *See* Richard D. Komer and Clark Neily, School Choice and States Constitutions, Inst. for Justice and Am. Legislative Exch. Council (Apr. 2007), *available at* http://ij.org/report/school-choice-and-state-constitutions/.

over whether, under *Locke*, the Free Exercise Clause lets Missouri deny a church access to a generally available, neutral program that, even if the church participated, would have nothing to do with religion. Unlike refusing to fund clergy, refusing to protect children equally from injury because they play at a church has neither the sanction of history nor Mr. Madison.

Trinity Lutheran Church applied to Missouri's Scrap Tire Grant Program for repurposed rubber to soften its playgrounds. The problem is that Trinity Lutheran Church is Lutheran. Missouri officials explained that their hands were tied by their Constitution's provision that says "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."[7]

About 35 States have provisions like Missouri's, conventionally called Blaine or No-Aid provisions, that disallow, in varying degrees, public funds from flowing to "religious" or "sectarian" recipients. Interpretations of these amendments are all over the map, geographically, of course, but also legally, philosophically, and even spiritually. In fraught cases ranging from book loans to orphanages to educational-choice programs, state and federal courts, faced with similar facts and constitutional language, reach opposite conclusions. But what unites these tribunals today is gaping disagreement about what constraint is imposed by the U.S. Constitution and particularly the decision in *Locke*.

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[7] Mo. Const. art. I, § 7; Pet. App. 152a-53a (denial letter).

For instance, in a Colorado case involving scholarships—whose Respondents are also now petitioning this Court for certiorari—three Justices read *Locke* to stand for the notion that state constitutions "may draw a tighter net around the conferral" of aid—in that case, money for pre-college private-schoolers.[8] The dissenters felt that this turned what the *Locke* Court saw as a guppy net—designed to catch the occasional pastor-in-training—into a vast trammel, cutting off (as it were) entire schools.[9] In a Florida court, sitting *en banc*, eight judges (with six judges dissenting) thought *Locke* "recognized" that a No-Aid provision could disqualify from funding not only a few devotional students but *all* "religious institutions."[10]

These conclusions ill fit with the Court's proviso in *Locke* that the "only" interest at issue was in "not funding the religious training of clergy."[11] Justice Scalia, in dissent, feared that the majority's logic would justify exclusion of religion from "public programs in virtually any context."[12] The Court reassured its

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[8] *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.,* 351 P.3d 461, 474 (Colo. 2015), *petitions for cert. filed*, Nos. 15-556 (U.S. Oct. 27, 2015), 15-557 (U.S. Oct. 28, 2015), *and* 15-558 (U.S. Oct. 28, 2015).

[9] *Id.* at 479-80 (Eid, J., dissenting).

[10] *Bush v. Holmes*, 886 So. 2d 340, 360, 363-64 (Fla. Dist. Ct. App. 2004), *aff'd in part on other grounds*, 919 So. 2d 392 (Fla. 2006).

[11] 540 U.S. at 722 n.5.

[12] *Id.* at 730 (Scalia, J., dissenting).

readers that "[n]othing in our opinion" suggested that.[13] Many judges, however, see something the Court did not.

The case below, and others like it, matter because States end up on both sides of these challenges. State agencies, seeking to honestly apply their State's No-Aid provisions, treat religious organizations and individuals differently—and get sued for differentiating. State legislatures pass laws making benefits generally available (like school-choice programs)—and the State gets sued for *failing* to differentiate. State and federal courts look to other state and federal decisions for guidance, but the courts are split. Often, as in the decision below and the Colorado case pending before this Court, the judges in the same jurisdiction reach polar opposite conclusions.

Powerful arguments have been made about federal constitutional limits on a State's No-Aid or Blaine provision to categorically exclude individuals or groups on the basis of religion, from neutral, generally available benefits. The certiorari petitions in the Colorado case catalogue most of them.[14] These arguments should come as no surprise, for Justices of this Court anticipated the problem: the plurality in *Mitchell v. Helms* wrote that "to require exclusion of

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[13] *Id.* at 722 n.5 (plurality opinion).

