No. 15-577

In The
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA,

Petitioner,

v.

SARA PARKER PAULEY,

Respondent.

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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Town of Greece v. Galloway,* 134 S. Ct. 1811 (2014), addressing a variety of issues of constitutional law. The ACLJ is dedicated, *inter alia*, to religious liberty and freedom of speech.

SUMMARY OF ARGUMENT

It should be an obvious norm of constitutional law that a government entity cannot discriminate against a church for the sole reason that it is a church. Yet this Court has never squarely so held. This case presents an excellent vehicle for a holding that will repair this gap in this Court's precedents.

ARGUMENT

Surprisingly, there is no case among this Court's precedents directly holding that the federal and state governments cannot discriminate against a church,

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[1]Counsel of record for the parties received timely notice of the intent to file this brief. Sup. Ct. R. 37.2(a). The parties in this case have consented to the filing of this brief. A copy of the consent letters are being filed with this brief. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

synagogue, or mosque, as such, for the sole reason that said entity is a religious body. The state of Missouri, and the court below, exploited this lacuna to declare that petitioner Trinity Lutheran Church (TLC) could be disqualified, *solely because TLC is a church*, from participation in and assistance under an undisputably secular program (viz., for converting used automobile tires into safe playground surfacing), even though TLC is otherwise completely qualified and eligible.

To be sure, this Court has held, in the context of a speech forum, that it violates the First Amendment to exclude an entity because of its religious message, *e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), including when a funding program is at issue, *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). This Court has held that it violates the First Amendment (specifically, the Free Exercise Clause) to target clergy for special political disabilities. *McDaniel v. Paty*, 435 U.S. 618 (1978). Indeed, this Court expressly declared that "State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

This Court has also held that the Equal Protection Clause bars restrictions that rest on no more than "a bare desire to harm" a particular group. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985) (citing *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

Thus, it would seem obvious that a government's posting of a "no churches, synagogues, or mosques allowed" sign, whether literal or figurative, would run

afoul of both the Equal Protection Clause and the religion and speech[2] clauses of the First Amendment.

Yet this Court has never so ruled. Moreover, ambiguity in this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), has left the lower courts to divide over whether in fact a "no churches" rule might be permissible. *Compare Trinity Lutheran Church v. Pauley*, 788 F.3d 779 (8th Cir. 2015) (decision below, approving exclusion of churches as such), *with Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (condemning "the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support").

May a government program of flood relief exclude houses of worship, and only houses of worship? May a municipality provide taxpayer-funded police, fire, and rescue to all other residents yet exclude only churches, synagogues, and mosques? *Cf. Everson*, 330 U.S. at 17-18 (describing such services as "indisputably marked off from the religious function" of church schools). And, here, may a state categorically exclude churches while otherwise allowing any entity that maintains a

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[2]Petitioner TLC brings its challenge under the Free Exercise and Equal Protection Clauses. While TLC apparently does not directly launch a Free Speech attack, the standards for message-based discrimination are the same under the Free Speech and Equal Protection Clauses. *E.g.*, *Carey v. Brown*, 447 U.S. 455, 463 (1980); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 n.4 (1992). Moreover, discrimination against an entity because of its exercise of a fundamental right – here, the religious expression and association that define a church – triggers strict scrutiny under the Equal Protection Clause. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications affecting fundamental rights trigger strict scrutiny).

playground to apply for resurfacing aid, for the safety of children who play there? The answer in all such cases should be a resounding "no." Yet, as the court below illustrated, that answer is far from clear to lower courts.

This Court should grant review both to resolve the circuit split and to provide much-needed clarification that, under a Constitution formed by a people yearning for religious freedom, while government may not establish a church, it also may not categorically relegate religious institutions to second-class status.

CONCLUSION

This Court should grant review and reverse the judgment below.

Respectfully submitted,

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