[14] S*ee* Petition for Writ of Certiorari, *Doyle v. Taxpayers for Pub. Educ.*, No. 15-556 (U.S. filed Oct. 27, 2015); Petition for Writ of Certiorari, *Douglas Cnty. Sch. Dist. v. Taxpayers for Pub. Educ.*, No. 15-557 (U.S. filed Oct. 28, 2015); Petition for Writ of Certiorari, *Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ.*, No. 15-558 (U.S. filed Oct. 28, 2015).

religious schools" from a generally available and neutral program would "raise serious questions under the Free Exercise Clause."[15]

II. Blaine's background

The Court has encouraged lawyers to study the history of anti-Catholic animus in America, a fact of life even before the States were United. In 1767, Boston patriots paraded to celebrate "Liberty & Property" and denounce "Devils" and "Popes."[16] The antagonism reached a high pitch during the 1884 presidential campaign, where, at a Manhattan rally for James G. Blaine, an over-candid preacher blasted Democrats as the party of "rum, Romanism, and rebellion"—which, lore says, cost Blaine vital Irish support in a State he lost by 600 votes.[17] It was Blaine who, a decade earlier, proposed the eponymous amendment to debar "sectarian" institutions from the use of public funds. A plurality in *Mitchell* recognized that state Blaine amendments "arose at a time of pervasive hostility … to Catholics" and constitutionalized an idea "born of bigotry."[18] Justice Breyer's dissent in *Zelman v. Simmons-Harris* drew on scholarship showing that anti-Catholicism was a "significant" force behind the successful movement to rewrite state constitutions to

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[15] 530 U.S. 793, 835 n.19 (2000).

[16] Robert Middlekauff, *The Glorious Cause: The American Revolution, 1763-1789*, at 163 (1982).

[17] Leslie H. Southwick, *Presidential Also-Rans and Running Mates, 1788 through 1996*, at 385-86 (2d ed. 1998).

[18] 530 U.S. at 828-29 (plurality opinion).

exclude Catholic schools from public money.[19] Seven justices, in these two cases, agreed on this history.

III. The "sectarian" problem

Judges and scholars alike mostly agree that, as framed, most No-Aid or Blaine provisions were not meant to bar aid to *religion* generally, but to bar aid, as Missouri's constitution puts it, to any "church, sect or creed of religion." Mo. Const. art. I, § 7. The reference to "sects"—or, in many States, "sectarian"[20]—is significant. Seven Justices agreed, reviewing the history, that "sectarian" was code for "Catholic."[21]

"Sectarian" did not mean merely "religious." Most 19th-century Americans thought that there was something like an all-embracing Christianity, and it

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[19] 536 U.S. 639, 720-21 (2002) (Breyer, J., dissenting).

[20] Ala. Const. art. XIV, § 263; Alaska Const. art. VII, § 1; Ariz. Const. art. IX, § 10; Cal. Const. art. XVI, § 5; Colo. Const. art. IX, § 7; Del. Const. art. X, § 3; Fla. Const. art. I, § 3; Ga. Const. art. I, § II, Para. VII; Idaho Const. art. IX, § 5; Ill. Const. art. X, § 3; Kan. Const. art. VI, § 6(c); Ky. Const. § 189; Mich. Const. art. I, § 4; Minn. Const. art. XIII, § 2; Miss. Const. art. VIII, § 208; Mont. Const. art. X, § 6; Neb. Const. art. VII, § 11; Nev. Const. art. XI, § 10; N.D. Const. art. VIII, § 5; Ohio Const. art. VI, § 2; Okla. Const. art. II, § 5; Pa. Const. art. III, § 15; S.D. Const. art. VIII, § 16; Tex. Const. art. I, § 7; Utah Const. art. X, § 1; Va. Const. art. IV, § 16; Wash. Const. art. IX, § 4; Wyo. Const. art. I, § 19.

[21] *Mitchell*, 530 U.S. at 828 (plurality opinion); *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting).

looked much like mainline Protestantism.[22] Catholic resistance to classroom reading of the King James Bible and the Lord's Prayer drew forth Catholic objection to the public schools' so-called "nonsectarian instruction," and resulted in the creation of Catholic schools.[23] But virtually *all* schools in the era when state Blaine Amendments were enacted were marked by religious instruction and observance.[24] No-Aid provisions were not intended to scrub all religion from the publicly funded square, but only *particular* "sectarian" expressions of religion. That kind of discrimination between religions would clearly be unconstitutional today.[25] Reinterpreting those provisions to apply more broadly to *all* religion, instead of merely *some* religions or religious practices, doesn't really address the original constitutional difficulty. It is hard to see how broadening impermissible discrimination somehow makes it permissible.

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[22] *See* Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295, 302 (2008) ("That the common schools were consciously Protestant was not denied ….").

[23] *Id.* at 304; Vincent P. Lannie, *Alienation in America: The Immigrant Catholic and Public Education in Pre-Civil War America*, 32 Rev. Pol. 503, 507-08, 511 (1970); *Zelman*, 536 U.S. at 720-21 (Breyer, J., dissenting) (citing John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 299-300 (2001)).

[24] Green, *supra* note 22, at 300-08.

[25] *See*, *e.g., Larson v. Valente*, 456 U.S. 228, 246 (1982).

IV. The keys: "neutrality" and "general availability"

The panel below recognized that Missouri's No-Aid provision would not survive under the rule proposed in Justice Scalia's *Locke* dissent, *i.e.*, that a State cannot offer a benefit to all residents, then snatch it back only from the religious. The panel added that Justice Scalia's rule was a "logical" leap in the direction that this Court "seems to be going."[26] This would not be the first time an appeals court recognized that this Court had thoroughly "undermined" decisions binding on the appeals court, while leaving to the Court itself the unpleasant duty of the coup de grâce.[27]

The decision the panel believed itself bound by, *Luetkemeyer v. Kauffman*, was this Court's wordless affirmation of a three-judge district court ruling in 1973. The dissent in that 1973 panel called Missouri's denial of busing service to parochial-school students "odious" discrimination against children of the "same state and country."[28] This Court was split, too: Justice White and Chief Justice Burger, in dissent, raised Free Exercise and Equal Protection concerns and found it hard to believe that Missouri had a rational antiestablishment basis to exclude Show-Me students from busing when *Everson* had said that *including*

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[26] Pet. App. 11a.

[27] *See*, *e.g.*, *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, 567 F.3d 856, 857 (7th Cir. 2009), *rev'd and remanded sub nom. McDonald v. City of Chicago*, 561 U.S. 742 (2010).

[28] *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 387-89 (W.D. Mo. 1973) (Gibson, J., dissenting).

such students caused no such establishment problem.[29] More to the point, *Luetkemeyer* is 40 years old. The district court decision, for instance, was heavily scented with *Lemon*.[30]

The panel below did not elaborate on why the leap it refused to make was "logical." Perhaps this was because the path forward is so clear. Two concepts, in particular, have become this Court's unmistakable signposts: "neutrality" and "general availability." Like those dusty roads that led to Rome, these words, in Free Exercise and Establishment cases, all point to the intuition that the State, when it hands out valuable benefits to everyone, should be neutral between faiths or between faith and non-faith.

This Court recognizes the "tension" that "inevitably exists" between the Free Exercise and Establishment Clauses.[31] Excessive solicitude for religion can run into Establishment problems; excessive exclusion can intrude on Free Exercise. Thus, the Court's case law requires the State to "maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion."[32] Neutrality is not merely an Establishment

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[29] *Luetkemeyer v. Kaufmann*, 419 U.S. 888, 889-90 (1974) (without opinion) (White, J., dissenting).

[30] *Luetkemeyer*, 364 F. Supp. at 381, 383-84.

[31] *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973); *Thomas v. Review Bd.*, 450 U.S. 707, 719 (1981); *Locke*, 540 U.S. at 718.

[32] *Nyquist*, 413 U.S. at 788.

or Free Exercise doctrine, but the posture that ensures "proper respect for both."[33]

The concepts of neutrality and general availability run through Free Exercise law. In *Sherbert v. Verner*, the Court said that extending unemployment benefits to Sabbatarians, in common with Sunday worshippers, "reflects nothing more than the governmental obligation of neutrality in the face of religious differences."[34]

Neutrality and general availability helped decide Establishment Clause cases, too. In *Mitchell,* the Court said that in such conflicts it had "consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."[35] Similar reasoning reigned in *Agostini v. Felton*,[36] *Zobrest v. Catalina Foothills School District*,[37] and *Mueller v. Allen*.[38]

Sometimes neutrality and general availability appear in decisions that do not distinguish between Establishment and Free Exercise. In *Everson v. Board of Education of Ewing*, the Court upheld a program to bus public- and private-school students alike. The

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[33] *Id.* at 792.

[34] 374 U.S. 398, 409 (1963).

[35] 530 U.S. at 809.

[36] 521 U.S. 203, 231-32 (1997).

[37] 509 U.S. 1, 8 (1993).

[38] 463 U.S. 388, 397 (1983).

Court said that the joint effect of First Amendment's religion provisions was to require a State to be "neutral in its relations with groups of religious believers and non-believers."[39] In another case, Justice O'Connor saw "equal treatment" as the "eminently sound approach":

> In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.[40]

V. Principles pushed to the extreme

The Court has "struggled to find a neutral course between the two Religion Clauses," because either one, "expanded to a logical extreme, would tend to clash with the other."[41] Inattention to this dilemma was the flaw in *Luetkemeyer*'s panel decision; it said that Missouri could, apparently without limit, mandate a "degree" of separation "higher" than the First Amendment's minimum.[42] Missouri's provision, like most No-Aid laws, is an Establishment Clause

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[39] 330 U.S. 1, 18 (1947).

[40] *Bd. of Educ. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

[41] *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970).

[42] *Luetkemeyer*, 364 F. Supp. at 386.

retrofitted with a height extension.[43] But if raised *too* high, conflict with Free Exercise is inevitable. The religion clauses are not an area of constitutional law, like criminal procedure, where a State can grant more protections than the U.S. Constitution promises without end. With the religion clauses, States face a floor *and* a ceiling.

There may be a need for some play in the joints. But the argument that not one taxpayer dollar must ever end up mingled with the assets of a religiously affiliated entity, because each dollar, even if given for a permissible purpose, might defray actual religious expenses, replaces neutrality with hostility and discrimination.[44] It is a theory better suited to our anti-terrorism law.[45]

Locke said Washington had a legitimate basis to decline specifically to underwrite clergy-training.[46] The panel below, by contrast, said Missouri had *general* antiestablishment concerns.[47] Amici States would never trivialize the importance of a sincere policy against direct state support for churches, a venerable principle that arose in reaction to centuries of actual established state religion. But the proper inquiry here is the actual

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[43] *Id.* at 383.

[44] *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747 (1976).

[45] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010).

[46] 540 U.S. at 720 n.3.

[47] Pet. App. at 17a.

basis for *this* program.[48] *Locke* did not simply rest on historical practice and early state constitutions; it considered the precise functioning of Washington's program, and the burden its exclusion imposed, finding it significant, for instance, that the scholarship could still be used for certain devotional theology courses, just not the "pastoral ministries" major.[49] Trinity Lutheran Church did not ask for new pews. It asked for ground-up tires to protect kids playing from injury. And in this respect it is similarly situated to every other preschool or daycare.

The Missouri tire-recycling program, which aims at once to reduce landfills and harm to children,[50] cannot serve any religious purpose. When the benefits sought have no tie to religion, withholding those benefits from churches alone seems arbitrary and unfair. Are the religious commitments of playground administrators really more relevant than those of religious hospital operators?[51] "The essence of all that has been said and written" on free exercise, said the Court in *Wisconsin v. Yoder*, is that only "interests of the highest order ... can overbalance legitimate claims to the free exercise."[52] This case lets the Court test how well

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[48] *See*, *e.g., Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184, 188 (2d Cir. 2014).

[49] *Locke*, 540 U.S. at 717, 724.

[50] Mo. Rev. Stat. § 260.273(6)(2); App. 86a-88a, App. 89a.

[51] *See Bradfield v. Roberts*, 175 U.S. 291, 298 (1899); Pet. App. 132a-33a.

[52] 406 U.S. 205, 215 (1972).

Trinity Lutheran Church's disqualification stacks up to this statement in *Yoder*—and whether, more specifically, *Locke* really supports the outcome below.

CONCLUSION

The nature of this area may explain the surprisingly confessional tone from Members of the Court in its jurisprudence here. "Candor compels acknowledgment," said the *Lemon* Court, "that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[53] Justice Jackson, concurring in *McCollum*, admitted that it was "idle to pretend" that judges could decide "where the secular ends and the sectarian begins."[54] If the Court kept taking these cases, he continued, it was destined to make Jefferson's wall of separation "serpentine."[55] This is a particularly apt adjective for the State and lower-federal court jurisprudence interpreting State No-Aid provisions, especially in light of *Locke*.

Trinity Lutheran's playground is an excellent place to decide when "no aid" becomes unconstitutional. State and federal courts need the next step in the *Locke* line to clarify what limits the U.S. Constitution places on State Blaine provisions. Amici believe that, under the U.S. Constitution, particularly the Free Exercise and Equal Protection Clauses, a State generally may not, after choosing to offer a religion-neutral, generally

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[53] *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

[54] *McCollum v. Bd. of Educ.*, 333 U.S. 203, 237-38 (1948) (Jackson, J., concurring).

[55] *Id.* at 238.

available program, administer it in ways that exclude a subset of constituents merely on account of their religious beliefs. If a State means to benefit citizens, it should benefit citizens, regardless of irrelevant incidentals like creed. Too much zeal to deny otherwise generally available government benefits to the faith-based smacks of discrimination. Missouri sincerely insists that it is simply enforcing the "absolute separation" of church and state required by its constitution.[56] Amici States here just as sincerely suggest—with all the respect due to a sister State—that in some cases "absolutism" is a synonym for unconstitutional "extremism."

Respectfully submitted,

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[56] *See, e.g.*, *Saint Louis Univ. v. Masonic Temple Ass'n*, 220 S.W.3d 721, 729 (Mo. 2007) (en banc); *Americans United v. Rogers*, 538 S.W.2d 711, 720 (Mo. 1976) (en banc); *Paster v. Tussey*, 512 S.W.2d 97, 101 (Mo. 1974) (en banc).

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